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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1946

OPINIONS FROM APRIL 8, 1947 THROUGH JUNE 16, 1947
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.
ROBERT H. JACKSON, Associate Justice.
WILEY RUTLEDGE, Associate Justice.
HAROLD H. BURTON, Associate Justice.

RETIRED

CHARLES EVANS HUGHES, Chief Justice.

TOM C. CLARK, Attorney General.
GEORGE T. WASHINGTON, Acting Solicitor Gen.[1]
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

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[1] During the vacancy in the office of Solicitor General, the duties of the office were performed, at the direction of the Attorney General, by the Honorable George T. Washington, Assistant Solicitor General, who signed government briefs and appeared as "Acting Solicitor General."

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, FRED M. VINSON, 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, FRED M. VINSON, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1946.

CRANE *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 68. Argued December 11, 1946.—Decided April 14, 1947.

1. Under § 113 (a) (5) of the Revenue Act of 1938, the "unadjusted basis" for determining gain or loss on the sale of physical property acquired by bequest subject to an unassumed mortgage is the value of the property undiminished by the amount of the mortgage. Pp. 5–11.

   The word "property," as used in that section, means a physical thing which is a subject of ownership or the owner's legal rights therein and not merely his "equity" after deducting the amount of mortgages or other liens. Pp. 5–11.

2. Under § 113 (b) (1) (B) of the Revenue Act of 1938, a taxpayer who acquired an apartment house by bequest subject to an unassumed mortgage equal to the value thereof, operated it for several years, and sold it for a price slightly in excess of the amount of the mortgage, was entitled to deductions for depreciation on the building; and the "adjusted basis" for determining gain or loss on the sale is to be determined by deducting such depreciation allowances from the value of the property at the time of acquisition. Pp. 11–12.

3. Under § 111 (b) of the Revenue Act of 1938, the "amount realized" on a sale of property for cash subject to an existing mortgage is the amount of the cash realized plus the amount of the mortgage,

even though the seller had acquired the property subject to the mortgage, which he never assumed, and the buyer neither assumed nor paid the mortgage. Pp. 12–14.

4. On an appeal from a decision of the Tax Court, the Circuit Court of Appeals had jurisdiction to review determinations by the Tax Court that "property" as used in § 113 (a) and related sections of the Revenue Act of 1938 means "equity," and that the amount of a mortgage subject to which property is sold is not the measure of a benefit realized within the meaning of § 111 (b), since these determinations announced rules of general applicability on clear-cut questions of law. P. 15.
5. As here construed, the Revenue Act of 1938 does not tax something which is not "income" within the meaning of the Sixteenth Amendment. Pp. 15–16.

153 F. 2d 504, affirmed.

The Tax Court expunged part of a deficiency determined by the Commissioner of Internal Revenue on account of the income tax on a gain realized on the sale of an apartment house which had been acquired by the taxpayer by bequest subject to an unassumed mortgage. 3 T. C. 585. The Circuit Court of Appeals reversed. 153 F. 2d 504. This Court granted certiorari. 328 U. S. 826. *Affirmed,* p. 16.

Edward S. Bentley argued the cause and filed a brief for petitioner.

J. Louis Monarch argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Sewall Key* and *Morton K. Rothschild.*

Mr. Chief Justice Vinson delivered the opinion of the Court.

The question here is how a taxpayer who acquires depreciable property subject to an unassumed mortgage, holds it for a period, and finally sells it still so encumbered, must compute her taxable gain.

Petitioner was the sole beneficiary and the executrix of the will of her husband, who died January 11, 1932. He then owned an apartment building and lot subject to a mortgage,[1] which secured a principal debt of $255,000.00 and interest in default of $7,042.50. As of that date, the property was appraised for federal estate tax purposes at a value exactly equal to the total amount of this encumbrance. Shortly after her husband's death, petitioner entered into an agreement with the mortgagee whereby she was to continue to operate the property—collecting the rents, paying for necessary repairs, labor, and other operating expenses, and reserving $200.00 monthly for taxes—and was to remit the net rentals to the mortgagee. This plan was followed for nearly seven years, during which period petitioner reported the gross rentals as income, and claimed and was allowed deductions for taxes and operating expenses paid on the property, for interest paid on the mortgage, and for the physical exhaustion of the building. Meanwhile, the arrearage of interest increased to $15,857.71. On November 29, 1938, with the mortgagee threatening foreclosure, petitioner sold to a third party for $3,000.00 cash, subject to the mortgage, and paid $500.00 expenses of sale.

Petitioner reported a taxable gain of $1,250.00. Her theory was that the "property" which she had acquired in 1932 and sold in 1938 was only the equity, or the excess in the value of the apartment building and lot over the amount of the mortgage. This equity was of zero value when she acquired it. No depreciation could be taken on a zero value.[2] Neither she nor her vendee ever assumed

[1] The record does not show whether he was personally liable for the debt.

[2] This position is, of course, inconsistent with her practice in claiming such deductions in each of the years the property was held. The deductions so claimed and allowed by the Commissioner were in the total amount of $25,500.00.

the mortgage, so, when she sold the equity, the amount she realized on the sale was the net cash received, or $2,500.00. This sum less the zero basis constituted her gain, of which she reported half as taxable on the assumption that the entire property was a "capital asset." [3]

The Commissioner, however, determined that petitioner realized a net taxable gain of $23,767.03. His theory was that the "property" acquired and sold was not the equity, as petitioner claimed, but rather the physical property itself, or the owner's rights to possess, use, and dispose of it, undiminished by the mortgage. The original basis thereof was $262,042.50, its appraised value in 1932. Of this value $55,000.00 was allocable to land and $207,042.50 to building.[4] During the period that petitioner held the property, there was an allowable depreciation of $28,045.10 on the building,[5] so that the adjusted basis of the building at the time of sale was $178,997.40. The amount realized on the sale was said to include not only the $2,500.00 net cash receipts, but also the principal amount [6] of the mortgage subject to which the property was sold, both totaling $257,500.00. The selling price was allocable in the proportion, $54,471.15 to the land and $203,028.85 to the building.[7] The Commissioner agreed that the land was

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[3] See § 117 (a), (b), Revenue Act of 1938, c. 289, 52 Stat. 447. Under this provision only 50% of the gain realized on the sale of a "capital asset" need be taken into account, if the property had been held more than two years.

[4] The parties stipulated as to the relative parts of the 1932 appraised value and of the 1938 sales price which were allocable to land and building.

[5] The parties stipulated that the rate of depreciation applicable to the building was 2% per annum.

[6] The Commissioner explains that only the principal amount, rather than the total present debt secured by the mortgage, was deemed to be a measure of the amount realized, because the difference was attributable to interest due, a deductible item.

[7] See *supra*, note 4.

a "capital asset," but thought that the building was not.[8] Thus, he determined that petitioner sustained a capital loss of $528.85 on the land, of which 50% or $264.42 was taken into account, and an ordinary gain of $24,031.45 on the building, or a net taxable gain as indicated.

The Tax Court agreed with the Commissioner that the building was not a "capital asset." In all other respects it adopted petitioner's contentions, and expunged the deficiency.[9] Petitioner did not appeal from the part of the ruling adverse to her, and these questions are no longer at issue. On the Commissioner's appeal, the Circuit Court of Appeals reversed, one judge dissenting.[10] We granted certiorari because of the importance of the questions raised as to the proper construction of the gain and loss provisions of the Internal Revenue Code.[11]

The 1938 Act,[12] § 111 (a), defines the gain from "the sale or other disposition of property" as "the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) . . . ." It proceeds, § 111 (b), to define "the amount realized from the sale or other disposition of property" as "the sum of any money received plus

[8] See § 117 (a) (1), Revenue Act of 1938, *supra*.

[9] 3 T. C. 585. The Court held that the building was not a "capital asset" within the meaning of § 117 (a) and that the entire gain on the building had to be taken into account under § 117 (b), because it found that the building was of a character subject to physical exhaustion and that petitioner had used it in her trade or business.

But because the Court accepted petitioner's theory that the entire property had a zero basis, it held that she was not entitled to the 1938 depreciation deduction on the building which she had inconsistently claimed.

For these reasons, it did not expunge the deficiency in its entirety.

[10] 153 F. 2d 504.

[11] 328 U. S. 826.

[12] All subsequent references to a revenue act are to this Act unless otherwise indicated. The relevant parts of the gain and loss provisions of the Act and Code are identical.

the fair market value of the property (other than money) received." Further, in § 113 (b), the "adjusted basis for determining the gain or loss from the sale or other disposition of property" is declared to be "the basis determined under subsection (a), adjusted . . . [(1) (B)] . . . for exhaustion, wear and tear, obsolescence, amortization . . . to the extent allowed (but not less than the amount allowable) . . . ." The basis under subsection (a) "if the property was acquired by . . . devise . . . or by the decedent's estate from the decedent," § 113 (a) (5), is "the fair market value of such property at the time of such acquisition."

Logically, the first step under this scheme is to determine the unadjusted basis of the property, under § 113 (a) (5), and the dispute in this case is as to the construction to be given the term "property." If "property," as used in that provision, means the same thing as "equity," it would necessarily follow that the basis of petitioner's property was zero, as she contends. If, on the contrary, it means the land and building themselves, or the owner's legal rights in them, undiminished by the mortgage, the basis was $262,042.50.

We think that the reasons for favoring one of the latter constructions are of overwhelming weight. In the first place, the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.[13] The only relevant definitions of "property" to be found in the principal standard dictionaries [14] are the two favored by the Commissioner, *i. e.*, either that "property" is the physical thing which is a subject of ownership, or that it is the aggregate of the owner's rights to control and dispose of that thing.

[13] *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560.

[14] See Webster's New International Dictionary, Unabridged, 2d Ed.; Funk & Wagnalls' New Standard Dictionary; Oxford English Dictionary.

"Equity" is not given as a synonym, nor do either of the foregoing definitions suggest that it could be correctly so used. Indeed, "equity" is defined as "the value of a property . . . above the total of the liens. . . ." [15] The contradistinction could hardly be more pointed. Strong countervailing considerations would be required to support a contention that Congress, in using the word "property," meant "equity," or that we should impute to it the intent to convey that meaning.[16]

In the second place, the Commissioner's position has the approval of the administrative construction of § 113 (a) (5). With respect to the valuation of property under that section, Reg. 101, Art. 113 (a) (5)–1, promulgated under the 1938 Act, provided that "the value of property as of the date of the death of the decedent as appraised for the purpose of the Federal estate tax . . . shall be deemed to be its fair market value . . . ." The land and building here involved were so appraised in 1932, and their appraised value—$262,042.50—was reported by petitioner as part of the gross estate. This was in accordance with the estate tax law [17] and regulations,[18] which had always required that the value of decedent's property, undiminished by liens, be so appraised and returned, and that mortgages be separately deducted in computing the net estate.[19] As the quoted provision of the Regula-

[15] See Webster's New International Dictionary, *supra*.

[16] *Crooks* v. *Harrelson*, 282 U. S. 55, 59.

[17] See §§ 202 and 203 (a) (1), Revenue Act of 1916; §§ 402 and 403 (a) (1), Revenue Acts of 1918 and 1921; §§ 302, 303 (a) (1), Revenue Acts of 1924 and 1926; § 805, Revenue Act of 1932.

[18] See Reg. 37, Arts. 13, 14, and 47; Reg. 63, Arts. 12, 13, and 41; Reg. 68, Arts. 11, 13, and 38; Reg. 70, Arts. 11, 13, and 38; Reg. 80, Arts. 11, 13, and 38.

[19] See *City Bank Farmers' Trust Co.* v. *Bowers*, 68 F. 2d 909, cert. denied, 292 U. S. 644; *Rodiek* v. *Helvering*, 87 F. 2d 328; *Adriance* v. *Higgins*, 113 F. 2d 1013.

tions has been in effect since 1918,[20] and as the relevant statutory provision has been repeatedly reenacted since then in substantially the same form,[21] the former may itself now be considered to have the force of law.[22]

Moreover, in the many instances in other parts of the Act in which Congress has used the word "property," or expressed the idea of "property" or "equity," we find no instances of a misuse of either word or of a confusion of the ideas.[23] In some parts of the Act other than the gain and loss sections, we find "property" where it is unmistakably used in its ordinary sense.[24] On the other hand, where either Congress or the Treasury intended to convey the meaning of "equity," it did so by the use of appropriate language.[25]

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[20] See also Reg. 45, Art. 1562; Reg. 62, Art. 1563; Reg. 65, Art. 1594; Reg. 69, Art. 1594; Reg. 74, Art. 596; Reg. 77, Art. 596; Reg. 86, Art. 113 (a) (5)–1 (c); Reg. 94, Art. 113 (a) (5)–1 (c); Reg. 103, § 19.113 (a) (5)–1 (c); Reg. 111, § 29.113 (a) (5)–1 (c).

[21] § 202 (a) (3), Revenue Act of 1921; § 204 (a) (5), Revenue Act of 1924; § 204 (a) (5), Revenue Act of 1926; § 113 (a) (5), Revenue Act of 1928; § 113 (a) (5), Revenue Act of 1932; § 113 (a) (5), Revenue Act of 1934; § 113 (a) (5), Revenue Act of 1936; § 113 (a) (5), Revenue Act of 1938; § 113 (a) (5), Internal Revenue Code.

[22] *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114.

[23] Cf. *Helvering* v. *Stockholms Bank*, 293 U. S. 84, 87.

[24] Sec. 23 (a) (1) permits the deduction from gross income of "rentals . . . required to be made as a condition to the continued use . . . for purposes of the trade or business, of *property* . . . in which he [the taxpayer] has no *equity*." (Italics supplied.)

Sec. 23 (l) permits the deduction from gross income of "a reasonable allowance for the exhaustion, wear and tear of *property* used in the trade or business . . . ." (Italics supplied.)

See also § 303 (a) (1), Revenue Act of 1926, c. 27, 44 Stat. 9; § 805, Revenue Act of 1932, c. 209, 47 Stat. 280.

[25] See § 23 (a) (1), *supra*, note 24; § 805, Revenue Act of 1932, *supra*, note 24; § 3482, I. R. C.; Reg. 105, § 81.38. This provision of the Regulations, first appearing in 1937, T. D. 4729, 1937–1 Cum. Bull. 284, 289, permitted estates which were not liable on mortgages

A further reason why the word "property" in § 113 (a) should not be construed to mean "equity" is the bearing such construction would have on the allowance of deductions for depreciation and on the collateral adjustments of basis.

Section 23 (l) permits deduction from gross income of "a reasonable allowance for the exhaustion, wear and tear of property . . . ." Sections 23 (n) and 114 (a) declare that the "basis upon which exhaustion, wear and tear . . . are to be allowed" is the basis "provided in section 113 (b) for the purpose of determining the gain upon the sale" of the property, which is the § 113 (a) basis "adjusted . . . for exhaustion, wear and tear . . . to the extent allowed (but not less than the amount allowable). . . ."

Under these provisions, if the mortgagor's equity were the § 113 (a) basis, it would also be the original basis from which depreciation allowances are deducted. If it is, and if the amount of the annual allowances were to be computed on that value, as would then seem to be required,[26] they will represent only a fraction of the cost of the corresponding physical exhaustion, and any recoupment by the mortgagor of the remainder of that cost can be effected only by the reduction of his taxable gain in the year of sale.[27] If, however, the amount of the annual allowances

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applicable to certain of decedent's property to return "only the value of the equity of redemption (or value of the property, less the indebtedness) . . . ."

[26] Secs. 23 (n) and 114 (a), in defining the "basis upon which" depreciation is "to be allowed," do not distinguish between basis as the minuend from which the allowances are to be deducted, and as the dividend from which the amount of the allowance is to be computed. The Regulations indicate that the basis of property is the same for both purposes. Reg. 101, Art. 23 (l)–4, 5.

[27] This is contrary to Treasury practice, and to Reg. 101, Art. 23 (l)–5, which provides in part:

"The capital sum to be recovered shall be charged off over the useful life of the property, either in equal annual installments or in accord-

were to be computed on the value of the property, and then deducted from an equity basis, we would in some instances have to accept deductions from a minus basis or deny deductions altogether.[28] The Commissioner also argues that taking the mortgagor's equity as the § 113 (a) basis would require the basis to be changed with each payment on the mortgage,[29] and that the attendant problem of repeatedly recomputing basis and annual allowances would be a tremendous accounting burden on both the Commissioner and the taxpayer. Moreover, the mortgagor would acquire control over the timing of his depreciation allowances.

Thus it appears that the applicable provisions of the Act expressly preclude an equity basis, and the use of it is contrary to certain implicit principles of income tax depreciation, and entails very great administrative difficulties.[30] It may be added that the Treasury has never furnished a guide through the maze of problems that arise in connection with depreciating an equity basis, but, on the contrary, has consistently permitted the amount of depreciation allowances to be computed on the full value of the property, and subtracted from it as a basis. Surely,

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ance with any other recognized trade practice, such as an apportionment of the capital sum over units of production."

See *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98, 101.

[28] So long as the mortgagor remains in possession, the mortgagee can not take depreciation deductions, even if he is the one who actually sustains the capital loss, as § 23 (l) allows them only on property "used in the trade or business."

[29] Sec. 113 (b) (1) (A) requires adjustment of basis "for expenditures . . . properly chargeable to capital account . . . ."

[30] Obviously we are not considering a situation in which a taxpayer has acquired and sold an equity of redemption only, *i. e.*, a right to redeem the property without a right to present possession. In that situation, the right to redeem would itself be the aggregate of the taxpayer's rights and would undoubtedly constitute "property" within the meaning of § 113 (a). No depreciation problems would arise. See note 28.

Congress' long-continued acceptance of this situation gives it full legislative endorsement.[31]

We conclude that the proper basis under § 113 (a) (5) is the value of the property, undiminished by mortgages thereon, and that the correct basis here was $262,042.50. The next step is to ascertain what adjustments are required under § 113 (b). As the depreciation rate was stipulated, the only question at this point is whether the Commissioner was warranted in making any depreciation adjustments whatsoever.

Section 113 (b) (1) (B) provides that "proper adjustment in respect of the property *shall in all cases be made* . . . for exhaustion, wear and tear . . . to the extent allowed (but not less than the amount allowable) . . . ." (Italics supplied.) The Tax Court found on adequate evidence that the apartment house was property of a kind subject to physical exhaustion, that it was used in taxpayer's trade or business, and consequently that the taxpayer would have been entitled to a depreciation allowance under § 23 (l), except that, in the opinion of that Court, the basis of the property was zero, and it was thought that depreciation could not be taken on a zero basis. As we have just decided that the correct basis of the property was not zero, but $262,042.50, we avoid this difficulty, and conclude that an adjustment should be made as the Commissioner determined.

Petitioner urges to the contrary that she was not entitled to depreciation deductions, whatever the basis of the property, because the law allows them only to one who actually bears the capital loss,[32] and here the loss was not hers but the mortgagee's. We do not see, however, that she has established her factual premise. There was no finding of the Tax Court to that effect, nor to the effect

[31] See note 22.

[32] See *Helvering* v. *Lazarus & Co.*, 308 U. S. 252; *Duffy* v. *Central R. Co.*, 268 U. S. 55, 64.

that the value of the property was ever less than the amount of the lien. Nor was there evidence in the record, or any indication that petitioner could produce evidence, that this was so. The facts that the value of the property was only equal to the lien in 1932 and that during the next six and one-half years the physical condition of the building deteriorated and the amount of the lien increased, are entirely inconclusive, particularly in the light of the buyer's willingness in 1938 to take subject to the increased lien and pay a substantial amount of cash to boot. Whatever may be the rule as to allowing depreciation to a mortgagor on property in his possession which is subject to an unassumed mortgage and clearly worth less than the lien, we are not faced with that problem and see no reason to decide it now.

At last we come to the problem of determining the "amount realized" on the 1938 sale. Section 111 (b), it will be recalled, defines the "amount realized" from "the sale . . . of property" as "the sum of any money received plus the fair market value of the property (other than money) received," and § 111 (a) defines the gain on "the sale . . . of property" as the excess of the amount realized over the basis. Quite obviously, the word "property," used here with reference to a sale, must mean "property" in the same ordinary sense intended by the use of the word with reference to acquisition and depreciation in § 113, both for certain of the reasons stated heretofore in discussing its meaning in § 113, and also because the functional relation of the two sections requires that the word mean the same in one section that it does in the other. If the "property" to be valued on the date of acquisition is the property free of liens, the "property" to be priced on a subsequent sale must be the same thing.[33]

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[33] See *Maguire* v. *Commissioner*, 313 U. S. 1, 8.

We are not troubled by petitioner's argument that her contract of sale expressly provided for the conveyance of the equity only. She

Starting from this point, we could not accept petitioner's contention that the $2,500.00 net cash was all she realized on the sale except on the absurdity that she sold a quarter-of-a-million dollar property for roughly one per cent of its value, and took a 99 per cent loss. Actually, petitioner does not urge this. She argues, conversely, that because only $2,500.00 was realized on the sale, the "property" sold must have been the equity only, and that consequently we are forced to accept her contention as to the meaning of "property" in § 113. We adhere, however, to what we have already said on the meaning of "property," and we find that the absurdity is avoided by our conclusion that the amount of the mortgage is properly included in the "amount realized" on the sale.

Petitioner concedes that if she had been personally liable on the mortgage and the purchaser had either paid or assumed it, the amount so paid or assumed would be considered a part of the "amount realized" within the meaning of § 111 (b).[34] The cases so deciding have already repudiated the notion that there must be an actual receipt by the seller himself of "money" or "other property," in their narrowest senses. It was thought to be decisive that one section of the Act must be construed so as not to defeat the intention of another or to frustrate the Act as a whole,[35] and that the taxpayer was the "beneficiary" of the payment in "as real and substantial [a sense] as if the money had been paid it and then paid over by it to its creditors." [36]

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actually conveyed title to the property, and the buyer took the same property that petitioner had acquired in 1932 and used in her trade or business until its sale.

[34] *United States* v. *Hendler*, 303 U. S. 564; *Brons Hotels, Inc.*, 34 B. T. A. 376; *Walter F. Haass*, 37 B. T. A. 948. See *Douglas* v. *Willcuts*, 296 U. S. 1, 8.

[35] See *Brons Hotels, Inc.*, *supra*, 34 B. T. A. at 381.

[36] See *United States* v. *Hendler*, *supra*, 303 U. S. at 566.

Both these points apply to this case. The first has been mentioned already. As for the second, we think that a mortgagor, not personally liable on the debt, who sells the property subject to the mortgage and for additional consideration, realizes a benefit in the amount of the mortgage as well as the boot.[37] If a purchaser pays boot, it is immaterial as to our problem whether the mortgagor is also to receive money from the purchaser to discharge the mortgage prior to sale, or whether he is merely to transfer subject to the mortgage—it may make a difference to the purchaser and to the mortgagee, but not to the mortgagor. Or put in another way, we are no more concerned with whether the mortgagor is, strictly speaking, a debtor on the mortgage, than we are with whether the benefit to him is, strictly speaking, a receipt of money or property. We are rather concerned with the reality that an owner of property, mortgaged at a figure less than that at which the property will sell, must and will treat the conditions of the mortgage exactly as if they were his personal obligations.[38] If he transfers subject to the mortgage, the benefit to him is as real and substantial as if the mortgage were discharged, or as if a personal debt in an equal amount had been assumed by another.

Therefore we conclude that the Commissioner was right in determining that petitioner realized $257,500.00 on the sale of this property.

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[37] Obviously, if the value of the property is less than the amount of the mortgage, a mortgagor who is not personally liable cannot realize a benefit equal to the mortgage. Consequently, a different problem might be encountered where a mortgagor abandoned the property or transferred it subject to the mortgage without receiving boot. That is not this case.

[38] For instance, this petitioner returned the gross rentals as her own income, and out of them paid interest on the mortgage, on which she claimed and was allowed deductions. See Reg. 77, Art. 141; Reg. 86, Art. 23 (b)-1; Reg. 94, Art. 23 (b)-1; Reg. 101, Art. 23 (b)-1.

The Tax Court's contrary determinations, that "property," as used in § 113 (a) and related sections, means "equity," and that the amount of a mortgage subject to which property is sold is not the measure of a benefit realized, within the meaning of § 111 (b), announced rules of general applicability on clear-cut questions of law.[39] The Circuit Court of Appeals therefore had jurisdiction to review them.[40]

Petitioner contends that the result we have reached taxes her on what is not income within the meaning of the Sixteenth Amendment. If this is because only the direct receipt of cash is thought to be income in the constitutional sense, her contention is wholly without merit.[41] If it is because the entire transaction is thought to have been "by all dictates of common sense . . . a ruinous disaster," as it was termed in her brief, we disagree with her premise. She was entitled to depreciation deductions for a period of nearly seven years, and she actually took them in almost the allowable amount. The crux of this case, really, is whether the law permits her to exclude allowable deductions from consideration in computing gain.[42] We have

[39] See *Commissioner* v. *Wilcox*, 327 U. S. 404, 410; *Trust of Bingham* v. *Commissioner*, 325 U. S. 365, 369–372. Cf. *John Kelley Co.* v. *Commissioner*, 326 U. S. 521, 527; *Dobson* v. *Commissioner*, 320 U. S. 489.

[40] *Ibid;* see also § 1141 (a) and (c), I. R. C.

[41] *Douglas* v. *Willcuts, supra*, 296 U. S. at 9; *Burnet* v. *Wells*, 289 U. S. 670, 677.

[42] In the course of the argument some reference was made, as by analogy, to a situation in which a taxpayer acquired by devise property subject to a mortgage in an amount greater than the then value of the property, and later transferred it to a third person, still subject to the mortgage, and for a cash boot. Whether or not the difference between the value of the property on acquisition and the amount of the mortgage would in that situation constitute either statutory or constitutional income is a question which is different from the one before us, and which we need not presently answer.

already showed that, if it does, the taxpayer can enjoy a double deduction, in effect, on the same loss of assets. The Sixteenth Amendment does not require that result any more than does the Act itself.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

The Tax Court concluded that this taxpayer acquired only an equity worth nothing. The mortgage was in default, the mortgage debt was equal to the value of the property, any possession by the taxpayer was forfeited and terminable immediately by foreclosure, and perhaps by a receiver *pendente lite*. Arguments can be advanced to support the theory that the taxpayer received the whole property and thereupon came to owe the whole debt. Likewise it is argued that when she sold she transferred the entire value of the property and received release from the whole debt. But we think these arguments are not so conclusive that it was not within the province of the Tax Court to find that she received an equity which at that time had a zero value. *Dobson* v. *Commissioner*, 320 U. S. 489; *Commissioner* v. *Scottish American Investment Co., Ltd.*, 323 U. S. 119. The taxpayer never became personally liable for the debt, and hence when she sold she was released from no debt. The mortgage debt was simply a subtraction from the value of what she did receive, and from what she sold. The subtraction left her nothing when she acquired it and a small margin when she sold it. She acquired a property right equivalent to an equity of redemption and sold the same thing. It was the "property" bought and sold as the Tax Court considered it to be under the Revenue Laws. We are not required in this case to decide whether depreciation was properly taken, for there is no issue about it here.

1 Syllabus.

We would reverse the Court of Appeals and sustain the decision of the Tax Court.

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

WALLING, WAGE AND HOUR ADMINISTRATOR, *v.* HALLIBURTON OIL WELL CEMENTING CO.

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

No. 74. Argued February 7, 10, 1947.—Decided April 14, 1947.

1. After enactment of the Fair Labor Standards Act, an employer whose employees worked irregular hours varying from less than 30 to more than 100 per week and formerly received fixed monthly salaries, entered into contracts with them individually which in each case specified a basic rate of pay per hour for the first 40 hours in any workweek and not less than one and one-half times that rate per hour for overtime, with a guaranty that the employee should receive each week for regular time and overtime not less than a specified amount. Under this plan, the employee worked more than 84 hours before he became entitled to any pay in addition to the weekly guaranty; but, when he worked enough hours to earn more than the guaranty, the surplus time was paid for at 150% of the basic contract rate. His compensation equalled or exceeded that which he was receiving when the Act went into effect and exceeded the minima which the Act prescribes. *Held:* This contract did not violate § 7 (a) of the Act. Pp. 18–26.
2. *Walling* v. *Belo Corp.*, 316 U. S. 624, followed. *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419; *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, distinguished. Pp. 20–26.

152 F. 2d 622, affirmed.

The District Court denied relief in a suit by the Wage and Hour Administrator to enjoin alleged violations of § 7 (a) of the Fair Labor Standards Act. 57 F. Supp.

408. The Circuit Court of Appeals affirmed. 152 F. 2d 622. This Court granted certiorari. 328 U. S. 828. *Affirmed*, p. 26.

Morton Liftin argued the cause for petitioner. With him on the brief were *Solicitor General McGrath, Arnold Raum, William S. Tyson* and *Joseph M. Stone.*

Ben F. Saye and *Paul Sandmeyer* argued the cause for respondent. With them on the brief was *Gurney E. Newlin. Harry C. Robb* entered an appearance for respondent.

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

This case brings here a question as to the application of the overtime provisions of the Fair Labor Standards Act [1] to the payment of compensation pursuant to employment contracts similar to those in *Walling* v. *Belo Corp.*, 316 U. S. 624.

Respondent is engaged in the business of cementing, testing and otherwise servicing oil wells, for which it uses its own peculiar equipment. To operate this equipment respondent retains a highly stabilized group of skilled and specially trained "field employees." The volume of respondent's business, however, is highly inconstant.

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* The relevant overtime provisions, contained in § 7 (a), 29 U. S. C. § 207 (a), are as follows:

"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—

. . . . . .

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Consequently, these employees are required to work a variable number of hours from day to day and from week to week.

Prior to passage of the Act in 1938, these employees were paid fixed monthly salaries. Thereafter, they were put on a "weekly-guarantee" plan similar to that which was to be involved in the *Belo* case. This plan was abandoned March 1, 1942, under pressure from the Administrator of the Act, and reinstated July 1, 1942, after the *Belo* decision had seemed to end all questions as to its legality.[2] Since its reinstatement the plan has been continuously in effect, and embodied in formal written contracts between respondent and the employees to whom it has applied.

The part of these contracts now in issue is respondent's agreement to pay these employees "a regular basic rate of [a specified number of] cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40) hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $ [a specified number] for each workweek." [3]

The regular basic rate so specified was in each case at or above the minimum prescribed by the Act or by the Administrator's order, but that rate was always so related to the guaranteed flat sum that the employee became entitled to more than the guarantee only in weeks in which he worked more than 84 hours.[4] The compensation

[2] This Court decided the *Belo* case June 8, 1942.

[3] Compare the almost identical wording of the *Belo* contract, 316 U. S. at 628.

[4] For instance, the lowest specified basic rate in May, 1944, when this case was tried, was 40 cents an hour. Compensation at this rate for 40 hours and at one and one-half this rate for 44 additional hours equals $42.40. Actually, the correlative weekly guarantee was the slightly greater sum of $42.69.

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actually paid was regularly consistent with the contractual obligation as stated.

Petitioner sued respondent under § 17 of the Act to enjoin against future adherence to this plan, on the ground that it failed to include overtime compensation as required by § 7 (a). He contended that the actual "regular rate" of compensation payable under these contracts was not the specified basic rate, but rather the quotient of the amount of the correlative guarantee divided by the number of hours worked in that week. This was said to follow from the fact that the employees usually worked less than 84 hours a week and nevertheless received the full guaranteed sum.

The District Court found, however, that the contracts were "bona fide," and that they were "intended to and did really fix the regular rate" at which the men were employed. It denied relief [5] and the Circuit Court of Appeals affirmed,[6] both Courts relying on our decision in the *Belo* case.

Petitioner admits a close similarity of facts and of his basic contentions in this and the *Belo* case. He argues, however, that the *Belo* decision should not be followed: (a) because there are factual differences between the two cases adequate to distinguish them, (b) because *Belo* has been implicitly overruled by later decisions of this Court, and (c) because the *Belo* decision is erroneous.

As to the first of these arguments, we note that the contracts in *Belo* and in this case are substantially identical, except for the amount of the hourly rate and of the fixed guarantee. Under the *Belo* contract, however, overtime would be paid in addition to the guaranteed wage after 54½ hours had been worked in any given week; [7] under

[5] 57 F. Supp. 408.

[6] 152 F. 2d 622.

[7] See the statement and explanation of the *Belo* contract, 316 U. S. at 627–629.

this contract, only after 84 hours. It is said that this 84 hours bears no relation to the usual workweek.

Actually, the employees in this case have no usual workweek. In many weeks they work more than 100 hours; in others less than 30. In about 20 per cent of the workweeks, they work in excess of 84 hours.[8] Whenever they do, they are paid in accordance with the contract on the basis of the specified hourly rate with appropriate overtime.

No more can be said as to the relation between 54½ hours and the usual workweek in *Belo*. It appears from the record in that case that the employees there involved also worked fluctuating workweeks, and that the average workweek was substantially less than 54½ hours. Indeed, it appears that the *Belo* employees exceeded 54½ hours in considerably less than 20 per cent of the weeks worked.[9] When they did so, they too were paid at the contractual rate with appropriate overtime.[10] There is nothing here to suggest different treatment of the two cases.

Petitioner also points to alleged differences in the fact that respondent in this case paid the full weekly guaran-

[8] The record shows that of 4,284 man-weeks worked by respondent's California field employees between July 5, 1942, and March 11, 1944, about 3% were less than 20 hours in length, about 13% were less than 40 hours, about 67% were from 40 to 84 hours, about 20% were over 84 hours, and about 7% over 104 hours, some running as high as 140 and 150 hours. This "work-week" was the basis for determining compensation, but it did not represent the number of hours actually worked by the employee. In the course of typical cementing and testing operations, many hours counted as working time were spent waiting while the drilling crew was running the casing, the cement was setting, the perforation work was being done by another company, or the testing tool was standing in the well hole.

[9] See Transcript of Record, Supreme Court of the United States, *Walling* v. *A. H. Belo Corp.*, No. 622, O. T. 1941, pp. 194–337.

[10] 316 U. S. at 631–632.

tee even when its employees worked less than 40 hours in the week, and the fact that respondent carried fixed rather than fluctuating overtime rates on its payroll records.

As to the first of these points, there is actually no difference between this case and *Belo*. The employees in both cases had a contractual right to the full guarantee however short their workweek, and those in *Belo* were paid it as well as those here.[11] The second fact we think without significance. The function of the payroll records was merely to show the amounts of compensation payable. These records did not affect respondent's contract obligations, nor suggest a practice at variance with the contract.

We think that whatever differences exist between this case and *Belo* are without substance, and that it must either be followed or overruled.

This brings us to petitioner's second argument, in which our attention is directed to three cases decided since *Belo*, wherein we held that certain plans of overtime compensation failed to meet the § 7 (a) requirement. It is urged that the provisions for overtime compensation in these cases were legally no less adequate than, and that the principles on which they were decided are necessarily inconsistent with, the overtime provision and the principles of the *Belo* case.

In *Belo* itself, the specified basic hourly rate was held to be the actual regular rate because, as to weeks in which employees worked more than 54½ hours, the specified rate determined the amount of compensation actually payable; as to weeks in which they worked less, the Court inferred from the collateral specification of a basic rate and provision for a legal but variable rate of overtime pay that the guaranteed flat sum then due also contemplated

[11] *Fleming* v. *A. H. Belo Corp.*, 121 F. 2d 207, at 210, note 6.

both basic pay and overtime.[12] On the other hand, we find that in the three later cases relied on by petitioner, the agreed method by which wages were computed made a like inference impossible.

In *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, we considered a "split-day plan," under which a prescribed "regular" hourly rate was payable for the first four hours of each eight-hour shift, and a prescribed "overtime" rate, of one and one-half the "regular" rate, was payable for the other four hours.[13] In those weeks in which an employee worked statutory overtime, he was paid at the contract "overtime" rate for many straight-time hours and at the contract "regular" rate for many overtime hours. Obviously, these prescribed rates were not actual regular and overtime rates, although so named in the plan. Consequently, as in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, we held that the regular rate was to be determined by dividing the wages actually paid by the hours actually worked. In so deciding, we expressly noted that *Belo* was not controlling because the wage plans involved in the two cases posed entirely different questions as to the application of § 7 (a).[14]

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[12] 316 U. S. at 631–632. In *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, decided the same day as *Belo*, the employees also worked an irregular number of hours each week, but were simply paid a fixed weekly wage. The Court noted the absence of any agreement between the contracting parties for the payment of a specified rate and overtime, and of any contractual limitation on the number of hours the employee could be required to work for the fixed wage. It also noted that these factors were not absent from the *Belo* plan. See 316 U. S. at 581.

[13] Theoretically, when an employee had so accumulated 40 "regular" hours in one week, all subsequent hours were compensable as "overtime." Actually, no employee ever did so. See 323 U. S. at 41.

[14] "Nothing in this Court's decision in *Walling* v. *Belo Corp.*, *supra*, sanctions the use of the split-day plan. The controversy there cen-

In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, the contracts established two alternative methods for computing each employee's wages. One was to multiply his straight-time hours of work by a specified basic hourly rate, and his overtime hours by one and one-half that rate, and add the products. The other was to multiply the number of jobs done by a specified piecework rate. The employee was entitled to be paid the greater of these two sums.[15] The method of computing the amount due at piecework rates, which were constant for work done on both straight-time and overtime hours, of course negated any possible inference that the payment of such amount contemplated legal overtime compensation. The specified hourly rates were so low, however, relative to piecework rates, that the latter were always, or almost always, determinative of the wage actually to be paid. These cases held merely that such specified hourly rates were not the "regular" rates of wage payments to which they were not related, and which were

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tered about the question whether the regular rate should be computed from the guaranteed weekly wage or whether it should be identical with the hourly rate set forth in the employment contract. There was no question, as here, pertaining to the applicability of the regular rate to the first 40 hours actually and regularly worked, with the overtime rate applying to all hours worked in excess thereof." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, at 42.

[15] In the *Harnischfeger* case, the scheme was actually a little different from that in the *Youngerman-Reynolds* case, which is stated in the text. In *Harnischfeger*, the employee was credited with (a) the product of the total number of hours worked multiplied by the basic rate, plus (b) the amount by which piecework earnings during all hours worked exceeded the product in (a), plus (c) the product of the number of overtime hours worked multiplied by one-half the basic hourly rate. The difference is that in *Harnischfeger* some provision was made for overtime; but in both cases the provision for overtime was inadequate, and for the same reason. See 325 U. S. at 431–432.

computed according to a necessarily inconsistent method. Again, *Belo* was expressly distinguished.[16]

Indeed, it would seem that the Court's opinions in these cases, far from undermining *Belo,* showed an affirmative concern that language appropriate to the situations then before us should not be extended to the different situation involved in this and the *Belo* case.

Finally, petitioner maintains that *Belo* was wrongly decided and that we should "define the area of [its] continued vitality, if any." His argument on this score is substantially the same as that advanced on behalf of the Administrator and considered by the Court in the *Belo* case itself.

The reasons stated in the *Belo* opinion for rejecting this argument are equally valid today, and need not be repeated. Moreover, our holding in *Belo* has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the *Belo* decision, the Congress has permitted § 7 (a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it.

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[16] "This Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, lends no support to respondent's position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, at 426.

See also the concurring opinion of MR. JUSTICE FRANKFURTER in *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 433. The Court did not expressly refer to *Belo* in its opinion in the *Harnischfeger* case; but, as it did in *Youngerman-Reynolds,* which involves substantially the same question and was decided the same day, we consider that further reference to *Belo* would have been redundant.

Even if we doubted the wisdom of the *Belo* decision as an original proposition, we should not be inclined to depart from it at this time.

Affirmed.

MR. JUSTICE RUTLEDGE.

I concur in the Court's judgment upon the authority of *Walling* v. *Belo Corp.*, 316 U. S. 624. I agree with MR. JUSTICE MURPHY that the *Belo* decision is inconsistent with later decisions here, in the view it takes concerning the legal effects of the Fair Labor Standards Act. But those cases are distinguishable upon their facts; the *Belo* case has been relied upon by the parties to this cause and no doubt also by others, in making their arrangements; and the facts here seem to me indistinguishable from those covered by the *Belo* decision. Accordingly, although I would restrict the effects of that decision narrowly to the factual situation presented, I join in the judgment now rendered.

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

It is conceded that the weekly guaranty was sufficient to pay for 40 hours at the so-called "regular basic rate" and for 44 additional hours at one and one-half times such "basic hourly rate." The contract overtime rate became effective only as to those hours of work in excess of 84. In other words, the "regular basic rate" referred to in the contracts had no meaning or effect whatsoever unless the employee worked more than 84 hours in a week. Whether he worked 20 hours, 40 hours or 60 hours in a week, he was paid the guaranteed amount.

To square such a wage scheme with the plain requirements of § 7 (a) of the Fair Labor Standards Act of 1938 is impossible. Time and again this Court has made it clear that the regular rate of compensation upon which

overtime payments are to be based is the hourly rate actually paid to the employee for the normal, non-overtime workweek for which he is employed. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 580; *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 40; *United States* v. *Rosenwasser,* 323 U. S. 360, 363; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 424; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427, 430. "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* 424–425.

Our attention in this case must therefore be focused upon the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek. And when we do that, we discover that the parties have agreed that the employees shall receive the guaranteed amount, not the so-called "regular basic rate." That guaranteed amount is thus the regular rate for purposes of § 7 (a) of the Act, the so-called "regular basic rate" being an obviously artificial one.

It is said, however, that this scheme is sanctioned by *Walling* v. *Belo Corp.,* 316 U. S. 624. That is true, but it does not justify continuance of the erroneous *Belo* doctrine. The *Belo* case has been distinguished in subsequent opinions of this Court, but the distinctions were essentially ones of fact. On the basis of legal and statutory theory, the *Belo* case is irreconcilable with the later

cases. The *Belo* case, which carries its own refutation in its dissenting opinion, should therefore be overruled. Otherwise we shall be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case. See Feldman, "Algebra and the Supreme Court," 40 Ill. L. Rev. 489; "Legality of Wage Readjustment Plans under the Overtime Provision of the Fair Labor Standards Act," 13 U. of Chi. L. Rev. 486; 44 Mich. L. Rev. 866.

UNITED STATES NATIONAL BANK ET AL. *v.* CHASE NATIONAL BANK ET AL.

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

No. 371. Argued February 7, 1947.—Decided April 14, 1947.

The principal asset of a bankrupt estate was an undivided interest in coal lands, operated in part by lessees and producing substantial royalties. More than four months prior to the adjudication in bankruptcy, two creditors had obtained judgments against the bankrupt, which constituted first and second liens on the interest in these lands. Subsequently, a plan suggested by the attorney for the trustee and certain general creditors was adopted, whereby in consideration of the secured creditors forbearing to press their claims, the estate was divided into two funds: a real estate fund, and a general fund including royalties, etc. The first fund was to go to the first judgment creditor, the second fund was to be divided pro rata among all creditors. After the plan had been in operation for more than twelve years, a general creditor whose attorney had proposed the plan petitioned the bankruptcy court for a decree to the effect that the two judgment creditors had waived their liens by sharing in distributions from the general fund. *Held:*

1. Upon the particular facts of this case, the liens are declared valid and in existence, notwithstanding the failure to follow the provisions of § 57 (h) of the Bankruptcy Act, and notwithstanding the distribution of dividends contrary to § 65 (a). Pp. 35–39.

(a) Whether a secured creditor's participation in distributions from the general assets of a bankrupt estate on the basis of his full claim constitutes a waiver of his lien and an election to be treated as an unsecured creditor, depends upon the circumstances surrounding the receipt of the dividends. In exceptional cases, the circumstances may demonstrate the continued vitality of the security as well as indicate the inequity of declaring the security forfeited. Pp. 35–36.

(b) In rare cases, where there is a reasonable doubt as to whether a waiver has occurred, a careful examination must be made, in the light of recognized principles of equity, to determine upon what conditions the dividends from the general assets were distributed to the secured creditor. P. 36.

(c) The judgment lien creditors having received dividends from the general fund in good faith and without intent to waive their liens, there being no equitable reason why the liens should be declared forfeited, the general creditor whose counsel recommended the plan and acquiesced in its operation being equitably estopped to object to the validity of the liens on the basis of the operation of the plan, and there being no evidence that any permanent injury to any general creditor resulted from the operation of the plan, the equities of this case require that the liens be held valid and in existence. Pp. 36–39.

2. In view of the fact that the bankruptcy proceedings have been unduly prolonged for over twenty years, the bankruptcy court should now take steps to wind up the estate in accordance with the provisions of the Bankruptcy Act. P. 39.

155 F. 2d 755, reversed.

In a proceeding in bankruptcy, a general creditor petitioned for a decree to the effect that two secured creditors had waived their liens by sharing in distributions from the general assets of the bankrupt estate. The District Court granted the petitions, 56 F. Supp. 190; but, on rehearing, denied them, 61 F. Supp. 151. The Circuit Court of Appeals reversed. 155 F. 2d 755. This Court granted certiorari. 329 U. S. 699. *Reversed and remanded,* p. 39.

Robert I. Rudolph argued the cause and filed a brief for petitioners.

William Dean Embree argued the cause and filed a brief for the Chase National Bank, respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

A problem arising under the Bankruptcy Act is presented by the unique facts of this case.

On June 10, 1926, Harvey C. Stineman was adjudicated a bankrupt upon a voluntary petition and the case was referred to a referee. The principal asset of the bankrupt estate was an undivided one-sixth interest in a large acreage of valuable coal lands, a large portion of which was operated by lessees and was producing substantial royalties. The value of the interest of the bankrupt estate in this asset is alleged to have been appraised at $90,000.

More than four months prior to the date when the petition was filed and the adjudication made, the United States National Bank of Johnstown, Pa., and the First National Bank of South Fork, Pa., had procured judgments against Stineman. These two judgments constituted first and second liens, respectively, on Stineman's interest in the coal lands. This interest had no other encumbrances upon it.

On January 8, 1927, the Johnstown bank filed its secured claim in the bankruptcy proceedings in the amount of $10,000, reciting as its security the first lien on the interest in the coal lands. This claim was allowed. Subsequently, in 1932, the Johnstown bank filed an amended claim in the amount of $13,685, interest accruing after bankruptcy having been added to the original claim. The amended claim was allowed in the amount filed and formed the basis for the bank's participation in the dividends from the general fund, mentioned hereinafter. A court order in 1944 reduced this claim to $10,000.

The South Fork bank, on June 29, 1926, filed its secured claim with the referee for $11,290, reciting the second

lien as its security, along with unsecured claims for $7,173.45. Dividends from the general fund were subsequently paid to the bank on the basis of the full amount of all its claims, $18,463.45.

Numerous general, unsecured claims were filed by other creditors, approximating $225,000 in amount. Included among these was the claim of the Chase National Bank of the City of New York, a claim which was allowed in the amount of $55,231.98.

The referee held a meeting of the creditors on December 31, 1929, more than three and a half years after the adjudication. The motive for this meeting appears to have been the fact that the Johnstown and South Fork banks, the judgment lien creditors, were pressing for payment of their secured claims. This meeting was attended by the bankrupt, the trustee in bankruptcy and representatives of the two judgment creditors, the Chase National Bank and certain other general creditors. Apparently not all of the general creditors appeared at this meeting. The consensus of opinion among those present was that the real estate had a value in excess of the liens but that "if the lien creditors foreclosed upon their liens, little, if anything, would be left for general creditors."

One of the attorneys present, P. J. Little, then made a suggestion. Mr. Little at this time was serving as counsel for the trustee, the Chase National Bank and several other general creditors. His suggestion was "that under the law the estate should be divided into two items; one item showing funds arising wholly from real estate which does not include any of the leases or the funds from any of the leases; the other fund should be made up of all royalties, rentals, or dividends on stocks or bonds. The first fund to go to the first judgment creditor, the second fund to be divided pro rata among all the creditors."

The parties apparently agreed to this proposal. Although no supporting order of the referee appears in the record, the administration of the bankrupt estate proceeded as if a supporting order had been entered. The two judgment lien creditors assented to this course of events and it is asserted that all the creditors understood that the liens were to remain intact until the underlying claims had been paid in full.

Thereafter, four dividends were declared and distributed from the real estate fund, while seven dividends were declared and distributed from the general fund. The Johnstown bank received at least $1,364.76 from the real estate fund; the South Fork bank appears to have received nothing from that fund. Both of these banks shared with the other creditors in the seven distributions from the general fund, the Johnstown bank receiving $2,435.06 and the South Fork bank, $3,285.35. No exceptions were ever taken to any of the various orders of distributions. In addition, these two banks have carefully revived their judgments during each five-year period, making the trustee in bankruptcy a party to the proceedings.

In October, 1942, the Chase National Bank filed petitions for a decree to the effect that the two banks had waived their liens by sharing in the distributions from the general fund along with the general creditors and that the Johnstown bank should be compelled to return the $1,364.76 it had received from the real estate fund. The referee, however, held that both the Johnstown and South Fork banks were entitled to maintain their positions as lien creditors and at the same time participate in the distributions from the general fund. The District Court reversed the referee's decision, feeling that participation in distributions from both the real estate and general funds was contrary to accepted bankruptcy practice. *In re Stineman,* 56 F. Supp. 190. On rehearing, the District

Court changed its mind; it became convinced that the Chase National Bank had recommended the arrangement, had acquiesced in its execution and was now estopped from objecting. *In re Stineman,* 61 F. Supp. 151. The Third Circuit Court of Appeals reversed, holding that the parties had completely disregarded the pertinent provisions of the Bankruptcy Act and that the Johnstown and South Fork banks had waived their liens and were entitled to share in the bankruptcy estate only as general creditors. *In re Stineman,* 155 F. 2d 755.

Sections 65 (a) and 57 (h) of the Bankruptcy Act are the ones pertinent to this case. Section 65 (a) provides: "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." 11 U. S. C. § 105 (a). Section 57 (h) provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court." 11 U. S. C. § 93 (h).

Under these provisions, there are several avenues of action open to a secured creditor of a bankrupt. See 3 Collier on Bankruptcy (14th ed.) pp. 149–157, 255–259. (1) He may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.,* 94 F. 2d 536; *Ward* v. *First Nat. Bank,* 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inas-

much as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.*, 179 F. 929; *Morrison* v. *Rieman*, 249 F. 97. (4) He may avail himself of his security and share in the general assets as to the unsecured balance. *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131; *Ex parte City Bank*, 3 How. 292, 315.

Section 57 (h) is a codification of this fourth possibility. It permits the secured creditor to receive dividends along with the general creditors only on the balance remaining after the value of the security has been determined and deducted from the claim. This rule, commonly known as the bankruptcy rule, is designed to preclude any unwarranted advantage from accruing to the secured creditor. Grounded upon the statutory principle of equality and ratable distribution, it prohibits the secured creditor from reaping the whole benefit of his security while simultaneously taking dividends from the general assets on the basis of his entire claim as if he had no security. This rule differs from the one in equity, which allows the secured creditor to receive dividends on the full amount of his claim, crediting all dividends received and reserving the security against any deficiency. *Merrill* v. *National Bank of Jacksonville, supra.* And see 3 Collier on Bankruptcy (14th ed.) p. 153; Hanson, "The Secured Creditor's Share of an Insolvent Estate," 34 Mich. L. Rev. 309; 12 Ford. L. Rev. 77.

It is argued that the plan adopted in this case cannot be sanctioned under the foregoing principles. This plan allegedly called for the use of something similar to the equity rule of distribution. The judgment lien creditors were to retain their liens while sharing fully in the dividends from the general funds as if they had no liens, crediting the

dividends received against their claims. But § 57 (h) is said plainly to outlaw the use of that rule; if the judgment lien creditors wished to retain their liens, they could share in the dividends only to the extent that their claims exceeded the value of their liens. Since they did not follow the provisions of § 57 (h), the conclusion is reached that they have waived their liens and must now be considered solely as unsecured creditors.

At this point it should be noted that the incomplete record before us fails to reveal the value of the interest in the coal lands to which the liens attached. The judgment lien creditors claim that the value was fixed at $90,000, but no such valuation appears in the record. That it might be less than $90,000 is indicated by the statement of these creditors that if they had foreclosed on their combined liens of $21,290, "there would have been little, if anything, left for the general creditors." But in the setting of this case, we believe it immaterial whether the value of the interest in the coal lands was greater or less than the amount of the secured claims. In either event, the problem before us concerns itself with the present validity of the liens. Has the conduct of the judgment lien creditors been such as to constitute a waiver of their judgment liens? That question we answer in the negative.

The fact that the judgment lien creditors received general dividends contrary to the scheme of § 57 (h) does not necessarily mean that they thereby waived their liens. Nothing in the language of § 57 (h) or of any other section of the Act makes such a receipt the necessary equivalent of a waiver. It is generally true that participation by a secured creditor in distributions from the general assets on the basis of his full claim indicates a waiver of the security and an election to be treated as an unsecured creditor. See *In re O'Gara Coal Co.*, 12 F. 2d 426. But that is not

an invariable result flowing from the application of any rigid statutory rule. The result depends, rather, upon the circumstances surrounding the receipt of the dividends. And in exceptional cases, those circumstances may demonstrate the continued vitality of the security as well as indicate that it would be inequitable to declare the security forfeited. See *Wuerpel* v. *Commercial Germania Trust & Savings Bank,* 238 F. 269; *Maxwell* v. *McDaniels,* 195 F. 426; *Hartford Accident & Indemnity Co.* v. *Coggin,* 78 F. 2d 471; *Standard Oil Co.* v. *Hawkins,* 74 F. 395.

In the rare case where there is reasonable doubt as to whether a waiver has occurred, a careful examination must therefore be made to determine the conditions under which the dividends from the general assets were distributed to the secured creditor. And that examination must be made in the light of the recognized principles of equity. It has long been established that "courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity." *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240; *Pepper* v. *Litton,* 308 U. S. 295, 304. In determining whether a waiver of liens has taken place, the bankruptcy court must accordingly look to the equities involved as well as to the intention of the parties. A waiver may be inequitable or unfair to the secured creditor; the receipt of dividends may not have caused permanent injury to the unsecured creditors; the dividends may have been received under a mistake of law or fact or pursuant to court approval; the objecting party may be estopped from questioning the validity of the liens. Such equitable considerations may well be decisive of a waiver or forfeiture in a particular case.

It is at once evident in this case that the judgment lien creditors received dividends from the general fund in good faith and without any intent to waive their liens. The principal asset of the estate was the interest in the coal lands and it was that interest to which the liens attached.

Representatives of various general creditors believed that it would be to their advantage to have this interest remain intact, without being liquidated in whole or in part in order to satisfy the liens. Their thought was that by maintaining undiminished the royalties and rentals from this interest the unsecured claims could more rapidly be satisfied. To that end it was proposed that the judgment lien creditors refrain from immediate liquidation of their claims and share in the dividends from the general fund, a fund which included the royalties and rentals from the interest in the coal lands. The judgment lien creditors accepted this proposal, being willing to postpone any immediate realization of their security. But they did so with the distinct understanding that their liens were not forfeited and they took pains to renew the underlying judgments every succeeding five years in order to keep the liens alive. There is thus absent any element of an intentional waiver of the liens or any action inconsistent with a desire to retain the liens in the circumstances surrounding the receipt of the dividends by the judgment lien creditors. Cf. *Thomas* v. *Taggart,* 209 U. S. 385; *In re Kaplan & Myers,* 241 F. 459.

Nor do we perceive any equitable reason why these liens should be declared forfeited. The incomplete record in this case does not indicate whether the referee or the bankruptcy court ever gave formal approval to the agreement under which the judgment lien creditors received dividends along with the unsecured creditors. But the bankruptcy proceedings went forward for more than twelve years as if such approval had been given, authorization being given for the distribution of numerous dividends pursuant to the plan. Certainly the agreement had the implied, if not the express, blessing of the referee and the bankruptcy court. Hence the judgment lien creditors cannot be accused of having participated in a plan which was unknown to, or disapproved by, those responsible for the proper admin-

istration of the proceedings. A forfeiture of the liens would only penalize unfairly the judgment lien creditors, who joined the plan in good faith and without any apparent intention of harming others or of securing any undue advantage for themselves.

It is further significant that the plan was proposed by an attorney for Chase National Bank, the general creditor now objecting. Apparently not all the general creditors were present or represented at the meeting on December 31, 1929, when the proposal was made and accepted. But the agreement, with its various dividend distributions taking place between 1935 and 1942, must have come to the attention of all the general creditors sooner or later; yet none of them raised any objection to the various distributions or to the agreement during this long period of time. No reason suggests itself why any of these general creditors should now be permitted to question the dividends received in the past by the judgment lien creditors or to demand that the liens be declared forfeited because of the receipt of such dividends. Especially is this so as to Chase National Bank. As the District Court noted, 61 F. Supp. at 152, its counsel recommended and had full knowledge of the agreement; and Chase had knowledge of the subsequent dividend distributions, to which it did not demur. At this late stage, it is equitably estopped from raising any objection to the validity of the liens on the basis of the operation of the plan which it proposed. Cf. *Merchants Bank* v. *Sexton,* 228 U. S. 634; *In re National Public Service Corporation,* 68 F. 2d 859; *In re American S. S. Nav. Co.,* 14 F. Supp. 106.

Moreover, the record does not indicate that any permanent injury to Chase National Bank or to the other general creditors resulted from the operation of the plan. The whole scheme was adopted with the idea that they would be benefited and we cannot say that this purpose has failed

of achievement. Having proposed and acquiesced in the plan, the Chase National Bank cannot now be heard to complain of any resulting injury, especially an injury that is not apparent in the record.

We conclude from these various considerations that the liens should be held to be valid and in existence despite the failure to follow the provisions of § 57 (h) and despite the distribution of dividends contrary to § 65 (a). There was never any intention to waive the security and those who might have objected to the distributions are now estopped. But in view of the fact that the bankruptcy proceedings have been unduly prolonged for over twenty years, the bankruptcy court should now take steps to wind up the estate in accordance with the provisions of the Bankruptcy Act. Those provisions are designed to bring about the speedy distribution of the bankrupt's assets, a distribution of the type which definitely has not occurred in this case.

The judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed.

MR. JUSTICE FRANKFURTER is of opinion that the order of the District Court should be restored on the ground that the creditors entered into an agreement which was not objectionable under § 57 (h) of the Bankruptcy Act, whereby the liens of the petitioners were saved.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS dissents.

TRAILMOBILE COMPANY ET AL. *v.* WHIRLS.

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

No. 85. Argued December 19, 1946.—Decided April 14, 1947.

1. Under § 8 (c) of the Selective Training & Service Act of 1940, a veteran's statutory right of seniority—insofar as it gives a reemployed veteran a preferred standing over non-veteran employees having identical seniority rights—does not extend beyond the expiration of the first year of reemployment. Pp. 51–61.
2. A question of *res judicata* arising from prior litigation in state courts and decided adversely to petitioners by the courts below, but in respect of which no error was assigned in the petition for certiorari, is not properly before this Court. P. 48.
3. A proceeding in which a reemployed veteran sought to establish seniority rights under § 8 (c) of the Selective Training & Service Act, and in which the decision of the court below was in his favor, *held* not moot although, because of procedures invoked by a labor union, he has not been at work but has been on leave of absence with full pay. Pp. 48–49.
4. The remand in this case will be so framed as to preclude foreclosure, by possible future application of the doctrine of *res judicata*, of such cause of action as the employee may have if he has been unlawfully expelled, suspended or otherwise dealt with by the union for asserting his legal rights. Pp. 50–51, 61–62.

154 F. 2d 866, reversed.

Respondent brought suit in the District Court against his employer, asserting rights under the Selective Training & Service Act of 1940. A labor organization was permitted to intervene. The District Court gave judgment for respondent. 64 F. Supp. 713. The Circuit Court of Appeals affirmed. 154 F. 2d 866. This Court granted certiorari. 328 U. S. 831. *Reversed,* p. 61.

Philip J. Schneider argued the cause for the Trailmobile Company, petitioner. With him on the brief was *Morison R. Waite.*

Sol Goodman and *Ernest Goodman* argued the cause and filed a brief for the International Union, United Automobile, Aircraft & Agricultural Workers of America—C. I. O., Local No. 392, petitioner.

Frederick Bernays Wiener argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney, Oscar H. Davis* and *Cecelia H. Goetz.*

Frank L. Mulholland, Clarence M. Mulholland and *Willard H. McEwen* filed a brief for the Railway Labor Executives' Association, as *amicus curiae,* urging reversal.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case, like *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. 275, presents a problem in the seniority standing of a reemployed veteran. It arises under § 8 of the Selective Training and Service Act of 1940.[1] The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces.[2] Here the question concerns the duration of the veteran's restored statutory seniority standing. The petitioners maintain that it ends with the first year of his reemployment. Respondent's position is that it

[1] 54 Stat. 885, 50 U. S. C. App. § 301 *et seq.* In 1944 there was a minor modification of § 8 not here relevant. 58 Stat. 798; *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. 275, 278, note 1. As amended the Selective Training and Service Act expired in its major part March 31, 1947. Act of June 29, 1946, 60 Stat. 341. But § 8 is saved indefinitely.

[2] "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence." 328 U. S. 275, 285.

lasts as long as the employment continues.[3] A suggestion has also been made that occurrences taking place since the decision in the Circuit Court of Appeals may have rendered the cause moot.

The case is an aftermath of a general controversy over seniority rights which arose among the employees of two corporations following their consolidation on January 1, 1944. Because of the relation of the general controversy to this litigation a detailed statement of the facts becomes necessary. Prior to their consolidation the Highland Body Manufacturing Company had been a wholly owned subsidiary of the petitioner, the Trailmobile Company. The two corporations manufactured the same commodities in separate plants in Cincinnati, Ohio.[4] During 1943 under the plan of consolidation the supplies, equipment and personnel of Highland were transferred gradually to the plant of Trailmobile. It took over the assets and business of Highland and assumed all its obligations. The employees of Highland were transferred to the payroll of Trailmobile as of January 1, 1944, when the consolidation became fully effective.[5]

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[3] Though the fact does not appear affirmatively in the record, the parties agree that Whirls upon his reemployment after his military service received in addition to the seniority he had acquired at the time of his entry into military service also seniority accrued during the period of his service, consistently with the standard of the *Fishgold* case. This accorded with the then effective collective bargaining agreement which provided: "In case of a national crisis, such as a declared or undeclared war, any man who relinquishes his job with the Company for services rendered to the Government, shall on his return to work retain his place on the seniority list with accumulation."

[4] See 51 N. L. R. B. 1106, 1107, for details of the companies' operations.

[5] In the last full year of independent operation, 1942, Highland had approximately 100 employees and produced commodities worth approximately $1,500,000 and Trailmobile had approximately 1,000 employees and produced commodities worth $12,000,000.

The employees of both companies had been affiliated with the American Federation of Labor. 51 N. L. R. B. 1106, 1108. At the time of the consolidation the Highland group, including respondent, claimed seniority with Trailmobile as of the dates of their employment by Highland. The former Trailmobile employees opposed this, maintaining that the Highland personnel should be considered as new employees of Trailmobile, with seniority dating only from January 1, 1944. This dispute was submitted to national representatives of the A. F. of L. They decided in favor of the Highland group.

The former Trailmobile employees were dissatisfied with this decision. They outnumbered the Highland claimants about ten to one. Accordingly, reorganizing as a unit of the Congress of Industrial Organizations, they requested recognition as the exclusive bargaining agent of Trailmobile's employees, including the Highland transferees. An election was held under the auspices of the National Labor Relations Board, in which the new C. I. O. local was chosen as bargaining representative for a unit composed of both groups.[6]

Trailmobile accordingly negotiated with the C. I. O. and in July, 1944, a collective bargaining agreement was concluded, effective as of June 21, 1944. It provided that the seniority rights of former Highland employees should be fixed as of January 1, 1944, regardless of the dates of their original employment by Highland.

Respondent Whirls had been in Highland's employ from 1935 to 1942, when he entered military service. He was

[6] 51 N. L. R. B. 1106; 53 N. L. R. B. 1248. As the National Labor Relations Board determined that the appropriate bargaining unit was one composed of both Highland and Trailmobile employees, 51 N. L. R. B. at 1113, the ex-Highland employees, of course, lost the election, since there were many more Trailmobile employees. See note 5. The bargaining unit excluded supervisory and certain miscellaneous employees of both companies. 51 N. L. R. B. 1114–1115.

honorably discharged and returned to his work with Highland in May, 1943.[7] He was thus among the employees transferred from Highland to Trailmobile as of January 1, 1944, whose seniority was reduced so as to start as of that date by the July, 1944, collective agreement with the C. I. O.

The Highland group contested the agreement's validity in the Ohio courts in a class suit brought July 17, 1944, by Hess, one of their number, on behalf of himself and 178 others similarly situated. These included 104 persons actually at work, veterans and nonveterans, among whom was Whirls, and 74 employees then in the armed forces. The petition alleged that Trailmobile then had about 500 employees in military service, of whom apparently some 426 were outside the Highland group.

The theory of the class suit was that, although the plaintiffs were not then members of the C. I. O., the collective bargaining agent was the representative of all employees in the unit and hence could not legally deprive a minority of the employees which it represented of their accrued seniority and other rights by any collective agreement with the company.[8] The petition alleged that the collective agreement arbitrarily and unlawfully deprived the plaintiffs of their "vested individual rights" and asked mandatory injunctive relief restoring each to seniority status as of the date of his employment by

[7] See note 3.

[8] There are holdings that, although a collective bargaining agent may by contract with the employer modify the seniority structure, it must act in good faith toward all employees. See Seniority Rights in Labor Relations (1937) 47 Yale L. J. 73, 90; Christenson, Seniority Rights under Labor Union Working Agreements (1937) 11 Temp. L. Q. 355, 370–371. The class suit was filed and determined before the decisions were rendered here in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248.

Highland. The company and the collective agent stood upon the terms of the collective agreement and the agent's authority as certified representative to make it as justifying the action taken under it.

The Ohio courts held against the plaintiffs in the action, sustaining the position of the company and the union.[9] They held in effect that the seniority rights in issue arose exclusively from contract, making no reference whatever to § 8 of the Selective Training and Service Act or any question relating to it; [10] that the company and the collective representative were lawfully empowered to enter into the contract fixing those rights as of January 1, 1944; that the trial court was not authorized, in its own language, "to contract for the plaintiff[s] or make a new contract," since that power "exists only in the exclusive bargaining agent, under the provisions of the National Labor Act so long as that agent acts within the law." [11]

Accordingly the suit was dismissed. The record here does not disclose the date of the trial court's judgment. But its decision was affirmed by the Ohio Court of Appeals before October 2, 1945, when the union's answer was filed in the present cause; and the case had been finally determined against the plaintiff's claims by the Supreme Court of Ohio prior to October 15, 1945.[12]

The record is not entirely clear concerning the exact character and sequence of events between July 15, 1944,

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[9] *Hess* v. *The Trailer Co.*, 31 O. O. 566, 17 O. Supp. 39, affirmed by the Court of Appeals, Hamilton County, Ohio, motion to certify record to the Ohio Supreme Court overruled, O. Law Rep., October 15, 1945, 51; 18 Ohio BAR 314.

[10] The pleadings in the class suit have been made part of the record in this case. Neither they nor the findings and judgment of the trial court in that cause disclose any reference to or consideration of § 8 or its possible effects upon that litigation.

[11] See note 8 *supra.*

[12] See note 9 *supra.*

when Whirls and other former Highland employees were notified that their seniority status would be changed, and September 18, 1945, when the present suit was filed in the District Court. Apparently, after the notice was given, Selective Service officials intervened in behalf of Whirls and other veterans,[13] although his allegation that his seniority was restored as a result of that intervention was denied both by the company and by the union. There is ambiguity also concerning whether the closed-shop provision appeared in the 1944 agreement or only in the 1945 one between the company and the C. I. O. The facts of record, however, are more consistent with the view that it was not introduced until the latter year.

At any rate, in June or July, 1945, Whirls joined the C. I. O. union, thus complying with the closed-shop provisions of the collective agreement. And until about September 3 of that year he continued to be employed in the painting department, where he had the highest seniority and was drawing pay of $1.05 per hour. On or about that date, however, the company transferred him to the stock department, threatening to reduce his pay to $0.83 per hour and also to reduce his seniority rating in accordance with the collective agreement.

Whether or not the threatened reductions actually took effect is not clear from the record, for not long afterward Whirls was transferred again, to a position paying $1.18 per hour in another department. But before this was done, represented by the United States

[13] Whirls' petition in this case alleged that after the notice of July 15, 1944, "defendant herein again restored plaintiff to his date of hiring, as regulating his seniority, to-wit: February 8, 1935, pursuant to a directive of the Selective Service System of the United States, and he continued to benefit by such seniority status until on or about September 3, 1945, at which time" the defendant transferred him as stated below in the text and threatened, unless restrained, to reduce his pay and seniority rating.

Attorney,[14] he brought this suit in the District Court under the Selective Training and Service Act. He sought to enjoin the threatened decrease in pay and change in seniority status. He also asked for restoration to his former position in the painting department and to his seniority as fixed by his original employment with Highland. The employer answered and the local C. I. O. union intervened in support of the employer's position. However, since Whirls had been transferred again before the case came on for hearing, the parties agreed at the hearing to limit the issues to those affecting the question of seniority. This was presented in two forms, (1) on the merits, the facts being substantially stipulated; (2) on the question whether the state court proceeding in the class suit had determined the seniority rights of Whirls, making the issue now raised *res judicata* for this suit. See *Angel* v. *Bullington,* 330 U. S. 183.

Taking respondent's view in both respects, the District Court rendered judgment in his favor. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court's judgment. 154 F. 2d 866. Besides holding *res judicata* inapplicable, both courts took the view, contrary to that later reached here in the *Fishgold* case, that the reemployed veteran was entitled to "superseniority" for one year following his reemployment,[15] and went on to hold that his statutory preferred status with respect to seniority and other incidents of his employment did not end with the expiration of that year. Because of the bear-

[14] Section 8 (e) of the Selective Training and Service Act, quoted in *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U. S. at 280, note 3.

[15] The Court of Appeals expressly stated its disagreement with the views expressed by Judge Learned Hand, 154 F. 2d 785, writing for the majority of the Circuit Court of Appeals in the *Fishgold* case, the decision in which was affirmed here.

ing of the *Fishgold* decision upon the problem and the importance of the question presented, we granted certiorari. 328 U. S. 831.

I.

At the outset it is important, in view of certain questions which have been injected beyond the issues presented for decision, to state explicitly what is not before us. In the first place, we are not required to determine whether the class suit in the state courts constituted an adjudication of the rights of the parties involved in this litigation. That question was presented to the District Court and the Circuit Court of Appeals. Both determined it adversely to petitioners, but no error was assigned to this ruling in the petition for certiorari. The question is therefore not before this Court and we express no opinion concerning it.

The view entertained in this respect by the District Court and the Circuit Court of Appeals, however, has assumed tangental bearing in connection with the suggestion that the cause may have become moot. In its memorandum filed upon the application for certiorari and in its brief, the Government calls attention to certain events not appearing of record but taking place after the decision of the Court of Appeals. Though suggesting the facts for our attention, the Government maintains that they do not render the controversy moot. This Court, of course, does not render advisory opinions. And since the suggestion of the facts not only is sufficient to raise the question of mootness but has injected others not comprehended in the issues, it is necessary to dispose of the matter before undertaking a determination of the question otherwise properly here for decision.

It is suggested and not denied that under date of April 10, 1946, respondent was notified by the collective agent that he had been charged with conduct unbecoming a

member of the union, namely, in bringing this suit without exhausting the remedies provided by its constitution and by-laws; in thereby violating the collective agreement; in negotiating with the employer through others than the union; and in conducting himself in a manner harmful to its interests and those of its members. Accordingly, on April 15, 1946, the union requested Trailmobile to suspend Whirls from work. In consequence, the company directed him not to report for duty. Since then, however, it has continued to keep him on the payroll, on leave of absence with full pay. Although the Government urges that Whirls thus continues in the company's employ and consequently the case is not moot, its suggestion of the facts has overlaid the only issue brought here by the petition for certiorari with questions of unlawful discrimination allegedly arising out of the suggested facts, under the decisions in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210; and *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248.[16]

The facts thus put forward have no proper bearing in this case otherwise than to suggest the question of mootness and to require that any decision which is made upon the merits here be made without prejudice to the future assertion of any rights of respondent which may have been violated by the conduct set forth. We agree that in the circumstances related he remains an employee of the company and the cause is not moot.

[16] The Government's brief puts the suggestion and discussion it makes as a matter of not desiring its "failure to explore the nature and causes" of the alleged discrimination to be taken "as an admission either" that there was not unfair discrimination under the *Steele*, *Tunstall* and *Wallace* cases, *supra;* or that such discrimination "cannot be redressed under Section 8 . . . after the lapse of the initial year of reemployment . . . ."

We also agree that the question of unlawful discrimination is not properly before us for decision.[17] That question, insofar as it arose from events prior to this litigation, was involved in the Ohio class suit without reference, it would seem, to § 8 or its possible effects. And because the petition for certiorari, as we have noted, assigned no error to the Court of Appeals' ruling on the issue of *res judicata* arising from the outcome of the class suit, we are not at liberty now to consider the effect of that litigation or the issues of discrimination embraced in it. Insofar as any question of unlawful discrimination may be thought to arise from the facts said to have taken place after the decision of the Circuit Court of Appeals, we are also not free at this time to consider or determine such an issue. As the brief of the Government in respondent's behalf pertinently states, "These points were not raised on respondent's behalf in the lower courts, and no evidence was introduced by any party on the issue of unfair discrimination. Cf. *Hormel* v. *Helvering,* 312 U. S. 552, 556. In view of that fact, and of the *Hess* litigation, we believe that it would be inappropriate, at this stage, to argue these issues."

Wholly aside from any question of power, this disclaimer on behalf of the party affected is a sufficient reason to justify refusal to inject such an issue here or to volunteer aid not sought. We therefore are required to say no more concerning the matter now than that, if respondent has been unlawfully expelled, suspended or otherwise dealt with by the union for asserting his legal rights, the law has provided remedies for such injuries and they may be redressed in appropriate proceedings designed for that purpose upon proof of the facts constituting the wrong and due consideration of the legal issues they present. To assure this possibility, however, the remand which be-

[17] See note 16.

comes necessary in this cause on the merits will be so framed as to preclude any foreclosure of such rights by possible future application of the doctrine of *res judicata* arising from this determination.

Since, moreover, in the view of the District Court and apparently of the Court of Appeals, the Ohio class suit was dispositive of issues of unlawful discrimination arising out of the facts presented in that litigation without reference to § 8,[18] it may be added that the Ohio determination could not apply, of course, to such discrimination taking place by virtue of later events.

We turn therefore to consideration of the sole question presented on the merits, namely, whether under § 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues.

II.

The relevant portions of §§ 8 (a) and 8 (b) are set out in the margin.[19] But we are concerned particularly with § 8 (c), which reads:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been

[18] The Court of Appeals, noting that Whirls was not named as a party to the class suit other than as a member of the class, pointed out that numerous members of the armed forces were involved in both groups of employees, but that their interests as veterans under § 8 were not common to the nonveteran employees in either group. Hence, it concluded, the class suit was not appropriate for rendering a judgment binding upon veteran members of the complaining class as to the question of their seniority under § 8. 154 F. 2d 866, 872.

[19] "SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training

on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The Government argues on respondent's behalf that the correct meaning of § 8, and particularly of subsection (c), is that upon reemployment the veteran is entitled to retain indefinitely his prewar plus service-accumulated seniority.[20] Under the statute, it says, this seniority can-

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and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; . . . ."

[20] The Government states that a veteran could be reduced in seniority on account of bona fide changed circumstances or on account of cause or upon waiver. As to this, see note 25.

not be taken away by a collective bargaining agreement or by the employer,[21] either during the year in which the statute insures the veteran against discharge without cause or thereafter while the employment continues.[22] Support for this view is thought to be derived from the syntax of the statutory language and from the legislative history.

It is argued that grammatically the "within one year" provision applies only to the last clause of subsection (c), relating to discharge without cause, and does not refer to the "other rights" [23] given by subsections (b) and (c), including restored statutory seniority. Because the "within one year" provision appears most proximately in connection with the prohibition against discharge, the Government seeks to give that prohibition, including its temporal term, effect as a command wholly distinct from

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[21] Seniority arises only out of contract or statute. An employee has "no inherent right to seniority in service . . . ." *Ryan* v. *New York Central R. R.*, 267 Mich. 202, 208; *Casey* v. *Brotherhood,* 197 Minn. 189, 191–192. "The seniority principle is confined almost exclusively to unionized industry." Decisions (1946) 46 Col. L. Rev. 1030, 1031, and authorities cited. "In private employment seniority is typically created and delimited by a collective bargaining agreement . . . ." *Ibid.*

[22] See note 20.

[23] The Government's argument is limited to seniority. But it is equally applicable to the other components of "position," such as pay. Thus, if accepted, it would mean that after the guaranteed one year a veteran could be discharged but could not have his pay reduced.

The position to which an employee must be restored is either the position previously held or "a position of like seniority, status, and pay." See note 18. It is thus recognized that part of the restored "position" is the seniority accrued prior to service in the armed forces and, under the *Fishgold* case, during service. "Seniority" is part of "position," and therefore when the Act states in subsection (c) that the veteran may not be discharged "from such position" it means both from the job itself and from the seniority which is part of the job.

and unrelated to anything preceding. It treats the clause as a grammatically independent sentence and a substantively unrelated provision, although it is separated from the earlier ones only by a comma followed by the conjunction "and."

On this premise of complete severability the Government builds its entire case. The premise necessarily regards § 8 (c) as making no express provision for the duration of "other rights," but as leaving this to be found wholly by implication. The Government then goes on to conclude that the period to be implied is indefinite. Although the statutory security against discharge ends with the prescribed year, the protection given by § 8 (c) to "other rights" is said therefore not only to be effective for that year, *cf. Fishgold* v. *Sullivan Drydock & Repair Corp., supra,* but to continue in full force for as long as the job may last beyond that time. In this view, of course, the result would be to "freeze" the incidents of the employment indefinitely while "freezing" the right to the job itself for only one year.

Difficulties arise in connection with this construction, both in its premise and in its conclusions. One is that the conclusion of indefinite duration would not follow necessarily, if the premise of complete severability were acceptable. On that basis "indefinite duration" as the Government conceives it would not be the only tenable period or even the most probably contemplated one. Several alternatives would be presented. However, the statutory year would not be among them, since it is implicit in the premise of severability that the Act does not apply the concluding clause of § 8 (c) to "other rights" to secure their extension either during or after that time. On the other hand, the Government's view ignores the usual rule of construction where time is not expressly prescribed, but is evidently to be implied. For generally in such cases

duration for a reasonable period is the term accepted by the law rather than permanency or indefinite extension.[24] And this, in varying circumstances, might be found to be longer or shorter than the statutory year prescribed for the job itself.

The real trouble however is in the basic premise both grammatically and substantively. It assumes not only the complete independence of the last clause of § 8 from what precedes, but also that employment within the meaning of the Act is something wholly distinct and separate from its incidents, including seniority, rates of pay, etc. We think, however, that the idea of total severability is altogether untenable. To accept it would do violence both to the grammatical and to the substantive structure of the statute.

The clause is neither an independent sentence nor a disconnected prohibition without significant relationship to what precedes. "From such position" has no meaning severed from the prior language. The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged. Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior "restoration" clauses. *Fishgold* v. *Sullivan Drydock & Repair Corp., supra.* Indeed such reference is explicit both in the phrase "from such position" and in the time provision itself, namely, "within one year *after such restoration.*"

To tear the concluding clause from its context is therefore impossible. It is conjunctive with all that precedes. Nor is it any the more permissible to disconnect its constituent temporal term. There can be no doubt whatever that Congress intended by § 8 (c) to secure the "other

[24] See, *e. g., Dillon* v. *Gloss,* 256 U. S. 368, 375; *Sunflower Oil Co.* v. *Wilson,* 142 U. S. 313, 322; 1 Williston, Contracts (Rev. ed.) 152.

rights" guaranteed by it for at least the minimum term of the prescribed one-year period. This indeed was a specific ruling of the *Fishgold* case.

The employee there had not been discharged in the sense of being thrown out of his job altogether. He simply had been deprived of the opportunity to work by the operation of the seniority system when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his full standing under the Act. That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service. In the language of § 8 (c) he is to be "considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces." The Court held, indeed, that the Act did not give him standing to outrank nonveteran employees who had more than the amount of seniority to which he was entitled and to which he had been restored; in other words, that he was not given so-called "superseniority." But it also squarely held that he was given security not only against complete discharge, but also against demotion, for the statutory year. And demotion was held to mean impairment of "other rights," including his restored statutory seniority for that year. "If within the statutory period he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of § 8 (c) be 'discharged from such position.' " 328 U. S. at 286.

That § 8 (c) applies to secure the protection of "other rights" for at least the statutory year was therefore inherent in the rationalization of the *Fishgold* decision. To that extent at any rate the concluding clause was held

applicable, not severable, concerning them. This of course destroys the Government's basic premise of the complete severability of that clause and its resulting non-applicability to "other rights." While the reemployed veteran did not acquire "superseniority," § 8 (c) gave him the restored standing for the minimum duration of the prescribed year.

It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it. Equally clearly Congress did not create them to be operative for the vaguely indefinite and variously applicable period of a reasonable time. But we cannot agree that they were given to last as long as the employment continues, unaffected by expiration of the one-year period.

To accept this conclusion, as we have said, would mean "freezing" the incidents of the employment indefinitely while "freezing" the right to employment itself for only one year. As long as the employee might remain in his job, his pay could not be reduced, his seniority could not be decreased, insurance and other benefits could not be adversely affected. And this would be true, although for valid reasons all of those rights could be changed to the disadvantage of nonveteran employees having equal or greater seniority and other rights than those of the veteran with restored statutory standing. The reemployed veteran thus not only would be restored to his job simply, as the *Fishgold* case required, "so that he does not lose ground by reason of his absence." 328 U. S. at 285. He would gain advantages beyond the statutory year over such nonveteran employees.

We do not think Congress had in mind such far-reaching consequences for the nation-wide system of employment, both public and private, when making the statutory provisions for the veteran's benefit. At the time it acted,

we had not declared war and the men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service. Visionary as this notion proved to be, it hardly can be taken to support the view that Congress contemplated "freezing" the specified incidents of restored employment indefinitely.

The *Fishgold* case, it is true, concerned only events taking place within the statutory year. As the Court of Appeals pointed out in distinguishing this case, 154 F. 2d at 871, the issues there involved no question of the reemployed veteran's standing after the statutory year. But, as we have said, the decision did hold that § 8 (c) applies to "other rights" for the year. And the rationalization was wholly inconsistent with the idea that those restored rights continued indefinitely after the year, unaffected by its termination. The restored veteran, it was held, could not be disadvantaged by his service to the nation. He "was not to be penalized on his return by reason of his absence from his civilian job." 328 U. S. at 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been "on furlough or leave of absence." It is clear, of course, that this statutory addition to the veteran's seniority status is not automatically deducted from it at the end of his first year of reemployment. But the *Fishgold* decision also ruled expressly that he was not to gain advantage beyond such restoration, by virtue of the Act's provisions, so as to acquire "an increase in seniority over what he would have had if he had never entered the armed services. . . . No step-up or gain in priority can be fairly implied." 328 U. S. at 285–286.

For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual

processes of collective bargaining or of the employer's administration of general business policy.[25] But if this extraordinary statutory security were to be extended beyond the statutory year, the restored veteran would acquire not simply equality with nonveteran employees having identical status as of the time he returned to work. He would acquire indefinite statutory priority over nonveteran employees, a preferred status which we think not only inharmonious with the basic *Fishgold* rationalization, but beyond the protection contemplated by Congress.

We are unable therefore to accept the Government's position. Aside from the events taking place after the Court of Appeals' decision, which as we have said are not properly here for consideration except upon the question of mootness, Whirls was treated exactly as were other employees in his group having the same seniority and status as he had on the date of his reemployment. There was no discrimination against him as a veteran or otherwise than as a member of that group. Both groups, the former Trailmobile employees and the former Highland employees, who composed his group, contained veterans and nonveterans in large numbers. Both contained veterans in active service and reemployed veterans when the collective agreement was made. Whirls was treated exactly as all other members of his group, the ex-Highland employees, veterans and nonveterans alike. Whether or not the collective agreement was valid, or infringed rights

[25] Section 8 (c), it will be recalled, forbids discharge "without cause within one year." It may be that the "without cause" qualification applies to "other rights" as well as to total discharge, more especially in view of the position we take concerning the severability of the concluding clause of § 8 (c). But no question is presented in this case whether the employer, for cause, could demote a reemployed veteran within the statutory year consistently with the requirements of § 8 (c), and we express no opinion in this respect.

of Whirls and other members of that group apart from rights given by § 8 (c), is not before us, for reasons we have stated. The only question here and the only one we decide is that § 8 (c), although giving the reemployed veteran a special statutory standing in relation to "other rights," as defined in the *Fishgold* case, during the statutory year, and creating to that extent a preference for him over nonveterans, did not extend that preference for a longer time.

On the facts therefore we are not required to determine the further question whether the statute would give protection to a reemployed veteran after the statutory year, if it were shown that he then had been demoted beneath his rightful standing under the Act as of the date of his restoration, though nonveteran employees having the same seniority standing as of that time had not been demoted or adversely affected. No such question is presented on the facts of record properly before us for consideration and decision. It will be time enough to consider such an issue whenever it may be presented.

We find it unnecessary therefore to pass upon petitioners' position in this case, namely, that all protection afforded by virtue of § 8 (c) terminates with the ending of the specified year. We hold only that so much of it ends then as would give the reemployed veteran a preferred standing over employees not veterans having identical seniority rights as of the time of his restoration. We expressly reserve decision upon whether the statutory security extends beyond the one-year period to secure the reemployed veteran against impairment in any respect of equality with such a fellow worker.

These reasons, founded in the literal construction of the statute and the policy clearly evident on its face, are sufficient for disposition of the case. They are not weakened by the Government's strained and unconvincing citation of the Act's legislative history.

That argument is grounded in conclusions drawn from changes made without explanation in committee with respect to various provisions finally taking form in § 8, changes affecting bills which eventually became the Selective Training and Service Act and the National Guard Act, 54 Stat. 858. Apart from the inconclusive character of the history, the Government's contention assumes that the only alternatives presented by the final form of the bill were indefinite duration for the incidents of the employment named and none at all. This ignores the other possibilities considered in this opinion, including duration for a reasonable time. Moreover, as has been noted, the most important committee changes relied upon were made without explanation.[26] The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.[27]

The argument for respondent in this case is of whole cloth in principle with the contention for "superseniority" made and rejected in the *Fishgold* case, as indeed the District Court and the Court of Appeals regarded it. Lacking any better legislative footing, it equally cannot stand.

Accordingly the judgment of the Court of Appeals is reversed. This however will be without prejudice from the decision here to respondent's assertion in the future of any rights he may have against Trailmobile or the col-

[26] See S. Rep. 1987, 76th Cong., 3d Sess.; H. Rep. 2847, 76th Cong., 3d Sess.; H. Rep. 2874, 76th Cong., 3d Sess.

[27] The Government also relies upon certain statements taken out of context from the debates. "As is true with respect to all such materials, it is possible to extract particular segments from the immediate and total context and come out with road signs pointing in opposite directions." *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, 733. None of the selections is directed toward the question whether the veteran's seniority continues after the guaranteed one-year period so as to be not subject to modification by a collective bargaining agreement.

lective agent on account of their acts not presented on this record or involved in the issues determined by this decision.

It is so ordered.

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER joins, dissenting.

Of the millions of wage earners whom the War took from their jobs into the armed services, some came from organized industries, others from unorganized industries; some had priority rights incident to their jobs, others had no such rights. For all, Congress provided the security of being able to get back their old jobs for at least a year after their return to civil life. But since industrial priority rights usually prevailing in organized industry have important bearing both on permanence of employment and wages, Congress guaranteed the veteran not merely "against loss of position" but also against "loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 285. In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away.

Congress thus dealt with two very different aspects of employment. It gave all wage earners the assurance of having their old jobs for a year. It further made imperative that wage earners who, by virtue of employment contracts, normally union contracts, had preferred positions should have the same preferred positions as those enjoyed by their fellows who had their status but remained behind. Congress limited the right to have a job to a year. But Congress, having assured a veteran the pri-

ority status he would have had had he remained at work, did not take away that status at the end of twelve months. Accordingly, because of the congressionally assured status, whereby a veteran had a priority right that he would have had, had he never left, he has whatever rights that status gave an employee under the general law of contract and more particularly, as in this case, under the National Labor Relations Act.

The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services. If he could not be deprived of his seniority rights under the employment contract had he remained behind, he cannot be deprived of them because he is a veteran. Therefore, if under the National Labor Relations Act, those wielding the power of an exclusive bargaining agency on behalf of the veteran could not have discriminated against him had he not been a veteran, they cannot discriminate against him because he is a veteran. Any other result would fly so completely in the face of what Congress was about in fashioning economic security for the returning veterans, that it would require language totally wanting in what Congress wrote to find such a strange purpose on its part.

Congress did not authorize arbitrary reduction of the seniority rights to which the veteran had been restored at the end of the year. If his rights under the contract of employment assure that he will not be discharged before an employee with lower seniority and that he is entitled to a certain wage scale he continues in employment with this seniority status and is entitled to all its benefits, as long as others with lower seniority remain on the job.

In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement. It is not likely that in furthering this policy

Congress would say that an employee, because he is a veteran, should suffer the consequences of having been to war after a year's return. The equality of treatment which Congress designed as between employees who went and employees who stayed could not be achieved by delaying for one year the disadvantages of having been away and then letting them affect the veteran.

Whirls came back from the army to his old work, where he had certain advantages of seniority. Now he has lost his seniority, and because he asked the courts to say whether he lost it legally he was booted out of his job and, moreover, was expelled from the union he had been compelled to join by reason of a closed-shop agreement. He may find other employment at his old craft closed to him. This is rather shocking and it is hard to believe that Whirls has no protection in law.

What happened to Whirls is this: The employer to whose service he returned was merged or consolidated with a bigger concern of the same kind—a corporation which had owned the company for which Whirls worked—and both businesses were continued under one ownership. This united the two working forces and the question arose as to relative seniority rights. Both groups had belonged to American Federation of Labor unions, so the problem was submitted to its national authorities. They ruled that each employee should retain seniority rights dating from the time he entered the employ of either company.

The bigger group revolted. They demanded their own seniority and demanded that the smaller group coming into the consolidation be treated as entirely new employees. They reorganized as a C. I. O. unit, demanded recognition as the exclusive bargaining agent of the whole enterprise and, of course, won the election. They then demanded and obtained a contract allowing their own seniority and establishing a closed shop. To keep his job at all, Whirls was obliged thereby to join the C. I. O. union

and, with others, suffered reduction of pay and loss of seniority rights.

Believing that he and others had been unlawfully dealt with and being supported by the Government in the belief, he sought a remedy in the courts. His claim was not frivolous, for two courts below granted him relief. But because he tested his rights in court, he was expelled from the union on charges that he negotiated for himself through others than the union and acted in a way contrary and harmful to its interests. Since he was no longer a member of the union, it demanded under the closed-shop agreement that the employer oust him from even the reduced job which its bargaining had left to him. The employer was obliged by its contract to comply but has been paying him on a leave-of-absence-with-pay basis. The short of it is that Whirls is out of seniority, out of work, and out of the union, with all that this means in a closed-shop industry. His predicament comes about not because of any fault of Whirls as a workman, nor because of his employer's wish.

The employer urges that we relieve it from the duty imposed by the court below of reinstating Whirls in his seniority rights because "the majority union members may compel the employer to discharge such returning veteran after the expiration of said one-year period. As in this case, the union might expel the veteran from the union, and thereby compel this employer to discharge such veteran under its closed shop contract with the union." One might have thought this an exaggerated fear conjured up in hostility to the union except that it is just what has happened, and that instead of repudiating it now the union endorses the threat. It says that the union "must do one of two things, (a) either discriminate against the Trailmobile veterans and allow the Highland veterans to supersede them on the seniority list, or, (b) in fairness to the Trailmobile veterans, negotiate for the discharge of High-

land veterans at the end of one year's guaranteed employment."

This combines a false alternative with a disingenuous threat. Both alternatives presuppose that the employer has an absolute right to discharge veterans after reemploying them for a year, whether or not they work under a contract which gives them seniority rights. But the question for decision is whether the veteran is secured in his seniority rights by the Act. If he is, he is to the extent of those rights under the employment contract entitled to his job even after the assured year has ended.

There is neither need nor authority to discriminate against any veteran of either plant. The fair solution would be that each employee go on the seniority list as of the date he entered either of the two units now consolidated. That was the solution under the collective agreement by which Whirls worked at the time of the consolidation. To thwart it, the whole machinery of the National Labor Relations Board was set in motion and apparently has been used in disregard of Whirls' rights under the Labor Act. Before we reach the question whether rights under the Labor Act have been infringed, however, it should be clear that the Selective Service Act secured Whirls' seniority rights, for it is those rights which he asserts were taken from him.

Section 8 (b) (B) refers to the job to which the veteran is entitled to be restored, *i. e.*, simply the same job which he left, or its equivalent. Section 8 (c) specifies what rights he shall have in that job. He is to have the seniority which would have accumulated while he was in service and he is to be assured against discharge for one year, regardless of what his or others' seniority rights are. Such assurance against discharge certainly does not terminate seniority rights after one year. Section 8 (b) (B) together with the provision against arbitrary discharge is enough to assure that the veteran will remain in the same

job for one year without diminution of its incidents. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 286, in which this Court said, "What it [Congress] undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year." 328 U. S. at 288.

That case interpreted the provisions against discharge as broad enough to prohibit also any reduction in status, pay, or seniority, during the year. But we did not hold that seniority rights ended with the year. Seniority rights are rights which, by their nature, endure as long as the employment does, and become more and more valuable in protecting that employment and enhancing its benefits. Ordinarily, one of their most important functions is to give a measure of security in the job. To have seniority rights for a year may not be an impossibility, but it is almost a contradiction in terms.

The job guaranteed against discharge for a year, then, is the job defined in § 8 (b) (B). But the right to discharge after the year is not unconditional where the employee is the beneficiary of a seniority plan. Of course, where employees have no seniority rights, the guarantee of one year's employment is their only right. But if a seniority system does exist, the Congress gave the employee "protection within the framework of the seniority system *plus* a guarantee against demotion or termination of the employment relationship without cause for a year." (Emphasis added.) *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. at 288.

It is to be noted that the seniority rights of Whirls were bargained away from him by a union which, under the National Labor Relations Act, was entitled to bargain as his representative. The Act makes the majority union "the exclusive representatives of all the employees in such unit" for bargaining. 49 Stat. 453, § 9 (a), 29 U. S. C.

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§ 159 (a). We have held that this not only precludes the individual from being represented by others but also prevents him from bargaining for himself. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332. While the individual is thus placed wholly in the power of the union, it does not follow that union powers have no limit. Courts from time immemorial have held that those who undertake to act for others are held to good faith and fair dealing and may not favor themselves at the cost of those they have assumed to represent. The National Labor Relations Act, in authorizing union organizations "for the purpose of collective bargaining or other mutual aid or protection," 49 Stat. 452, § 7, 29 U. S. C. § 157, indicates no purpose to excuse unions from these wholesome principles of trusteeship.

We have held under a similar Act that the courts may intervene to prevent a majority union from negotiating a contract in favor of itself against a colored minority. Speaking for all but two members of the Court, Chief Justice Stone, after recognizing that the representatives may make "contracts which may have unfavorable effects on some of the members of the craft represented" in such matters as seniority, based on relevant differences of conditions, said: "Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences." *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, 203. That opinion also declared that "It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and

that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." 323 U. S. at 202. And in *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210, we held that where an individual is without available administrative remedies, the courts must grant him protection.

I do not think that Whirls' seniority rights after one year are made immutable or immune from collective bargaining. But the statute restored these rights to him as a veteran. They stand until they are lawfully modified. The record indicates that they have never been terminated or modified by good faith collective bargaining in the interests of the craft. It raises the suspicion that they were simply misappropriated to the benefit of the majority group which was under a duty to represent his interests as well as its own.

The courts cannot tolerate the expulsion of a member of a union, depriving him of his right to earn a living merely because he invokes the process of the courts to protect his rights—even if he does so mistakenly. The Labor Relations Act makes it an unfair labor practice by an employer "To discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in proceedings under it. 49 Stat. 453, § 8, 29 U. S. C. § 158. Neither may a union use its own power over its members to by-pass the courts. *Cf. Dorchy* v. *Kansas,* 272 U. S. 306.

This action is equitable in character and equity traditionally adapts its remedies to the facts as developed by trial rather than to the form of pleadings. There could be no objection if the Court would remand the case for development of a more complete record. But I could not agree that it should be done with the suggestion that Whirls was not treated with discrimination because all in the Highland group were treated alike. If the Trailmobile Company had absorbed the wholly-owned Highland Company

before Whirls returned and used the consolidation as an excuse to deny Whirls reemployment rights, this Court would hardly have approved so transparent a scheme. The union has no more right to rely on the consolidation to justify deprivation of seniority rights.

INDEPENDENT WAREHOUSES, INC. ET AL. *v.* SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, ET AL.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 83. Argued December 16, 1946.—Decided April 14, 1947.

1. A New Jersey municipal ordinance which forbids carrying on the business of storing goods for hire without payment of an annual license tax does not violate the Commerce Clause of the Constitution when applied (in the circumstances of this case) to a warehouse in which coal shipped from another state is stored within the municipality under a "transit" privilege, pending a decision by the owner whether to ship it to another state or to another point in the same state—even though most of the coal actually is shipped to other states. *Minnesota* v. *Blasius,* 290 U. S. 1. Pp. 79–85.
2. The fact that the ordinance applies only to commercial storage facilities, and that there are no other commercial storage facilities in the municipality subject to the tax, does not render the ordinance violative of the due process or equal protection clause of the Fourteenth Amendment. P. 86.
3. The decision of the highest court of a State that a local tax is valid under the law of the State is binding upon this Court. Pp. 86–87.
4. The tax can not be held unconstitutional as excessive, where the amount of it is not shown to be unrelated to the value of the privilege conferred. P. 87.
5. The power of the State to impose the tax here in question can not be defeated by private contractual arrangements such as those here involved. P. 87.

6. The tax can not be deemed prohibitive in view of the fact that it was imposed in lieu of other taxes of substantially the same amount which had been paid in previous years. Pp. 87–88.
7. So far as the ordinance provides for the punishment of individuals who work in unlicensed storage facilities, it violates no provision of the Federal Constitution. P. 88.
8. One who has made no attempt to secure the license required by the ordinance, is without standing to attack the constitutionality of a provision which allegedly gives to the municipality an uncontrolled discretion to revoke licenses which may be issued. P. 88.
9. The claim that the provision of the ordinance for cumulative penalties violates the Fourteenth Amendment is without substance, since the provision has not been applied in this case so as to impose cumulative penalties, and since the provision is expressly made separable if invalid. Pp. 88–89.

134 N. J. L. 133, 45 A. 2d 703, affirmed.

From convictions of violating a municipal ordinance providing for the licensing of storage warehouses, the appellants, a corporation and an individual, appealed. The Supreme Court of New Jersey reversed the convictions. 132 N. J. L. 390, 40 A. 2d 796. The Court of Errors and Appeals reversed, sustaining the convictions. 134 N. J. L. 133, 45 A. 2d 703. *Affirmed*, p. 89.

Duane E. Minard argued the cause for appellants. With him on the brief were *Clement K. Corbin, Willis T. Pierson* and *Edward A. Markley*.

Harry Lane and *Ralph W. Chandless* argued the cause, and *Mr. Lane* filed a brief, for appellees.

Mr. Justice Rutledge delivered the opinion of the Court.

An ordinance of Saddle River Township, New Jersey, forbids carrying on the business of storing goods for hire

except upon the payment of an annual license tax.[1] Independent Warehouses, Inc., and Thompson, an agent of that company, have been convicted and fined for conducting such a business without procuring the license or paying the tax. The convictions have been sustained by New Jersey's highest court.[2] The appeal here seeks to have that judgment reversed on the basis that the business done was exclusively interstate and consequently the application made of the ordinance contravenes the commerce clause of the Federal Constitution, Art. I, § 8. Fourteenth Amendment objections also are raised.[3]

The main thrust of the argument has been toward the commerce clause phase of the case. In this the controversy is of the familiar "interruption" or "cessation" type. The issue accordingly requires only a determination of the proper application to be made of well-established legal principles to the particular circumstances. It is whether the cessation taking place in the movement of goods interstate, as shown by the record, is of a nature which permits the state or a municipality to tax the goods or services, here the business of storing them, rendered in connection with their handling.[4]

The governing principles were stated in *Minnesota* v. *Blasius,* 290 U. S. 1, 9–10, as follows:

> ". . . the States may not tax property in transit in interstate commerce. But, by reason of a break in the

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[1] The material terms of the ordinance appear at note 9 *infra* and text.

[2] See text Part I *infra.* A prior suit in a federal district court to enjoin enforcement was dismissed because of the existence of a "plain, speedy, and efficient remedy" in the state courts. *Independent Warehouses* v. *Saddle River Township,* 52 F. Supp. 96; 28 U. S. C. § 41 (1).

[3] Those objections are discussed in Part III of this opinion.

[4] "A non-discriminatory tax upon the business of storing" goods which are not yet in interstate commerce is not forbidden. *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 21.

transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax.[5] Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit.' *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, 101.

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement. . . . Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit. The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . .

"Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

[5] See note 4.

Since the circumstances characterizing the interruption are of controlling importance, we turn to the details of the movement and of the stoppage shown by the record.

I.

The suit is the culmination of a controversy extending back to 1939, with earlier litigious chapters in the state and federal courts. It grows out of the operation of facilities for storing and handling coal under various arrangements between the Erie Railroad Company and other corporations affiliated for this and other enterprises by stock ownership or by contract.

The Pennsylvania Coal Company is a wholly owned subsidiary of Erie. It owns and operates coal mines in Pennsylvania. In 1901 it acquired 67.25 acres of land in Saddle River Township, New Jersey. This acreage and its facilities, known as Coalberg, are located on the New York, Susquehanna and Western Railroad and perform functions connected with that road's operations not material to this cause. Coalberg also is connected directly with the Bergen County Railroad, a freight cutoff of Erie. Its chief purpose, and the only one relevant to this controversy, is to provide storage for coal shipped in from the Coal Company's Pennsylvania mines and later shipped out to various destinations.

Prior to 1939, Coalberg was operated by the Coal Company or its lessees as a private business, not as a public utility. During this time the Township levied personal property taxes upon the coal in storage, assessing and collecting them from its owners.[6] These were, as they are now, chiefly coal distributors using Coalberg's storage facilities, principally because of their accessibility to distributing centers, especially in the vicinity of New York

[6] In 1921 the New Jersey Supreme Court sustained the imposition of these taxes against attack on various grounds. *Pennsylvania Coal Co.* v. *Saddle River,* 96 N. J. L. 40.

City, and to shipping facilities both by rail and by water.[7]

In 1939, however, by arrangements to be set forth involving Erie, the Coal Company and Independent Warehouses, Coalberg was converted into a public utility to serve shippers of coal on Erie lines. Under New Jersey law, goods stored in warehouses conducted for hire are exempted from personal property taxes. Rev. Stat. N. J. § 54:4–3.20. The Township, despite the change in Coalberg's mode of operation, continued to levy such taxes on the stored coal until the 1940 assessment was invalidated in the state courts. *Pattison & Bowns* v. *Saddle River Township,* 129 N. J. L. 135; 130 N. J. L. 177.

The municipality's resulting loss in revenue amounted to about eight per cent of the total collected for local, county and state purposes. To make up for this, as its brief here candidly admits, the Township enacted the ordinance now in question, acting under other provisions of state law. N. J. Stat. Ann. §§ 40:52–1, 40:52–2. The effect was to shift the direct incidence of the tax from the owners of the coal, *i. e.,* the shipper-distributors, to the operator of the storage business and to change its character from a direct property tax to that of a license or franchise tax for the privilege of conducting that business in the state. The amount of revenue thus produced, though in dispute, substantially will repair the loss suffered from invalidation of the property tax. This suit is the outgrowth of the Township's effort to enforce the new taxing provisions.

It is necessary to state in some detail the arrangements made in 1939 by which the change was brought about in

[7] Coalberg is located conveniently to tidewater ports, as well as rail facilities for distribution in northern New Jersey and elsewhere. The distributors using Coalberg's facilities forward their coal not only to the near-by metropolitan area of New York City and northern New Jersey, but also to the New England States.

the mode of operating Coalberg. An agreement then made between the Coal Company and Erie provides that the former shall operate Coalberg "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain Tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey . . . ." The agreement recites that it is made in view of the considerations that the Coal Company has no need for Coalberg's storage facilities and that they are of use to Erie in affording "facilities for the storage of prepared anthracite coal for shippers on Erie lines whereon said Coalberg Storage Yard is located so that shipments of coal may not be diverted to other and competing lines on which facilities for coal storage are available . . . ." Erie pays the net monthly loss, if any, of operating the yard and the Coal Company remits to Erie the net monthly surplus, if any. Erie also undertakes to maintain an agent at Coalberg duly authorized on its behalf to issue warehouse receipts for coal placed in storage by shippers.

The Coal Company has discharged the operating function under its agreement with Erie by an arrangement also made in 1939 with Independent Warehouses, which is a New York corporation engaged in the warehousing business. The Coal Company leased Coalberg to Independent Warehouses for $1.00 a year and the latter undertook to operate the plant for a consideration which now amounts to approximately $500 a year. The agreement between the Coal Company and Erie governs the manner of Coalberg's operation by Independent Warehouses.

Under these arrangements purchasers from the Coal Company who ship coal from the mines designate the destination on the shipping papers. If they designate Coalberg, the coal is sent there in railroad cars. It is unloaded to the storage pile where it is kept until ordered out

by the owner. It is then reloaded into railroad cars, and when it is reshipped there is a new billing to the new destination. Most of the coal, after it has been stored, goes to states other than New Jersey. Some, however, is marketed in New Jersey. It is disputed whether there is any local distribution in the Township, but if so the amount is comparatively insignificant.

The financial arrangements under the governing tariff are as follows. On arrival of the shipments at Coalberg the transportation charges on the movement from the mine to Coalberg are paid to the Erie freight agent at Coalberg. When the coal is moved again after storage, the remainder of the through tariff rate from the point of original shipment at the mine in Pennsylvania is paid. This arrangement is known as the transit privilege. "The privilege of transit enables grain [here coal] to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C." *Board of Trade* v. *United States,* 314 U. S. 534, 537–538, and authorities cited.

The storage facilities given to shippers are free for a period of two years,[8] although a charge is made by Erie for unloading the cars into the stock pile and for reloading the cars for reshipment. A charge is also made by Independent Warehouses upon such coal owners as obtain warehouse receipts from it.

[8] The tariff provides: "The period of time allowed for the storage privilege and protection of the through rate from point of origin to ultimate destination shall be two (2) years from date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard . . . ."

The licensing ordinance applied in this case was adopted in 1943, following upon the New Jersey decision in *Pattison & Bowns* v. *Saddle River Township, supra.* The ordinance provides:

> "No person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on."

The ordinance specifies that for the license there shall be charged and collected in advance an annual fee of three-quarters of a cent for each square foot of ground in the Township where the business is carried on. There is also a penalty clause,[9] in addition to other provisions not now pertinent.

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[9] "Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. . . . Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense."

Independent Warehouses did not apply for the license or pay the tax for 1943. Consequently that company and Thompson were convicted in the Magistrate's Court before appellee Scheele, the Recorder of the Township, for having violated the ordinance by conducting the storage operations at Coalberg without complying with its requirements. Each was fined $200.[10] The Coal Company and Erie were allowed to intervene when the case went before the New Jersey Supreme Court, because of their obvious interest in the outcome of the litigation. That court held the ordinance unconstitutional as an undue burden on interstate commerce and reversed the convictions. 132 N. J. L. 390. In turn the New Jersey Court of Errors and Appeals reversed the Supreme Court's determination. 134 N. J. L. 133. It held that the ordinance was valid under the provisions of state law, and that neither the commerce clause nor the Fourteenth Amendment guaranties relied upon had been infringed. The case comes here on appeal, pursuant to § 237 (a) of the Judicial Code. See *King Mfg. Co.* v. *Augusta,* 277 U. S. 100; *Jamison* v. *Texas,* 318 U. S. 413, 414.

II.

That the storage of the coal is part of a transit privilege does not in itself sustain appellants' claim that the interstate movement had not stopped sufficiently for the state's taxing power to attach when the coal reached and was stored in Coalberg. Cf. *Minnesota* v. *Blasius, supra; Bacon* v. *Illinois,* 227 U. S. 504. It has long been recognized that transit privileges rest "upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destina-

[10] Thompson was to be imprisoned for 90 days in the event of default in payment of his fine.

tion." *Central Railroad Co.* v. *United States,* 257 U. S. 247, 257. See also *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 279 U. S. 768, 779–780. Of course this fiction, which may be desirable for ratemaking or other purposes, cannot control the power of a state or municipality to tax activities properly subject to exercise of that power apart from the fiction's application to them.

Indeed, the facts of this case demonstrate that here at least the fiction is complete. They show that the journey of the coal from the Pennsylvania mines to Coalberg and the subsequent journeys upon leaving Coalberg were not parts of a "continuity of transit" in the sense held by this Court's previous decisions to preclude a valid exercise of the states' taxing or regulatory powers. See, *e. g., Pittsburg & Southern Coal Co.* v. *Bates,* 156 U. S. 577; *General Oil Co.* v. *Crain,* 209 U. S. 211; *Bacon* v. *Illinois, supra; Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665.

A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid it cannot be determined what the ultimate destination or use of the property may be. Thus in *General Oil Co.* v. *Crain, supra,* the oil was shipped to Memphis and held there until required to supply orders from out-of-state customers. In *Brown* v. *Houston,* 114 U. S. 622, coal sent from Pennsylvania to New Orleans was held taxable in Louisiana because, although some of it was subsequently exported, it "was being held for sale to anyone who might wish to buy." *Champlain Co.* v. *Brattleboro,* 260 U. S. 366, 376. In *Bacon* v. *Illinois, supra,* the grain sent to Bacon's elevator was at his complete disposal. "He might sell the grain in Illinois or forward it as he saw fit." Although his intention was to forward it after inspection, grading, etc., this purpose was held irrelevant. 227 U. S. at 516. And in *Susquehanna Coal Co.* v. *South Amboy, supra,* although there was an anticipation of or-

ders for the coal unloaded at South Amboy, yet there were no actual orders from customers. See also *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport,* 289 U. S. 249.

Those cases are indistinguishable from this one as to the facts and the effect of the stoppage. Once the coal has reached Coalberg, no one can determine, without receiving an order from the owner, to what point or person it finally will be sent or to what use it will be put. Indeed, at the actual time of storage, even the owner may not know where the coal will go next, for the very purpose of the storage is in part to meet seasonal demand.[11] And while

[11] It is to be noted however that the two-year period allowed by the tariff for storage, see note 8, is longer than is necessary to allow for meeting seasonal demand.

Storage-in-transit privileges are supplied, it is said, "as a result of traffic demands." A witness gave the following illustrations:

"(a) Coal is a commodity of seasonal consumption. Most of it is consumed in cold weather. If the mines could produce currently sufficient coal to meet cold weather requirements, the railroads would be swamped with coal traffic during the fall and winter months when other seasonal products are moving in large volume and weather conditions retard transportation operations. By spreading coal shipments for winter use over the months of most favorable operating conditions, a more uniform transportation revenue is assured.

"(b) Coal dealers and consumers ship it more uniformly throughout the year by using storage-in-transit privileges under railroad tariffs, and use negotiable warehouse receipts to finance their purchases where necessary.

"(c) The movement during warm weather of the bulk of the winter coal supply avoids car storage and releases cars more rapidly than if they arrived frozen solid, as they often do in winter, where delayed by bad weather or had to wait unloading and use at the place of consumption.

"(d) Experience has shown many instances, like those of recent occurrence, when a supply of stored coal close to the market areas has been necessary to prevent or relieve acute shortages of fuel in cases of labor, weather, or other interruptions in production or transportation.

"(e) A uniform movement of coal during favorable operating conditions, avoids the congestion, delay and increased expense which

the form of billing is not conclusive, *Minnesota* v. *Blasius, supra,* the fact that the coal is billed to Coalberg and is not rebilled until the owner asks that it be released from storage further shows that the final destination is not known by the owner or by others.

Moreover, in all these cases the duration of the cessation of transit is indefinite and in this case may extend as long as two years without loss of transit privilege. Indeed, except for that loss it may extend indefinitely, since under the controlling tariff Erie does not require, but only reserves the right to require, removal at the end of two years.[12] It is also significant that invariably the goods are fungibles, a fact pointing up the fictional basis of the in-transit privilege. The goods which are sent initially into the interstate commerce stream are not the identical goods which finally arrive at the place of consumption.

In view of all these considerations, the case falls more appropriately in the category allowing the state's taxing power to apply, than in the one denying its applicability. The interruption hardly can be held to be "due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement," *Minnesota* v. *Blasius,* 290 U. S. at 9–10, broad as may be the latitude given for such incidents of transit. More is involved here than stopping to take advantage of such latitudes. The case therefore is one, again in the language of the *Blasius* case, "where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State,

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otherwise attends rush and emergency transportation in winter weather.

"(f) Such storage-in-transit facilitates a more uniform and steady employment, not only of the miners but also of railroad employees, as well as a more uniform and steady railroad revenue."

[12] See note 8.

or for shipment elsewhere, as his interest dictates . . . ." 290 U. S. at 10.

The facts bring the case exactly within this description, although the record shows that most of the coal after storage goes to other states and little, if any, is distributed locally at Coalberg. Not what ultimately happens to the goods or where they finally go, but the occasion and purpose of the interruption are controlling. "The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied." *Minnesota* v. *Blasius,* 290 U. S. at 10.

Here the cessation takes place not simply for the carrier's transit reasons relating to the necessities or convenience of the journey, but for reasons primarily concerned with the owner's business interests. As in the *Bacon* and *Susquehanna Coal* cases, *supra,* he is entirely free to keep or market the goods in New Jersey or to send them elsewhere. Marketing considerations primarily, and it may be exclusively, determine this choice and many or all of the controlling factors may not arise until after the coal has reached Coalberg or indeed many months later.

The situation in this respect is not materially different from those involved in the *Susquehanna Coal, Bacon,* and other cases cited, or indeed from one in which a coal distributor might place his storage facilities at some distance from his place of market, as at a near-by way station, in order to reduce the cost of his storage operations. That reasons of economy and convenience or even of necessity arising from the absence or prohibitive cost of storage space at the immediate point of distribution might lead him thus to locate his storage operations, and thereby incur the necessity and expense of hauling the goods from storage to market, hardly could be held to make the inter-

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ruption an incident of transit rather than one of his own business policy and interest. That he may secure the same advantages by using the storage facilities of others for like purposes, rather than his own, does not change the result. In neither case does the arrangement defeat the state's power to tax his property so located or his business thus conducted.

Moreover, as has been noted, some of the coal remains in New Jersey, being shipped out from Coalberg as the shipper directs. As to this all interstate transportation has ended. The fact that the owner elects to take advantage of Coalberg's storage facilities for conducting his storage operations rather than his own located at the point or points of final distribution in New Jersey, whether near to Coalberg or at some distance, does not make the final wholly intrastate movement between those points a leg of the initial interstate movement begun at the mine.

As for the coal moving out of Coalberg interstate, the fact that this movement crosses a state line makes it of course an interstate movement. But this does not make it part of a continuous journey beginning at the mine and ending in the second state of destination. Indeed, not until after the storage has taken place is it determined or can it be known whether this coal will move out of Coalberg interstate or intrastate. And this is because it cannot be known before that time whether the owner's interest, disconnected from the ordinary and usual incidents of transportation, will dictate one market or use rather than another. Interruptions thus governed cannot be classified as interruptions merely incident to transit or dictated by its necessities or convenience.

The 1939 change in Coalberg's mode of operation did not alter in any substantial way the character, duration or purpose of the stoppage. Since then as before, the primary reasons dictating the shippers' action in taking

advantage of it are their business reasons rather than transit reasons as such. Accordingly the state's power to tax the goods stored could not be affected by that change. That the state has chosen to discontinue exercising it as a matter of state taxing policy can make no difference in this respect. Nor can this fact, or the change in method of operation, defeat the state's power to tax the business of furnishing the facilities for storage, since that business also becomes local or interstate depending upon the purposes of the stoppage, whether for transit reasons or chiefly for nontransit ones.

The authorities above cited, it is true, generally involved property taxes levied upon the stored coal. But their controlling principle applies equally to franchise or other taxes upon the business of furnishing the storage facilities. Cf. *General Oil Co.* v. *Crain,* 209 U. S. 211; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. It would be an impermissible anomaly to hold that the goods stored may be taxed, because the interruption of transit is for nontransit purposes, but that the business of furnishing the facilities for storing them is not affected or governed legally by the same purposes, for applying the state's powers of taxation.

Accordingly, the case is governed by the prior decisions allowing states and municipalities to tax in situations of this sort. It follows that the tax is not forbidden because it is part of a licensing measure. Even where it is undisputed that the commerce is exclusively interstate in nature, "not the mere fact or form of licensing, but what the license stands for by way of regulation is important." *Robertson* v. *California,* 328 U. S. 440, 458. See also *Union Brokerage Co.* v. *Jensen,* 322 U. S 202; *Federal Compress Co.* v. *McLean,* 291 U. S. 17. Nor does anything in the Interstate Commerce Act forbid local taxation where it is otherwise permissible. The tax therefore is valid under the commerce clause.

III.

Whether the tax and the licensing measure as applied may stand under the Fourteenth Amendment also must be considered. Appellants say that the ordinance is discriminatory and unreasonable. Discrimination is claimed because the ordinance is applicable only to commercial warehouses and not to private warehouses and because there are no other commercial warehousing facilities in the Township subject to the tax. This contention is grounded on the provisions of New Jersey law, noted above, exempting property stored in commercial warehouses from taxation. It also is closely related to the further claim that the tax is prohibitory and unreasonable, and the two claims may be considered together.

> "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 509.

We need not consider in this connection the ultimate power of the state to tax,[13] for we are of opinion that neither the selection made here nor the amount of the tax is barred by the Fourteenth Amendment.

The New Jersey Court of Errors and Appeals has held that the present tax is not an illegal evasion of the state laws exempting personal property in commercial warehouses from property taxes, and that the municipality

[13] See the dissenting opinion of Mr. Justice Brandeis in *Liggett Co.* v. *Lee*, 288 U. S. at 570 ff.

was empowered by state law to levy this tax. Those rulings are conclusive upon us. Nor is it material to any question we have to decide that the practical result of the valid taxing power given the municipality enabled it to make up the loss in revenue suffered when Coalberg was transformed to a public facility.

Constitutionally speaking, the tax is not invalid as being unreasonably large for the privilege conferred.[14] It is not shown that the exaction is unrelated to the value of the privilege conferred and the Court of Errors and Appeals found to the contrary.[15] Private contractual arrangements, such as have been made here,[16] cannot be effective to defeat the state's power to impose such a tax, with the practical effect of relieving the real beneficiaries of the privilege from all taxation by virtue of their success in shunting its burden contractually to the nominal operator.[17] And the suggestion that the tax under the ordinance is prohibitive can carry no weight in view of the fact

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[14] The tax, however, may be somewhat larger than the aggregate of the former personal property taxes. Personal property taxes paid prior to 1939 amounted to about $12,000 a year. Estimates of this tax given in the record vary from about that sum to around $20,000 a year. The variation corresponds to different estimates of the area, in terms of footage, constituting the base for calculation of the tax.

[15] See note 14. Cf. the dissenting opinion of Mr. Justice Brandeis in *Liggett Co.* v. *Lee,* 288 U. S. at 573, "The Federal Constitution does not require that taxes . . . be proportionate to the differences in benefits received by the taxpayers . . . or that taxes be proportionate to the taxpayer's ability to bear the burden."

[16] The record discloses that the present agreements between Independent Warehouses and the coal company are from year to year until terminated upon notice.

[17] Cf. *Browning* v. *Waycross,* 233 U. S. 16, 23; *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 22: "It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause."

that substantially equal personal property taxes were paid prior to 1939.[18]

Appellants' other arguments may be given shorter disposition. The contention that Thompson's conviction is "unlawful" is answered by the decision of the New Jersey Court of Errors and Appeals which held that the municipality possesses the power which it exercised to convict persons working in unlicensed warehousing premises as well as to prohibit corporations and others from carrying on the business of warehousing without obtaining a license. Thompson was convicted not for his employer's act but for his own.

It is suggested also that the ordinance gives to the municipality an uncontrolled discretion to revoke the license and is therefore invalid for uncertainty, since it permits the Township Committee to "revoke any such license for sufficient cause after notice and hearing." Appellants have made no attempt to secure a license and therefore are not in position to attack the revocation provisions of the ordinance. Cf. *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 188, and authorities cited.

Finally the ordinance is said to be invalid because of the provision for cumulative penalties.[19] The penal provisions however have not been imposed cumulatively in this case. Moreover the New Jersey Court has held them separable,[20] if illegal. In such circumstances, the objec-

[18] See note 14.

[19] The ordinance makes each day's continuance of violation a separate offense.

[20] The New Jersey Court of Errors and Appeals stated: "The ordinance contains a provision that in case 'any section or part' thereof shall be held illegal or unconstitutional, such invalidity 'shall not be construed as impairing the force and effect of the remainder of the ordinance.' If it be conceded *arguendo* that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected. 134 N. J. L. at 144.

tion that the mere unapplied provision for cumulation violates the Fourteenth Amendment is without substance. *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 311, and authorities cited.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

The dissenting views lead me to add a few words to the Court's opinion, in which I join.

Nearly thirty-five years ago Mr. Justice Holmes observed that "one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." (Holmes, Speeches, Law and the Court, 98, 102). His concern has not lost force with time, and it is important to be duly mindful of it whenever a State claims the power to tax in a situation like that now before us.

Equally relevant are other observations by Mr. Justice Holmes regarding this problem. "It being once admitted, as of course it must be, that not every law that affects commerce among the States is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the States both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines." *Galveston, Harrisburg, etc. R. Co.* v. *Texas,* 210 U. S. 217, 225. And so, this Court has sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced. *Oliver Iron Co.* v. *Lord,* 262 U. S. 172. Mr. Justice Holmes joined in that opinion although "There could not be a case of a State's product more certainly destined to interstate commerce." Holmes, J., dissenting in *Pennsylvania* v. *West Virginia,* 262 U. S.

553, 600, 601. Again, the Court has held that a State may impose a non-discriminatory tax on goods which, although connected "as a general course of business" with "a flow of interstate commerce," "has come to rest and has acquired a situs within the State" at "a depot . . . for another interstate journey." *Minnesota* v. *Blasius,* 290 U. S. 1, 8, 11. For the practical purposes which determine the constitutional issue there can be no difference between taxing such goods as property and taxing the business of being a depot for such goods. In striking the constitutional balance between State and national powers, figures of speech are treacherous. The ore which Minnesota was allowed to tax in the *Lord* case, and the cattle which Minnesota was allowed to tax in the *Blasius* case, were in no practical sense less in the "flow of commerce" than the coal the storage of which was the business subjected to a non-discriminatory license tax by New Jersey.

Nor can it make a difference that this storage business was conducted by a concern controlled by the coal-carrying road. If a wholly independent storage concern would have had to pay a license tax, the controlling constitutional principles require no different result because the storage facility is a subsidiary of a railroad. Presumably there are good business reasons for the use of such a subsidiary corporation. Compare *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 456. Those reasons are equally valid for the State's taxing purposes. It cannot be said that New Jersey has given no opportunities, has afforded no protection, and has conferred no benefits upon Independent Warehouses, Inc., merely because in an ultimate sense there is a financial identification between Independent Warehouses and the Erie Railroad. Compare *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444. If what was here involved were merely an occasional and transient storage

of coal moving from Pennsylvania to New York, New Jersey could not levy a property tax on the coal nor a license tax for the storing of it. The controlling consideration here is that there was storage of the coal precisely like the holding of the cattle in the *Blasius* case. In both cases there was a sufficiently distinct and permanent break in the process of transportation between the States so as to give rise to interests in the State of storage to justify the exertion of its non-discriminatory taxing power. For me this case is controlled by *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665. Here, as in that case, there was something more "than an incidental interruption of the continuity" of the coal's "journey through the State." There was "a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State." 228 U. S. at 668 and 669. Thereby the State's power to tax arose.

The fact that for railroad-rate purposes this storage was treated as part of a transit privilege does not affect the relation of the storage to the taxing powers of the State. Assuming that such a storage may properly be treated as a stop-over privilege under the Interstate Commerce Act, it does not follow that the break in the process of interstate transportation is not of such significance in its relation to a State as to allow that State to tax the protection given to the property during the break as well as the opportunity afforded in conducting the business for such separable and enduring storage in the State.

MR. JUSTICE JACKSON, with whom THE CHIEF JUSTICE joins, dissenting.

The Erie Railroad Company is a common carrier engaged in interstate commerce. By a specific tariff filed with the Interstate Commerce Commission pursuant to the Interstate Commerce Act, it and several other rail

carriers have long published a joint and proportional through-tariff on anthracite coal from coal mining stations in Pennsylvania to points in New York and New Jersey. The tariff provides for storage-in-transit services at Coalberg, New Jersey, with reshipment to destination under original agreements. Independent Warehouses, Inc., as contract agent for the Erie, operates these storage-in-transit facilities, has custody of the coal in storage under Erie tariffs as a public warehouseman, and issues warehouse receipts for coal received under railroad waybills. Title to Coalberg is in the Pennsylvania Coal Co., a wholly-owned subsidiary of Erie, and it receives from Independent Warehouses one dollar per year for its lease. The Erie ultimately bears all losses and gets all gains. It is apparent that Coalberg is a facility for storage in transit of coal operated as part of the Erie's interstate transportation service.

The function of the storage in transit is vital. During the summer season, consumption of anthracite coal is light and neither dealers nor consumers in the City of New York and elsewhere are able to store adequate winter reserves. At critical times there would be grave danger of inadequate fuel supplies from interruptions of transportation or of mining operations if stock piles were not accumulated near consuming centers, such as New York, to be drawn upon in periods of peak demand. Therefore, the railroad accepts coal shipments which it mingles in stock piles at Coalberg, near New York, with the privilege to the shipper of ordering the same grade and quantity sent on to destination as needed. When orders for reshipment come, they are drawn from stock piles and delivered. Storage-in-transit is a device to equalize the demands on coal transportation facilities and to provide a reserve supply of coal for periods when consumption exceeds production, to enable movement away from the mines during the

period when production exceeds consumption, and to finance future purchases by warehouse receipts issued against coal in transit. It is an essential part of dependable and low-cost transportation of anthracite coal from the mines to the great metropolitan consuming area.

For the privilege of operating this storage-in-transit facility at Coalberg in New Jersey, the municipality demands an annual license fee, in advance, which it is alleged would amount to $20,475. This is merely for the privilege of doing the business. The property used in the operation is also subject to the usual property tax on a valuation of $133,875, which is not in question.

The issue is whether this local privilege tax unconstitutionally burdens interstate commerce. The burden and its substantiality are undeniable, but the Court concludes that these local assessments upon interstate traffic are within the power of the state and, of course, the amount, be it $20,000 per year or $20,000,000 per year, is wholly for the local authorities to determine if their power to tax is upheld.

I cannot agree that the commerce clause of the Federal Constitution has left interstate traffic vulnerable to such local permissions and burdens. Because the immediate impact of the tax is on a railroad, we should not delude ourselves as to its real effect. It is a tax on traffic—on the movement of goods—and its weight is shifted from the carrier to the consumer. There is, of course, a "local incident," a stoppage in transit, a reloading. "Local incidents" of some sort can be identified in all interstate transportation. But in this case local sales or deliveries are insubstantial in amount. The whole operation is incidental to interstate transportation and not to any local business. It is integrated in operation, ownership and management with transportation. It is under the federal commerce power and under Interstate Commerce Commis-

sion regulation. The stoppage may be longer than many other stoppages in transit incident to railroading. But the storage of perpetually renewed and continuously drawn-upon stock piles is no longer than necessary to adapt transportation facilities to the needs of an economy, one end of which must engage in continuous production and the other in only seasonal consumption. That a single municipality or state can fasten local tax burdens upon such an incident makes interstate commerce vulnerable to the very barriers and obstructions the commerce clause of the Constitution was designed to end.

The unedifying story of Colonial rivalry in preying upon commerce, which more than any one thing made our Federal Constitution a necessity, is too often told by historians to justify repetition. This tax is reminiscent, however, of some phases of that commercial warfare. In 1787 New York was being supplied with firewood from Connecticut and much farm produce from New Jersey. It seized upon "local incidents" to lay a tax. Every sloop which came down through Hell Gate, every cart of firewood entering the city, and every market boat rowed across the Hudson River had to pay heavy entrance duties. Then came retaliatory measures. See Fiske, *The Critical Period of American History*, Chap. IV. These chronic quarrels were destroying the trade of all the rivals, and it was sought by the Constitution to free trade from local burdens and controls.

This New Jersey tax on transportation of New York's coal supply is more dangerous in the end than the old New York tax on its own firewood. In that case the consumers who ultimately would pay the tax also controlled the government which shortsightedly laid the tax. It was a tariff, and the tariff-ridden people could remove it.

But here the ultimate burden of the tax falls on consumers of New York and elsewhere who have no repre-

sentation in the government which lays the tax and fixes its amount. The authorities who fix the tax will never have to answer to those who pay it. That is the evil of "taxation without representation." Here is a tax that falls immediately upon a single taxpayer, for it does not appear that any other is similarly affected. It is a tax that falls ultimately on non-residents of the taxing authority. If it is valid, I know of no reason why the community should bear any of its own tax burdens. This is the great vice of these local burdens on interstate movement of goods. If this is not the sort of burden and barrier to a nation's free trade that our commerce clause was designed to end, I should think one would be hard put to find an example. This decision represents a trend that seems to me quite out of the spirit of our history and quite as detrimental to our commercial welfare and unity. See my concurring opinion, *Duckworth* v. *Arkansas,* 314 U. S. 390, 397. I am not unaware of the needs of this locality, as of all others, for revenue. But it seems to me that the activities at Coalberg are as fully in the current of interstate commerce as those we held immune from state taxation in *Freeman* v. *Hewit,* 329 U. S. 249, and *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422. The storage-in-transit service is as essential to maintaining and as much a part of the flow of coal as loading and unloading of goods shipped in interstate commerce is of that commerce. The Constitution laid restraints upon each locality lest their local advantages be pursued at the cost of the commerce on which the prosperity of all depends. I would reverse the judgment.

McCULLOUGH *v.* KAMMERER CORPORATION ET AL.

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

No. 755. Argued April 8, 1947.—Decided April 28, 1947.

In a patent infringement suit, an appeal may be taken under § 129 of the Judicial Code, as amended, 28 U. S. C. § 227a, from an "order" denying on the merits a motion to set aside (because of unlawful use of the patent) an earlier decree which held the patent valid and infringed and was "final except for the ordering of an accounting." Pp. 98–100.

(a) Since it left nothing to be done except to conduct an accounting, the order falls squarely within § 129, as amended. P. 99.

(b) Under Rule 54 of the Federal Rules of Civil Procedure, the fact that the Court designated its action as an "order" instead of a "decree" is immaterial. P. 99.

(c) Nor is such an order rendered non-appealable because one appeal had already been taken. Pp. 99–100.

156 F. 2d 343, reversed.

In a patent infringement suit, a Circuit Court of Appeals dismissed an appeal under § 129 of the Judicial Code, as amended, 28 U. S. C. § 227a, from an order denying a motion to set aside a decree holding the patent valid and infringed and ordering an accounting. 156 F. 2d 343. This Court granted certiorari. 329 U. S. 712. *Reversed,* p. 100.

A. William Boyken argued the cause for petitioner. With him on the brief were *R. Welton Whann* and *Robert M. McManigal.* *W. Bruce Beckley* entered an appearance for petitioner.

Leonard S. Lyon argued the cause for respondents. With him on the brief were *Frederick S. Lyon* and *Mark L. Herron.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In an earlier phase of this patent infringement suit a patent owned by respondent Kammerer was held valid and infringed by the petitioner. An accounting for profits and damages was ordered. 39 F. Supp. 213. The Circuit Court of Appeals affirmed. 138 F. 2d 482. We granted certiorari to consider whether a license agreement between respondents Kammerer and Baash-Ross contained restrictions which were contrary to public policy and unlawful so as to bar recovery against petitioner. On oral argument of the case here it developed that no findings of fact had been made by the District Court on this issue, nor had the question been presented to or passed on by the Circuit Court of Appeals. We therefore dismissed the writ of certiorari. 323 U. S. 327.

On remand, the Circuit Court of Appeals did not disturb its original affirmance of the District Court's holding that the patent was valid and infringed. But on motion of the petitioner, the court amended its judgment of affirmance so as to authorize the District Court to "entertain a motion or motions . . . to modify or set aside its order or orders for . . . damages and accountings thereof, and take such action thereon as it may determine" concerning petitioner's contention that respondents' unlawful use of the patent should bar all recovery for infringement. 148 F. 2d 525, 526. Thereafter the petitioner presented a motion to the District Court in which he alleged respondents had, contrary to the public interest, used the patent to restrain trade, fix prices, and suppress competition. Relying on these allegations, petitioner asked the Court to stay the accounting and to render a final judgment dismissing the complaint on the ground that respondents had illegally misused the patent. Without introducing further evidence both parties submitted the motion to the District Court on facts already in the record. After an

argument, the Court made extensive findings of fact against petitioner, concluded that his defense had not been established, and entered an order denying his motion to stay the accounting and to enter a final judgment dismissing the complaint. The Circuit Court of Appeals dismissed petitioner's appeal from the District Court's disposition of his motion on the ground that the District Court's order was "not a decree, final or otherwise." 156 F. 2d 343, 345. We hold that the appeal was erroneously dismissed.

The Act of February 28, 1927, 44 Stat. 1261, 28 U. S. C. § 227a, provides that "when in any suit in equity for the infringement of letters patent for inventions, a decree is rendered which is final except for the ordering of an accounting, an appeal may be taken from such decree to the circuit court of appeals . . . ." The object of this 1927 amendment to § 129 of the Judicial Code was to make sure that parties could take appeals in patent equity infringement suits without being compelled to await a final accounting. The reports of the Congressional committees on the measure called attention to the large expenses frequently involved in such accountings and the losses incurred where recoveries were ultimately denied by reversal of decrees on the merits.[1] And see *Brick* v.

[1] The House Committee on Patents expressed the belief that the legislation "is needed to prevent a great burden of expense to litigants in actions to determine the validity of patents, where an accounting is involved. Under present procedure appeals may be taken from the interlocutory decree upholding the patent but not until a full accounting has been made to the court. Under this bill such appeal can be taken from such interlocutory decree . . . so as to obviate the cost of an accounting in the event the case is reversed on appeal." H. R. Rep. No. 1890, 69th Cong., 2d Sess. 1 (1927).

The Senate Committee emphasized the same expense incident to conducting an accounting before the merits had been determined on appeal. It apparently went on the assumption that § 129 already authorized appeals prior to accounting from an injunction against

A. I. Namm & Sons, Inc., 21 F. 2d 179. It was for this reason that Congress authorized departure in this type of case from the usual practice under which appeals are not allowed until rendition of a final judgment which disposes of all phases of a controversy. See *Catlin* v. *United States*, 324 U. S. 229, 233.

Nor do the unusual circumstances under which this order was rendered make it any the less appealable. Whether or not the District Court would have had authority on its own motion to reopen the proceedings to consider the alleged misuse of the patent, see *Marconi Wireless Telegraph Co.* v. *United States*, 320 U. S. 1, 47–48, it was proper for it to do so after the Circuit Court of Appeals amended its judgment as it did. After reopening the case, the District Court gave full consideration to the question presented by the motion and decided it upon the merits. See *Bowman* v. *Loperena*, 311 U. S. 262. There was then nothing that remained to be done except to conduct an accounting. Therefore, the resulting order falls squarely within § 129 as amended. The fact that the Court designated its action as an "order" rather than a "decree" is not of crucial significance. See Rule 54, Rules of Civil Procedure.[2] For though called an "order," its binding effect in disposing of the question before it is the same as though it had been entitled a "decree." Nor is

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infringement. It wanted to permit an appeal prior to accounting whether there was an effective injunction outstanding or not, even though a patent had expired making inappropriate an injunction against its continued violation. Sen. Rep. No. 1319, 69th Cong., 2d Sess. 1 (1927).

This case presents the precise situation which the Senate Committee thought the Act was designed to avoid in that it happens here that the patent has expired. But both reports indicate that the purpose of the Act was to permit appeals whenever everything but an accounting had been accomplished.

[2] " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Rule 54, F. R. C. P.

the order rendered non-appealable because one appeal had already been taken, any more than it would have been had the first decree been reversed *in toto* and this order entered after the reversal. Since the order denying petitioner's motion for a judgment of dismissal of respondents' claim is, within the meaning of § 129, "final except for the ordering of an accounting," it is appealable.

Reversed.

FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* RHODES, SHERIFF, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 682. Argued April 7, 1947.—Decided April 28, 1947.

1. The Act of August 24, 1937, 50 Stat. 751, confers power upon this Court to review, on direct appeal, a ruling against the constitutionality of an act of Congress which is made in the application of a statute to a particular circumstance, even though the statute is not challenged as a whole. Pp. 102–104.
2. Under § 205 (a) of the Emergency Price Control Act, as amended by the Price Control Extension Act of July 25, 1946, injunctions to prevent the future eviction of tenants in defense areas may be granted by a federal district court at the instance of the Price Administrator notwithstanding the fact that, between the expiration of the Price Control Act on June 30, 1946, and the enactment of the Price Control Extension Act on July 25, 1946, judgments for restitution of the leased property had been obtained by the landlords in state courts. Pp. 104–107.
3. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution, even though such rights were acquired by judgments. P. 107.
4. In a suit by the Price Administrator under § 205 (a) of the Emergency Price Control Act to prevent the eviction of tenants in a defense area, § 265 of the Judicial Code does not bar an injunction against state officials to prevent the execution of state judgments of eviction. Pp. 107–108.

Reversed.

In a suit brought by the Price Administrator under § 205 (a) of the Emergency Price Control Act to prevent execution of judgments of eviction rendered by state courts against tenants in a defense area, a federal district court denied a preliminary injunction, on the ground that the provision of § 18 of the Price Control Extension Act of July 25, 1946, making the Act effective retroactively on June 30, 1946, is unconstitutional. On direct appeal, this Court ordered substitution of the Temporary Controls Administrator for the Price Administrator (329 U. S. 688) and *reversed* the judgment, p. 108.

Samuel Mermin argued the cause for appellant. With him on the brief were *Acting Solicitor General Washington, John R. Benney, William E. Remy, David London, Irving M. Gruber* and *Albert J. Rosenthal.*

No appearance for appellees.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal is from an interlocutory order of the District Court of the United States for the Northern District of Texas denying preliminary injunctions. Appellant's predecessor sued certain landlord appellees and the Sheriff and a constable of Tarrant County, Texas, in that United States District Court for an injunction to stop eviction of tenants under state judgments that were recovered by the landlords in suits for restitution of leased property.[1] The state suits were filed by the landlords without the certificates required by the Rent Regulation for Housing to maintain such actions. 8 F. R. 7322; 10 F. R. 11666; 11 F. R. 5824, 8106. The state judgments were entered

[1] Jurisdiction of suits for such injunctions is conferred upon the district courts of the United States by § 205 of the Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, and the Price Control Extension Act of July 25, 1946, 60 Stat. 664.

after June 30, 1946, the termination date of the Emergency Price Control Act, and before July 25, 1946, the date of the approval by the President of the Price Control Extension Act. As there was no federal price control statute during this period, these judgments will be treated as valid when granted.

The decision of the District Court, denying the motion as to the landlords and directing the entry of the order, was based on the unconstitutionality, as applied to these state judgments, of that portion of § 18 of the Price Control Extension Act of July 25, 1946, that declared, "The provisions of this Act shall take effect as of June 30, 1946, . . ." [2] This provision the Court thought was unconstitutional (1) because the words affected the state judgments retroactively by bringing them under the Extension Act [3] and (2) because the vested rights, created by the prior judgments in the landlords to obtain restitution of their leased properties, could not be destroyed by subsequent legislation. Apparently it was felt that the due process clause of the Fifth Amendment forbade such regulation of the incidents of judgments. The question is raised as to whether the Act of August 24, 1937, 50 Stat. 751, confers power upon this Court to review, on direct appeal, a ruling against the constitutionality of an act of Congress when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance, as in this appeal, rather than upon the challenged statute as a

[2] Price Control Extension Act of July 25, 1946, *supra*.

[3] As this opinion relies upon the validity under the price control acts of the prohibition of future eviction of tenants in § 6 of the Rent Regulation for Housing, 8 F. R. 7322; 10 F. R. 11666; 11 F. R. 5824, 8106, it is unnecessary to consider further whether the mere inclusion of these past judgments within the reach of the price control legislation, by advancing the effective date of the act, is constitutional. Compare *Blodgett* v. *Holden*, 275 U. S. 142, 146, and *Untermyer* v. *Anderson*, 276 U. S. 440, 445, with *United States* v. *Hudson*, 299 U. S. 498.

whole. A reading of the first three sections of the act convinces us that Congress granted litigants in courts of the United States a direct appeal to this Court from decisions against the constitutionality of any act of Congress as applied in the pending litigation.

The first section only authorizes the intervention of the United States in private litigation, "whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question . . . ."[4] It has nothing to do with appeals. The second section allows an appeal to this Court from a final or interlocutory order only when the United States is a party, through the preceding § 1 or originally, and the decision is against the constitutionality of the federal law. It provides for expedition in our determination of the appeal. Section three relates to the allowance or refusal of injunctions staying acts of Congress in whole or in part on the ground of repugnancy to the Constitution, and requires a three-judge court, expedition in determination and notice to the United States. The specific provision for prompt review of judgments granting or denying "in whole or in part" such an injunction is limited to applications for stays of acts of Congress because of their unconstitutionality. Thus the constitutionality of federal acts comes to us by direct appeal, under the Act of August 24, 1937, only when the United States is a party to the litigation below or an injunction is sought. This enables the United States to exercise large discretion, by its determination as to whether or not to intervene, as to what cases are reviewable directly

[4] The last three words were construed in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 288, to allow appeals under Judicial Code § 237 to this Court from final judgments of state courts of last resort upholding the validity of state statutes against a challenge to their application to particular circumstances because of their repugnance to federal law. This was a settled construction for the words. See *Kepner* v. *United States*, 195 U. S. 100, 124.

in this Court.[5] The Congress intended prompt review of the constitutionality of federal acts.[6] Since § 1 allows intervention when the constitutionality of an act is "drawn in question" and § 2 allows appeal after intervention, it follows that there is an appeal from an order that invalidates, as unconstitutional, a statute as applied. To limit the generality of the language of § 2 of the Act of August 24, 1937, to cases that involved only the constitutionality as a whole of the challenged statutes might seriously impair prompt determinations of matters of great public interest. Litigants may challenge the constitutionality of a statute only in so far as it affects them.[7] We hold that jurisdiction of the appeal from the challenged order is conferred upon this Court by 28 U.S.C. § 349a.

The Court was also of the view that § 265 of the Judicial Code barred any injunction against the state officials.

The appellant sought injunctions against future eviction of these tenants through writs of restitution or other process by which eviction might be con-

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[5] *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, 249–50.

[6] H. Rep. No. 212, 75th Cong., 1st Sess., p. 2:

"The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress requires no comment."

S. Rep. No. 963, 75th Cong., 1st Sess., pp. 3–4:

"The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights."

[7] *Blackmer* v. *United States*, 284 U. S. 421, 442; *Virginian R. Co.* v. *Federation*, 300 U. S. 515, 558; *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 513.

summated. Sections 2 (d), 4 (a) and 205 (a) of the Emergency Price Control Act of 1942, as amended, and Rent Regulation § 6 (a), set out below.[8] Such an injunction is in accord with the administrative Interpretations of

[8] Emergency Price Control Act of 1942, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306:

Section 2 (d). "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, . . . regulate or prohibit . . . renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in . . . rent increases, . . . inconsistent with the purposes of this Act."

Section 4 (a). "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to . . . do or omit to do any act, in violation of any regulation or order under section 2, . . . or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 205 (a). "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Rent Regulation for Housing, 8 F. R. 7322, 10 F. R. 11666; 11 F. R. 5824, 8106:

Section 6. "*Removal of tenant*—(a) *Restrictions on removal of tenant.* So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, . . ."

the Rent Regulation.[9] The properties involved in this litigation were defense-area housing accommodations. There is no suggestion that the heretofore referred to sections of the price control acts and § 6 of the Rent Regulations for Housing do not authorize these legal proceedings. The constitutionality of the price control acts, generally considered, is unquestioned. *Bowles* v. *Willingham,* 321 U. S. 503. The sole inquiry for us, at this point, is whether it was erroneous for the district court to refuse to allow the temporary injunction, because to do so would invade the constitutional right of the landlord appellees to retain the fruits of their "vested rights" in the valid judgments.

As the appellant is undertaking to enjoin future eviction of the tenants or lessees, our consideration is not affected by the proviso of § 18 of the Extension Act, set out in the margin.[10] The retroactive provision of § 18, quoted above

[9] Pike & Fischer, OPA Service, Rent, Interpretations of the Rent Regulation for Housing, § 6–VI, issued July 25, 1946:

"Interpretation 6–VI. Evictions Pending On July 25, 1946.

"The Emergency Price Control Act of 1942, as amended, on July 25, 1946, was extended by striking out 'June 30, 1946' and substituting 'June 30, 1947,' as the expiration date of the Act. Section 18 provides that the provisions of the Act shall take effect as of June 30, 1946. In this section a savings clause was inserted for the protection of persons who had acted contrary to the regulation during the interim period between June 30, 1946, and July 25, 1946. This savings clause provides that no act or transaction occurring between said dates shall be deemed a violation. As a result any eviction which occurred during the interim period was not a violation of the Act or regulation. By reason of this the tenant who has been in fact evicted during this interim period receives no protection. If, however, he is in possession on July 25, 1946, he is entitled to the protection of the eviction provisions of the regulation and it is a violation of the regulation for the landlord on or after that date to attempt to evict by court process or otherwise except in accordance with the provisions of Section 6 of the regulation."

[10] "*Provided further,* That no act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act shall be deemed to be a violation of the Emer-

at note 2, is inapposite for the same reason. It is immaterial whether the state judgments were obtained before or after the effective date of the Extension Act. The effort of the appellant is to enjoin future proceedings for eviction after the acquisition by the landlord appellees through valid judgments of what the district court characterized as "vested rights." Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by "prophetic discernment." [11] The rights acquired by judgments have no different standing.[12] The protection of housing accommodations in defense-areas through the price control acts may be accomplished by the appellant notwithstanding these prior judgments. The preliminary injunctions should have been granted.

Only a word need be said as to the contention that § 265 of the Judicial Code forbids an injunction against the execution of state judgments by state officers.[13] A contention

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gency Price Control Act of 1942, as amended, or the Stabilization Act of 1942, as amended, or of any regulation, order, price schedule, or requirement under either of such Acts: . . ."

[11] *Sproles* v. *Binford*, 286 U. S. 374, 391; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603; *Calhoun* v. *Massie*, 253 U. S. 170; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 303–11; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 259.

[12] *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 509; *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370.

[13] Judicial Code § 265:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

was made before this Court in similar cases last term that § 265 forbade a federal injunction to stay such proceedings in any court of a state. The argument was not accepted. We thought that § 205 (a) of the Emergency Price Control Act of 1942 created an exception to § 265.[14] No specific mention was made in these opinions as to whether state officers who were parties in the case could be enjoined. However, we do not see any ground, under § 265 of the Judicial Code, to differentiate as to stays against a sheriff or a constable or stays against the parties to the litigation. We think the District Court had power to stay the sheriff and constable.

Judgment reversed.

MR. JUSTICE FRANKFURTER, dissenting.

In considering the scope of our appellate jurisdiction, great weight should be given to the strong policy of the Congress, ever since the Judiciary Act of 1891, to keep the docket of this Court within manageable proportions for the wise disposition of causes by the ultimate judicial tribunal. That consideration applies also to the few Acts, passed since the creation of the circuit courts of appeals, which allow cases to come here directly from the district court where issues of great public importance, such as the constitutionality of legislation, are at stake.

In *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, this Court gave an expansive content to review, as a matter of right, of State court judgments where is drawn in question "the validity of a statute." Our jurisdiction was held to cover review of a finding of unconstitutionality in the application of a statute to a particular situation, though the statute is otherwise left in full force and effect. While, for the reasons set forth in the dissent of Mr. Justice

[14] *Porter* v. *Lee*, 328 U. S. 246; *Porter* v. *Dicken*, 328 U. S. 252; *Bowles* v. *Willingham*, 321 U. S. 503, 510.

Brandeis, I have never been reconciled to the soundness of that decision, I accept it. But I do not feel obliged to extend its scope beyond its requirements.

There is an important difference between review of State court decisions and decisions of the district courts. The latter are subject to review as a matter of course by the circuit courts of appeals. They are not dependent on review by grace through *certiorari,* as would be comparable State decisions except for the *Dahnke-Walker* doctrine. I do not feel myself required by the Act of August 24, 1937, to hold that direct appeal lies to this Court whenever a district court finds unconstitutional an application of a statute to the circumstances of a particular case. It is one thing not to allow final determination of the fate of a federal statute to be delayed until a decision of a district court can go through a circuit court of appeals and then reach this Court. It is quite another thing to bring here directly from a district court every decision indicating unconstitutionality in application, no matter how restricted its incidence. Of course this does not mean that direct review of district court decisions by this Court would be available only for cases that involve "the constitutionality as a whole" of a challenged statute. The Act of 1937 refers explicitly to invalidation "in whole or in part." Although this is made explicit in § 3 of the Act, the scope of direct review here, on the score of unconstitutionality, ought not to be different under different sections of this Act. A direct appeal is called for only when a district court strikes down, in whole or in part, that which Congress has unequivocally written. It is unwarranted when all that is in issue is whether the allowable scope of what Congress has written excludes a particular situation.

The immediate case gives point to these general observations. The incidents of a judgment are not the same

in all the States. The effect of this Act upon judgments in the different States may thus involve consideration of the procedure of a particular State. These are hardly questions of the kind which led to the authorization, by the Act of August 24, 1937, of direct review where a district court's decision "is against the constitutionality of any Act of Congress." 50 Stat. 751, 752.

Nor should it be decisive of this Court's exceptional jurisdiction on direct appeal from the district courts that the Government is the litigant. Like other litigants the Government at times attaches importance to a particular case out of all proportion to the more comprehensive factors that should control this Court's jurisdiction. We cannot be blind to the fact that review here is sometimes pressed in response to commendable administrative earnestness which fails, however, to take fully into account the demands of this Court's business. Moreover, it was not the interest of the Government as such which moved Congress to grant direct appeals from the district courts. By the Judiciary Act of 1925 Congress narrowly confined direct review here of district court decisions regardless of the character of the litigant, and the extension of such review by the Act of 1937 should be strictly confined.

I would dismiss this appeal and remand the case to the Circuit Court of Appeals. See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392, and *Phillips* v. *United States*, 312 U. S. 246, 254.

Syllabus.

FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* MOHAWK WRECKING & LUMBER CO. ET AL.

NO. 583. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued April 1, 1947.—Decided April 28, 1947.

1. The President's Executive Order No. 9809, issued under § 1 of the First War Powers Act of 1941 after the cessation of hostilities but before the termination of a technical state of war, validly consolidated the Office of Price Administration and three other agencies into the Office of Temporary Controls. Pp. 113–119.

   (a) The war powers are adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. P. 116.

   (b) Section 1 of the First War Powers Act, authorizing the President to redistribute functions among executive agencies, authorizes the creation of a new agency and the consolidation within it of functions and powers previously exercised by one or more other agencies. P. 116.

   (c) The authority conferred upon the President by § 1 of the First War Powers Act was not limited to the transfer of functions from agencies existing when the Act became law. P. 117.

   (d) An incumbent of an office "existing by law," within the meaning of § 2, at the time of the passage of the First War Powers Act who has once been confirmed by the Senate need not be confirmed again in order to exercise powers transferred to him by the President from another officer appointed by the President and confirmed by the Senate. P. 118.

2. Under Rule 25 of the Rules of Civil Procedure, the Temporary Controls Administrator was properly substituted for the Price Administrator in pending enforcement proceedings after the lifting of most price controls—there being "substantial need" for continuing and maintaining enforcement proceedings previously

*Together with No. 512, *Raley et al., trading as Raley's Food Store,* v. *Fleming, Temporary Controls Administrator,* on certiorari to the United States Court of Appeals for the District of Columbia.

brought by the Price Administrator, since the Emergency Price Control Act preserved accrued rights and liabilities thereunder. P. 119.

3. Under § 201 of the Emergency Price Control Act, the Price Administrator could delegate to district directors authority to sign and issue subpoenas. *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, distinguished. Pp. 119–123.

156 F. 2d 891, reversed; 81 U. S. App. D. C. 156, 156 F. 2d 561, affirmed.

No. 583. The Price Administrator applied to a District Court for an order under § 202 (e) of the Emergency Price Control Act, 56 Stat. 23, as amended, to enforce a subpoena *duces tecum* issued by a District Director of the Office of Price Administration. The District Court denied and dismissed the application. 65 F. Supp. 164. The Circuit Court of Appeals affirmed. 156 F. 2d 891. This Court granted certiorari, 329 U. S. 705, and ordered substitution of the Temporary Controls Administrator for the Price Administrator. 329 U. S. 688. *Reversed,* p. 123.

No. 512. The Price Administrator applied to the District Court of the United States for the District of Columbia for an order to enforce a subpoena *duces tecum* issued by the District Director of the Office of Price Administration. That Court ordered compliance with the subpoena. The United States Court of Appeals for the District of Columbia affirmed. 81 U. S. App. D. C. 156, 156 F. 2d 561. This Court granted certiorari, 329 U. S. 705, and ordered substitution of the Temporary Controls Administrator for the Price Administrator. 329 U. S. 687. *Affirmed,* p. 123.

David London argued the cause for petitioner in No. 583 and respondent in No. 512. With him on the brief were *Acting Solicitor General Washington, John R. Benney, Philip Elman, William E. Remy, Samuel Mermin* and *Jacob W. Rosenthal.*

John W. Babcock argued the cause and filed a brief for respondents in No. 583.

Paul Flaherty and *C. L. Dawson* submitted on brief for petitioners in No. 512.

Arthur E. Pettit, Paul R. Stinson, Arthur Mag and *Dick H. Woods* filed a brief in No. 583 for the Singer Sewing Machine Company, as *amicus curiae,* in support of respondents' motion to vacate the order of substitution.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

These cases present the question whether the Emergency Price Control Act, 56 Stat. 23, as amended, 50 U. S. C. App. Supp. V, § 901 *et seq.,* authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas. In the first of these cases the Circuit Court of Appeals for the Sixth Circuit held that such authority did not exist, 156 F. 2d 891; in the second, the Court of Appeals for the District of Columbia held that it did. 81 U. S. App. D. C. 156, 156 F. 2d 561. The cases are here on petitions for writs of certiorari which we granted to resolve the conflict.

First. After we granted the petitions we ordered, on motion of the Acting Solicitor General, that Philip B. Fleming, Temporary Controls Administrator, be substituted as a party in each case in place of Paul A. Porter, Administrator, Office of Price Administration, resigned. Thereafter respondents in the first of these cases filed a motion to vacate the order of substitution, a motion which we deferred to the hearing on the merits.[1] The question

[1] Compare *Porter* v. *American Distilling Co.,* 71 F. Supp. 483; *Porter* v. *Bowers,* 70 F. Supp. 751, and *Bowles* v. *Ell-Carr Co., Inc.,* 71 F. Supp. 482, with *Porter* v. *Wilson,* 69 F. Supp. 447, and *Porter* v. *Hirahara,* 69 F. Supp. 441.

has now been briefed and argued and we conclude that the motion to vacate the order of substitution should be denied.

The Act was amended in 1946 to provide for its termination not later than June 30, 1947, saving, however, rights and liabilities incurred prior to the termination date.[2] By November 12, 1946, almost all commodities (including services) were by administrative order [3] made exempt from price control.[4] Price control had thus entered a temporary transition period. On December 12, 1946, the President issued an Executive Order "for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government." That order consolidated the Office of Price Administration and three other agencies into the Office of Temporary Controls [5]—an agency in the Office for Emergency Management of the Executive Office of the President. The latter had previously been established pursuant to the Reorgani-

[2] 60 Stat. 664. Section 1 (b) now provides:

"The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

[3] Express provisions for decontrol were added by the 1946 amendments. See, for example, § 1a (b)–(h).

[4] See Supplementary Order 193, November 12, 1946, 11 Fed. Reg. 13464, as amended November 19, 1946, 11 Fed. Reg. 13637.

[5] Exec. Order No. 9809, 11 Fed. Reg. 14281.

zation Act of 1939.[6] The Executive Order provided a Temporary Controls Administrator, appointed by the President, to head the Office of Temporary Controls and vested in him, *inter alia,* the functions of the Price Administrator, including the authority to maintain in his own name civil proceedings, whether or not then pending, relating to matters theretofore under the jurisdiction of the Price Administrator. Petitioner is the Temporary Controls Administrator appointed by the President.

It is argued that the President had no authority to transfer the functions of the Price Administrator to another agency and to vest in an officer appointed by the President the power which the Emergency Price Control Act, § 201, had conferred upon an Administrator appointed by the President by and with the advice and consent of the Senate. And it is said that even though such authority existed, it came to an end with the cessation of hostilities.

By § 1 of the First War Powers Act of 1941, 55 Stat. 838, 50 U. S. C. App. Supp. V, § 601, the President is

> "authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary . . ."

That power may be exercised "only in matters relating to the conduct of the present war," § 1, and expires six months after "the termination of the war." § 401.

[6] See Reorganization Plan I, 5 U. S. C. § 133t (note); 4 Fed. Reg. 3864; 6 Fed. Reg. 192.

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On December 31, 1946, after the creation of the Office of Temporary Controls, the President, while recognizing that "a state of war still exists," by proclamation declared that hostilities had terminated.[7] The cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161, that the war power includes the power "to remedy the evils which have arisen from its rise and progress" and continues during that emergency. *Stewart* v. *Kahn*, 11 Wall. 493, 507. Whatever may be the reach of that power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here.

Section 1 of the First War Powers Act does not explicitly provide for creation of a new agency which consolidates the functions and powers previously exercised by one or more other agencies. But the Act has been repeatedly construed by the President to confer such authority.[8] Such construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight. See *United States* v. *Jackson*, 280 U. S. 183, 193; *Billings* v. *Truesdell*, 321 U. S. 542, 552–553. And the appropriation by Congress of funds for the use of such agencies stands as confirmation and ratification of the action of the Chief Executive. *Brooks* v. *Dewar*, 313 U. S. 354, 361.

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[7] Proclamation 2714, 12 Fed. Reg. 1.

[8] Each of the following agencies was a new agency created by Executive Order to exercise powers formerly vested in other agencies or to perform new functions: National Housing Agency, Exec. Order No. 9070, 7 Fed. Reg. 1529; War Food Administration, Exec. Order No. 9334, 8 Fed. Reg. 5423; Office of War Mobilization, Exec. Order No. 9347, 8 Fed. Reg. 7207; Office of Economic Warfare, Exec. Order No. 9361, 8 Fed. Reg. 9861; Foreign Economic Administration, Exec. Order No. 9380, 8 Fed. Reg. 13081; Surplus War Property Administration, Exec. Order No. 9425, 9 Fed. Reg. 2071.

Nor do we think there is merit in the contention that the First War Powers Act gave the President authority to transfer functions only from agencies in existence when that Act became law. It is true that § 1 authorizes the President "to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon" any agency. But the latter clause is only an illustration of the authority granted, not a limitation on it. It makes clear that the authority extends to existing agencies as well as to others. That construction is supported by § 5 of the Act which states that upon its termination all executive and administrative agencies "shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this title to the contrary notwithstanding." As stated by the Emergency Court of Appeals, unless § 1 authorizes the President to redistribute functions of agencies created after the passage of the Act, the reference in § 5 to functions "hereafter" provided by law is "wholly meaningless." *California Lima Bean Growers Assn.* v. *Bowles,* 150 F. 2d 964, 967. Nor is that result affected by the subsequent enactment of the Emergency Price Control Act which in § 201 (b) authorized the President to transfer any of the powers and functions of the Office of Price Administration "with respect to a particular commodity or commodities" to any government agency having other functions relating to such commodities. Whatever effect that provision may have, it does not purport to deal with general enforcement functions and so restricts in no way the authority of the President under the First War Powers Act to transfer them. Yet enforcement functions are all that are involved in the present cases.

We need not decide whether under the First War Powers Act the President had authority to transfer functions of an officer who need be confirmed by the Senate to one appointed by the President without Senate confirmation. For § 2 of that Act provides:

> "That in carrying out the purposes of this title the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, governmental corporations, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, governmental corporation, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto."

The authority to "utilize . . . offices, or officers now existing by law" is sufficient to sustain the transfer of functions under the Executive Order from Porter, resigned, to Fleming. For prior to the Act Fleming had been appointed by the President and confirmed by the Senate as Federal Works Administrator.[9] He thus was the incumbent of an office "existing by law" at the time of the passage of the Act and by virtue of § 2 could be the lawful recipient through transfer by the President of the functions of other agencies as well. To hold that an officer, previously confirmed by the Senate, must be once more confirmed in order to exercise the powers transferred to him by the President would be quite inconsistent with the broad grant of power given the President by the First War Powers Act. Any doubts on this score would, moreover, be removed by the recognition by Congress in a recent appropriation of the status of the Temporary Controls Ad-

[9] December 4, 1941. See 87 Cong. Rec. 9413.

ministrator.[10] That recognition was an acceptance or ratification by Congress of the President's action in Executive Order No. 9809. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 301–302; *Brooks* v. *Dewar, supra.*

For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure. The rule requires a showing of "substantial need" for continuing and maintaining the action. Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark,* 320 U. S. 531, 536; *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44; *Collins* v. *Porter,* 328 U. S. 46, 49. And Congress has explicitly provided that accrued rights and liabilities under the Emergency Price Control Act are preserved whether or not suit is started prior to the termination date of the Act.[11] If investigation were foreclosed at this stage, such rights as may exist would be defeated, contrary to the policy of the Act.

Second. We come then to the merits. The Administrator, by order, delegated the function of signing and issuing

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[10] 61 Stat. 14, 16, under the heading "Executive Office of the President, Office for Emergency Management," the following:

"Office of Temporary Controls

"Salaries and expenses: For an additional amount, fiscal year 1947, for the Office of Price Administration transferred by Executive Order 9809 of December 12, 1946, to the Office of Temporary Controls, $7,051,752, to be available for the payment of terminal leave only: *Provided,* That it is the intent of the Congress that the funds heretofore and herein appropriated shall include all expenses incident to the closing and liquidation of the Office of Price Administration and the Office of Temporary Controls by June 30, 1947."

[11] See § 1 (b) *supra,* note 2. And for the general statute preventing the extinguishment of liability under a repealed statute, unless the repealing act expressly provides for it, see Rev. Stat. § 13, as amended, 58 Stat. 118, 1 U. S. C. Supp. V, § 29.

subpoenas to regional administrators and district directors.[12] Section 201 (a) of the Emergency Price Control Act provides in part:

> "The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended."

Section 201 (b) of the Act provides:

> "The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

Practically identical provisions were included in § 4 (b) and (c) of the Fair Labor Standards Act, 52 Stat. 1060, 1061–1062, 29 U. S. C. § 204. The Court held in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357, that the latter provisions did not authorize the Administrator under that Act, to delegate his power to sign and issue subpoenas. Accordingly the main controversy here is whether the *Cudahy* decision controls this case. We do not think it does.

The legislative history of the Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the bill was in Conference. On the other hand, the Senate Committee in reporting the bill that became the Emergency Price Control Act described § 201 (a) as authorizing the Administrator to "perform his duties through such employees or agencies by delegating to them any of the powers given to him by the bill." And it said that § 201 (b) authorized him or "any representative or other agency

[12] Revised General Order 53, May 13, 1944, 9 Fed. Reg. 5191.

to whom he may delegate any or all of his powers, to exercise such powers in any place." S. Rep. No. 931, 77th Cong., 2d Sess., pp. 20–21. In the *Cudahy* case the Act made expressly delegable the power to gather data and make investigations, thus lending support to the view that when Congress desired to give authority to delegate, it said so explicitly. In the present Act, there is no provision which specifically authorizes delegation as to a particular function. In the *Cudahy* case, the Act made applicable to the powers and duties of the Administrator the subpoena provisions of the Federal Trade Commission Act, §§ 9 and 10, 38 Stat. 722, 723, 15 U. S. C. §§ 49 and 50, which only authorized either the Commission or its individual members to sign subpoenas. The subpoena power under the present Act is found in § 202 (b)[13] and is not dependent on the provisions of another Act having a history of its own. The Act involved in the *Cudahy* case granted no broad rule-making power. Section 201 (d) of the present Act, however, provides:

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. See *Plapao Laboratories* v. *Farley*, 67 App. D. C. 304, 92 F. 2d 228. There is no provision in the present Act negativing the existence of such authority, so far as the subpoena power is concerned. Nor can the

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[13] Section 202 (b) provides in part:

"The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

absence of such authority be fairly inferred from the history and content of the Act. Thus the presence of the rule-making power, together with the other factors differentiating this case from the *Cudahy* case, indicates that the authority granted by § 201 (a) and (b) should not be read restrictively.

As stated by the court in *Porter* v. *Murray*, 156 F. 2d 781, 786–787, the overwhelming nature of the price control program entrusted to the Administrator suggests that the Act should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts. The program of price control inaugurated probably the most comprehensive legal controls over the economy ever attempted. We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction. Certainly, so far as the investigative functions were concerned, he could hardly be expected, in view of the magnitude of the task,[14] to exercise

[14] The following statistics indicate the volume of litigation and investigations involved:

	1943	1944	1945	1946
Civil Cases commenced by United States in District Courts under Emergency Price Control Act.* (Fiscal years ending June 30)...	2,219	6,524	28,283	31,094
Investigations completed by Office of Price Administration.** (Calendar years).	652,851	333,151	193,348	106,240†

*(Rep. Dir. Adm. Off. U. S. Courts (1943) Table 7; *Id.* 1944 Table 7; *Id.* (1945) Table C3; *Id.* (1946) Table C3.)

**(Quarterly Rep. O. P. A.: Eighth, p. 71; Twelfth, p. 75; Seventeenth, p. 104; Eighteenth, p. 82; Nineteenth, p. 95.)

†First nine months only.

his personal discretion in determining whether a particular investigation should be launched. Delay might do injury beyond repair. The pyramiding in Washington of all decisions on law enforcement would be apt to end in paralysis. To tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration. These considerations reinforce the construction of the Act which allows the Administrator authority to delegate his subpoena power.

The other objections to the subpoenas are without merit.

We reverse the judgment in *Fleming* v. *Mohawk Wrecking & Lumber Co.*, and affirm the judgment in *Raley* v. *Fleming*.

So ordered.

MR. JUSTICE JACKSON, concurring.

I concur in the opinion and result. But the issue here is so related to other problems that I desire to state my grounds.

I would be reluctant to adopt a construction of an Act, such as the Emergency Price Control Act, which would certainly impede its administration unless it were necessary to carry out the intent of Congress or to protect fundamental individual rights.

If the Administrator may not delegate his power to sign subpoenas but must personally sign all subpoenas issued in the process of enforcement throughout the United States, one of two practices would be certain to result. He might sign large batches of blank subpoenas and turn them over to subordinates to be filled in over his signature. Or he might sign batches of subpoenas already made out by subordinates, probably without reading them and certainly without examining the causes for their issuance or

the scope of the information required. The personal signature of the Administrator on the subpoena under those circumstances is no protection to individual rights.

Of all the subpoenas issued by administrative authority, a very small percentage are contested. The important thing for protection of the individual is that when he does have reasons for resisting obedience he can obtain a hearing. I am in doubt as to whether under this Act and the regulations for its administration a person who has reasons for resisting the subpoena has any administrative review or remedy. But in any event he cannot be punished for contempt until a court order for its enforcement has issued and has been disobeyed.

Enforcement of such subpoenas by the courts is not and should not be automatic. So long as they are subject to full inquiry at this point it does not seem to me important to the individual or inconsistent with the policy of Congress that the subpoena issue by a subordinate of the Administrator. If the courts were to be shorn of their power of independent inquiry before enforcement, and I have thought we were tending that way, *cf.* dissent in *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, I should expect Congress to intend greater responsibility at the point of original issue. I concur only because I think adequate judicial safeguards exist.

Syllabus.

CHAMPION SPARK PLUG CO. *v.* SANDERS ET AL., DOING BUSINESS AS PERFECT RECONDITION SPARK PLUG CO.

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

No. 680. Argued April 2, 3, 1947.—Decided April 28, 1947.

1. Respondents engaged in the business of repairing used trade-marked spark plugs and reselling them without removing the original trade marks. In a suit by the manufacturer, the trial court found that respondents had infringed the trade mark but that there had been no fraud or palming off. It denied an accounting but enjoined further infringement. *Held:* The equities of this case are satisfied by a decree requiring that the word "repaired" or "used" be plainly and durably stamped on each plug and that the containers and printed matter used in connection with the sales clearly show that the plugs are used and reconditioned by respondents, giving their names and address—even though the decree does not require that the trade marks be removed. Pp. 126–132.
2. Under the Trade Mark Act of 1905, a finding that a trade mark has been infringed does not necessarily require that an accounting be ordered where an injunction will satisfy the equities of the case. P. 131.
3. In the circumstances of this case, a finding that respondents had also engaged in unfair competition does not require more stringent controls or that an accounting be ordered. Pp. 130–132.

156 F. 2d 488, affirmed.

The District Court found that respondents had infringed petitioner's trade mark, enjoined further infringement, and denied an accounting. 56 F. Supp. 782, 61 F. Supp. 247. The Circuit Court of Appeals modified the decree in certain details. 156 F. 2d 488. This Court granted certiorari. 329 U. S. 709. *Affirmed,* p. 132.

Samuel E. Darby, Jr. argued the cause for petitioner. With him on the brief were *Wilbur Owen* and *Carl F. Schaffer.*

John Wilson Hood argued the cause and filed a brief for respondents.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

Petitioner is a manufacturer of spark plugs which it sells under the trade mark "Champion." Respondents collect the used plugs, repair and recondition them, and resell them. Respondents retain the word "Champion" on the repaired or reconditioned plugs. The outside box or carton in which the plugs are packed has stamped on it the word "Champion," together with the letter and figure denoting the particular style or type. They also have printed on them "Perfect Process Spark Plugs Guaranteed Dependable" and "Perfect Process Renewed Spark Plugs." Each carton contains smaller boxes in which the plugs are individually packed. These inside boxes also carry legends indicating that the plug has been renewed.[1] But respondent company's business name or address is not printed on the cartons. It supplies customers with petitioner's charts containing recommendations for the use of Champion plugs. On each individual plug is stamped in small letters, blue on black, the word "Renewed," which at times is almost illegible.

Petitioner brought this suit in the District Court, charging infringement of its trade mark and unfair competition. See Judicial Code § 24 (1), (7), 28 U. S. C. § 41 (1), (7). The District Court found that respondents had infringed the trade mark. It enjoined them from offering or selling

[1] "The process used in renewing this plug has been developed through 10 years continuous experience. This Spark Plug has been tested for firing under compression before packing."

"This Spark Plug is guaranteed to be a selected used Spark Plug, thoroughly renewed and in perfect mechanical condition and is guaranteed to give satisfactory service for 10,000 miles."

any of petitioner's plugs which had been repaired or reconditioned unless (a) the trade mark and type and style marks were removed, (b) the plugs were repainted with a durable grey, brown, orange, or green paint, (c) the word "REPAIRED" was stamped into the plug in letters of such size and depth as to retain enough white paint to display distinctly each letter of the word, (d) the cartons in which the plugs were packed carried a legend indicating that they contained used spark plugs originally made by petitioner and repaired and made fit for use up to 10,000 miles by respondent company.[2] The District Court denied an accounting. See 56 F. Supp. 782, 61 F. Supp. 247.

The Circuit Court of Appeals held that respondents not only had infringed petitioner's trade mark but also were guilty of unfair competition. It likewise denied an accounting but modified the decree in the following respects: (a) it eliminated the provision requiring the trade mark and type and style marks to be removed from the repaired or reconditioned plugs; (b) it substituted for the requirement that the word "REPAIRED" be stamped into the plug, etc., a provision that the word "REPAIRED" or "USED" be stamped and baked on the plug by an electrical hot press in a contrasting color so as to be clearly and distinctly visible, the plug having been completely covered by permanent aluminum paint or other paint or lacquer; and (c) it eliminated the provision specifying the precise legend to be printed on the cartons and substituted there-

[2] The prescribed legend read:

"Used spark plug(s) originally made by Champion Spark Plug Company repaired and made fit for use up to 10,000 miles by Perfect Recondition Spark Plug Co., 1133 Bedford Avenue, Brooklyn, N. Y."

The decree also provided:

"the name and address of the defendants to be larger and more prominent than the legend itself, and the name of plaintiff may be in slightly larger type than the rest of the body of the legend."

for a more general one.[3] 156 F. 2d 488. The case is here on a petition for certiorari which we granted because of the apparent conflict between the decision below and *Champion Spark Plug Co.* v. *Reich,* 121 F. 2d 769, decided by the Circuit Court of Appeals for the Eighth Circuit.

There is no challenge here to the findings as to the misleading character of the merchandising methods employed by respondents, nor to the conclusion that they have not only infringed petitioner's trade mark but have also engaged in unfair competition.[4] The controversy here relates to the adequacy of the relief granted, particularly the refusal of the Circuit Court of Appeals to require respondents to remove the word "Champion" from the repaired or reconditioned plugs which they resell.

We put to one side the case of a manufacturer or distributor who markets new or used spark plugs of one make under the trade mark of another. See *Bourjois & Co.* v. *Katzel,* 260 U. S. 689; *Old Dearborn Co.* v. *Seagram Corp.,* 299 U. S. 183, 194. Equity then steps in to prohibit defendant's use of the mark which symbolizes plaintiff's good will and "stakes the reputation of the plaintiff upon the character of the goods." *Bourjois & Co.* v. *Katzel, supra,* p. 692.

We are dealing here with second-hand goods. The spark plugs, though used, are nevertheless Champion plugs and not those of another make.[5] There is evidence

[3] "The decree shall permit the defendants to state on cartons and containers, selling and advertising material, business records, correspondence and other papers, when published, the original make and type numbers provided it is made clear that any plug referred to therein is used and reconditioned by the defendants, and that such material contains the name and address of defendants."

[4] See *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 493–494; *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526, 530.

[5] Cf. *Federal Trade Commission* v. *Klein,* 5 F. T. C. 327.

to support what one would suspect, that a used spark plug which has been repaired or reconditioned does not measure up to the specifications of a new one. But the same would be true of a second-hand Ford or Chevrolet car. And we would not suppose that one could be enjoined from selling a car whose valves had been reground and whose piston rings had been replaced unless he removed the name Ford or Chevrolet. *Prestonettes, Inc.* v. *Coty,* 264 U. S. 359, was a case where toilet powders had as one of their ingredients a powder covered by a trade mark and where perfumes which were trade marked were rebottled and sold in smaller bottles. The Court sustained a decree denying an injunction where the prescribed labels told the truth. Mr. Justice Holmes stated, "A trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. . . . When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo." P. 368.

Cases may be imagined where the reconditioning or repair would be so extensive or so basic that it would be a misnomer to call the article by its original name, even though the words "used" or "repaired" were added. Cf. *Ingersoll* v. *Doyle,* 247 F. 620. But no such practice is involved here. The repair or reconditioning of the plugs does not give them a new design. It is no more than a restoration, so far as possible, of their original condition. The type marks attached by the manufacturer are determined by the use to which the plug is to be put. But the thread size and size of the cylinder hole into which the plug is fitted are not affected by the reconditioning. The heat range also has relevance to the type marks. And there is evidence that the reconditioned plugs are inferior so far as heat range and other qualities are concerned. But inferiority is expected in most second-hand articles. Indeed,

they generally cost the customer less. That is the case here. Inferiority is immaterial so long as the article is clearly and distinctly sold as repaired or reconditioned rather than as new.[6] The result is, of course, that the second-hand dealer gets some advantage from the trade mark. But under the rule of *Prestonettes, Inc.* v. *Coty, supra,* that is wholly permissible so long as the manufacturer is not identified with the inferior qualities of the product resulting from wear and tear or the reconditioning by the dealer. Full disclosure gives the manufacturer all the protection to which he is entitled.

The decree as shaped by the Circuit Court of Appeals is fashioned to serve the requirements of full disclosure. We cannot say that of the alternatives available the ones it chose are inadequate for that purpose. We are mindful of the fact that this case, unlike *Prestonettes, Inc.* v. *Coty, supra,* involves unfair competition as well as trade mark infringement; and that where unfair competition is established, any doubts as to the adequacy of the relief are generally resolved against the transgressor. *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526, 532. But there was here no showing of fraud or palming off. Their absence, of course, does not undermine the finding of unfair competition. *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U. S. 483, 493–494; *G. H. Mumm Champagne* v. *Eastern Wine Corp.,* 142 F. 2d 499, 501. But the character of the conduct giving rise to the unfair competition is relevant to the remedy which should be afforded. See *Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608. We cannot say that the conduct of respondents in this case, or the nature

[6] See *Federal Trade Commission* v. *Typewriter Emporium,* 1 F. T. C. 105; *Federal Trade Commission* v. *Check Writer Manufacturers,* 4 F. T. C. 87; *In the Matter of Federal Auto Products Co.,* 20 F. T. C. 334.

of the article involved and the characteristics of the merchandising methods used to sell it, called for more stringent controls than the Circuit Court of Appeals provided.

Mishawaka Mfg. Co. v. *Kresge Co.*, 316 U. S. 203, states the rule governing an accounting of profits where a trade mark has been infringed and where there is a basis for finding damage to the plaintiff and profit to the infringer. But it does not stand for the proposition that an accounting will be ordered merely because there has been an infringement. Under the Trade Mark Act of 1905,[7] as under its predecessors, an accounting has been denied where an injunction will satisfy the equities of the case. *Saxlehner* v. *Siegel-Cooper Co.*, 179 U. S. 42; *Rowley Co.* v. *Rowley*, 193 F. 390, 393; *Middleby-Marshall Oven Co.* v. *Williams Oven Mfg. Co.*, 12 F. 2d 919, 921; *Golden West Brewing Co.* v. *Milonas & Sons*, 104 F. 2d 880, 882; *Hemmeter Cigar Co.* v. *Congress Cigar Co.*, 118 F. 2d 64, 71–72; *Durable Toy & Novelty Corp.* v. *J. Chein & Co.*, 133 F. 2d 853, 854–855. The same is true in case of unfair competition. *Straus* v. *Notaseme Co.*, 240 U. S. 179, 181–183. Here, as we have noted, there has been no showing of fraud or palming off. For several years respondents apparently endeavored to comply with a cease and desist order of the Federal Trade Commission requiring them to place on the plugs and on the cartons a label revealing that the plugs were used or second-hand. Moreover, as stated by the Circuit Court of Appeals, the likelihood of damage to petitioner or profit to respondents due to any misrepre-

[7] Section 19 of that Act, 33 Stat. 724, 729, 15 U. S. C. § 99, provides in part, ". . . upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction."

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sentation seems slight. In view of these various circumstances it seems to us that the injunction will satisfy the equities of the case.

Affirmed.

AYRSHIRE COLLIERIES CORP. ET AL. *v.* UNITED STATES ET AL.

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

No. 467. Argued April 7, 8, 1947.—Decided April 28, 1947.

1. Under the provision of the Urgent Deficiencies Act of October 22, 1913, 28 U. S. C. § 47, requiring that an application to enjoin or set aside any order of the Interstate Commerce Commission be "heard and determined" by three judges, a judgment based upon a determination by only two judges is void—even though all three judges were present at the hearing and one of them was prevented by illness from participating in the determination of the case. Pp. 135–139.
2. The fact that a prayer for an interlocutory injunction was not pressed and that the decision was only on an application for a permanent injunction makes no difference, since the statutory requirement that three judges hear and determine an application applies to suits for permanent as well as interlocutory injunctions. Judicial Code § 266, distinguished. Pp. 139–144.

Judgment vacated and appeal dismissed.

Two judges of a three-judge court, during the absence of the third, denied a permanent injunction against enforcement of an order of the Interstate Commerce Commission. On appeal to this Court, the judgment is vacated and the appeal is dismissed. P. 144.

Earl B. Wilkinson argued the cause for Ayrshire Collieries Corporation et al., appellants. With him on the brief were *Arthur R. Hall* and *J. Alfred Moran.*

Carson L. Taylor argued the cause for the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, appellant. With him on the brief were *William L. Hunter, A. N. Whitlock* and *M. L. Bluhm.*

Daniel W. Knowlton argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Berge, Edward Dumbauld, David O. Mathews, Nelson Thomas* and *Daniel H. Kunkel.*

Charles W. Stadell argued the cause for the Central Illinois District Coal Traffic Bureau et al., appellees. With him on the brief was *Erle J. Zoll, Jr.,* who submitted on brief for the Alton Railroad Company et al., appellees.

Mr. Justice Murphy delivered the opinion of the Court.

Appellants filed complaints in the United States District Court for the Southern District of Indiana seeking a temporary stay, an interlocutory injunction and a permanent injunction against the enforcement of an order of the Interstate Commerce Commission, dated July 9, 1945. This order had been entered in connection with findings by the Commission that certain railroad tariffs were unlawful and that other rates should be prescribed in lieu thereof. *Coal to Beloit, Wis., and Northern Illinois,* 263 I. C. C. 179.

The complaints requested that the court convene a specially constituted court of three judges, as required by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220, 28 U. S. C. § 47, to hear the motions "for a temporary or interlocutory injunction and for final hearing in this proceeding." Circuit Judge Evans and Dis-

trict Judge Igoe were then assigned to sit with District Judge Baltzell to hear and determine these applications, and the cases were consolidated for all purposes. The applications for a temporary stay and an interlocutory injunction were assigned for hearing on January 3, 1946. But on that day, it appearing that the Commission had postponed the effective date of its order to April 8, 1946, the court ordered that "the hearing upon the petitioners' application for an interlocutory injunction and temporary stay heretofore assigned and set for January 3, 1946, be and the same hereby is, continued to the day of final hearing herein and that said final hearing shall be had on March 25, 1946 . . . ." The Commission made a further postponement of the effective date of its order to July 8, 1946, in order that the carriers subject to the order might avoid the necessity of preparing and filing new tariffs prior to the termination of the court proceeding. It also appeared that the illness of Judge Baltzell made it impossible for the court to convene as scheduled on March 25. And so the court reassigned the case for trial on April 22, with Judge Baltzell being replaced by Circuit Judge Major.

Argument was held on April 22 before Circuit Judges Evans and Major and District Judge Igoe at the "final hearing upon the plaintiffs' petitions for a permanent injunction." On June 5, 1946, findings of fact and conclusions of law were filed and entered under the signatures of Judges Major and Igoe; the Commission's order was sustained in all respects and a judgment was entered dismissing the complaints. The following notation was made in the margin of the findings of fact and conclusions of law: "Judge Evan A. Evans became ill subsequent to the hearing of these causes and he is and has been unable to participate in a determination thereof. The findings of fact, conclusions of law and judgment have therefore been entered by the remaining judges of such court."

The case was brought here on direct appeal.[1] We are of the opinion that the District Court's judgment was void, only two of the three judges having participated in the determination of the case. We accordingly do not reach the issues involving the Commission's authority and the merits of its order, issues that have been argued at length before us.

The applicable provisions of the Urgent Deficiencies Act, 38 Stat. 220, 28 U. S. C. § 47, state: ". . . No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. . . . *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, . . . allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days . . . and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement

[1] Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, 220, 28 U. S. C. §§ 45 and 47a; Judicial Code § 238, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

as to judges and the same procedure as to expedition and appeal shall apply. . . ."

The requirement that three judges hear and determine suits to enjoin or set aside Interstate Commerce Commission orders had its origin in the provisions of the Expediting Act of February 11, 1903, 32 Stat. 823. That Act required three circuit judges, or two circuit judges and a district judge, to hear cases brought by the United States to enforce the antitrust and commerce laws. This feature was then extended by the Hepburn Act of 1906, 34 Stat. 584, 592, to all suits brought to enforce or enjoin any order of the Interstate Commerce Commission, "including the hearing on an application for a preliminary injunction." The Act of June 18, 1910, 36 Stat. 539, created the Commerce Court and vested in it jurisdiction over suits to enjoin Commission orders; that court was composed of five judges, four of them constituting a quorum and at least three being required to concur in all decisions. Finally, the Urgent Deficiencies Act of 1913 transferred this jurisdiction to three-judge district courts, as detailed above. *United States* v. *Griffin,* 303 U. S. 226, 232–233.

The policy of requiring the deliberation of three judges in suits to enjoin the enforcement of Interstate Commerce Commission orders is thus a well-established one. It is grounded in the legislative desire to guard against ill-considered action by a single judge in the important and complex situations frequently presented by Commission orders. Such matters are deemed to warrant the full deliberation which a court of three judges is likely to secure.

This requirement, of course, is necessarily technical. It is not a broad social measure to be construed with liberality. It is a technical rule of procedure to be applied as such. See *Phillips* v. *United States,* 312 U. S. 246, 250–

251. While due consideration must be given to the statutory policy of expediting the disposition of applications to enjoin the enforcement of Commission orders, the plain language of the Urgent Deficiencies Act compels strict adherence to the command that such applications "shall be heard and determined by three judges, of whom at least one shall be a circuit judge." And we must insist upon obedience to that legislative will even though the disposition of some applications may thereby be delayed.

When the framers of the Urgent Deficiencies Act declared that these applications "shall be heard and determined by three judges," we assume that they meant exactly what they said. The requirement that three judges hear and determine an application means that they must adjudicate the issues of law and fact which are presented by the case, a function which implies that they must weigh the arguments and testimony offered by both sides and vote either to grant or deny the relief sought by the moving party.[2] In addition, "Compliance with the statute

[2] In *Ohio* v. *United States,* 6 F. Supp. 386, affirmed, 292 U. S. 498, a case under the Urgent Deficiencies Act was argued before a court of three judges, all of whom participated in the discussions leading to a determination of the case. One of the judges died before the decision was announced. An opinion written by the judge who died was found among his papers after his death and was published as the opinion of the court, concurred in by the other two judges. The opinion had been written pursuant to an arrangement made at a prior conference of the three judges. The findings of fact and conclusions of law, which were filed some time after the opinion, were signed only by the two surviving judges. The matter, however, was not raised by the parties on appeal and was not considered or decided by this Court. The mere fact that the case was entertained by this Court is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored. *United States* v. *More,* 3 Cranch 159, 172; *Snow* v. *United States,* 118 U. S. 346, 354–355; *Cross* v. *Burke,* 146 U. S. 82, 87; *Louisville*

requires the assent of the three judges given after the application is made evidenced by their signatures or an announcement in open court with three judges sitting followed by a formal order tested as they direct." *Cumberland Tel. Co.* v. *Public Service Commission,* 260 U. S. 212, 218. All three judges, in other words, must fully perform the judicial function.[3] See *Dohany* v. *Rogers,* 281 U. S. 362, 369–370.

It is significant that this Act makes no provision for a quorum of less than three judges. Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases.[4] 28 U. S. C. § 212. The absence of such a quorum provision as to three-judge district courts is a strong corroborating indication that participation by all three judges is necessary to render a valid decision.

Trust Co. v. *Knott,* 191 U. S. 225, 236; *Arant* v. *Lane,* 245 U. S. 166, 170.

Cf. *Frellsen & Co.* v. *Crandell,* 217 U. S. 71, where this Court, after Mr. Justice Brewer's death, adopted as its opinion one previously written by him.

[3] In *James* v. *Clements,* 217 F. 51, a case had been argued and submitted to a three-judge circuit court of appeals and a decision rendered by a divided vote. A petition for rehearing had been filed and the court had decided that the prior decision was erroneous and that the opposite result should be announced without further briefs or argument. But before an order to that effect could be promulgated, one of the judges died. Since the other two judges were divided in their views, the case was restored for argument before a full bench of three judges. See also *Ryan* v. *Pennsylvania Public Utility Commission,* 44 F. Supp. 912, 914.

[4] But see 32 Stat. 823, as amended by 58 Stat. 272, 15 U. S. C. (Supp. V, 1946) § 29, which provides that the senior circuit judge and the two circuit judges next in order of seniority shall "hear and determine" appeals from district court judgments in antitrust cases where this Court is unable to consider the appeals because of a lack of a quorum. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416.

The Act provides, it is true, that a decision may be reached by a three-judge court if a "majority of said three judges" concur. But that means only that the decision of the three judges need not be unanimous; it does not imply that two judges alone may hear and determine the case.

Moreover, we cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge. And should the latter have publicly indicated an opinion differing from that of his colleagues, his position might be helpful to the litigants and to this Court if the case were appealed.

It is readily apparent that this statutory requirement has not been met in this case. While all three judges of the specially constituted court heard the oral argument, only two of them participated in the determination of the case. The findings of fact, the conclusions of law and the judgment were all entered without the approval, concurrence or dissent of the third judge. He thus missed the very essence of the judicial function in this case—the actual adjudication of the issues of law and fact. All that we have here is an adjudication by two judges. But under the statute it is not enough that there be an adjudication by two judges. They lack any statutory authority to hear and determine an application to enjoin the enforcement of a Commission order. Any action of theirs in granting or denying such an application is as void as similar action by a single judge. See *Cumberland Tel. Co.* v. *Public Service Commission, supra,* 218–219; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10, 16.

It is suggested, however, that the three-judge requirement applies only to applications for interlocutory injunc-

tions against the enforcement of Interstate Commerce Commission orders; and since the decision in this case was one denying a permanent injunction, no complaint can be made that the decision was rendered by less than three judges. Reference is made in this respect to § 266 of the Judicial Code, 28 U. S. C. § 380, which deals with injunctions against the enforcement of state statutes or state administrative orders on the ground of unconstitutionality of the statute involved. Prior to 1925, that section indicated that a three-judge court was necessary only to pass upon applications for interlocutory injunctions. A single judge had jurisdiction to hear the cause on final hearing and to grant or deny a permanent injunction, thereby permitting him to reconsider and decide questions already passed upon by the three judges on the application for an interlocutory injunction. To end that anomalous situation, an amendment was added by the Act of February 13, 1925, 43 Stat. 938, to the effect that "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court . . . ." The problem then arose as to whether the words "such suit" in this amendment referred only to a suit in which an interlocutory injunction was in fact sought or to a suit in which it might have been, but was not, requested. A series of decisions by this Court has made it clear that the former interpretation is the correct one. A three-judge court must be convened for final hearings on applications for permanent injunctions against the enforcement of state statutes only where an interlocutory injunction has been sought and pressed to a hearing. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419. Where an interlocutory injunction is not

sought and pressed, a single judge may hear and determine the application for a permanent injunction.

By analogy, it is claimed that the same rule should obtain under the Urgent Deficiencies Act, that a three-judge court should be necessary for final hearings on applications for permanent injunctions only where interlocutory injunctions have been sought and pressed. While it is admitted that an interlocutory injunction was sought in this case, the argument is made that the application was not pressed to a hearing, the need for such temporary relief having been eliminated by the postponement of the effective date of the Commission order. The whole emphasis of the Act, like that of § 266 of the Judicial Code, is said to be directed toward the prevention of improvident issuance of interlocutory injunctions or restraining orders. Since there was no such danger in this case, the conclusion is reached that the underlying reason for the convening of a three-judge district court is absent here.

The answer to this argument is to be found in the clear language of the Act itself. It provides simply: "and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." Unlike § 266 of the Judicial Code, there is no reference here to "such suit"—to a suit where an interlocutory injunction is sought and pressed. Rather there is an unambiguous reference to the final hearing of "any suit" brought to enjoin the enforcement of a Commission order. That can only mean any suit seeking permanent relief, regardless of whether interlocutory relief is also requested. And since "the same requirement as to judges" is to apply to the final hearing of any suit, three judges must hear and determine the matter.

In addition, this portion of the Urgent Deficiencies Act was part of the original enactment and was not added to meet a problem like that which arose under § 266 of the Judicial Code. It was drawn against a background of prior statutes which provided for injunctive relief against the enforcement of Commission orders without regard to the presence of a request for temporary relief. The Hepburn Act required a three-judge court for "all" suits brought to enjoin a Commission order, "including the hearing on an application for a preliminary injunction,"—a clear indication that a three-judge court was also necessary where only permanent relief was sought. And the statute which created the Commerce Court, from which the district courts inherited their jurisdiction in this instance, referred to "cases" brought to enjoin or set aside Commission orders, making no distinction as to those in which only permanent relief was sought. We can only conclude that the framers of the Urgent Deficiencies Act meant to require a three-judge court in any suit brought to enjoin the enforcement of a Commission order, including a suit where an interlocutory injunction is not sought and pressed to a hearing.

Time and again this Court has referred to the three-judge court requirement under this Act without making the distinction which has been made under § 266 of the Judicial Code. *Lambert Co.* v. *Baltimore & Ohio R. Co.*, 258 U. S. 377, 381–382; *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781, 784–785; *United States* v. *Griffin*, *supra*, 232–233. Indeed, without passing upon the precise problem, this Court has affirmed judgments of three-judge district courts which had granted permanent injunctions in cases where no interlocutory injunctions had been sought or pressed. See, *e. g.*, *United States* v. *Idaho*, 298 U. S. 105. And see *Hudson & Manhattan R. Co.* v. *United States*, 28 F. Supp. 137, 140.

The language and background of the Act, which have been augmented by the consistent understanding of this Court,[5] thus combine to require the use of a three-judge district court in all cases in which a permanent or interlocutory injunction is sought against the enforcement of a Commission order. It matters not in a particular case whether an interlocutory injunction is requested or whether, if such relief is asked, the application is pressed to a hearing. This Act seeks to guard against more than an improvident issuance of interlocutory injunctions by single judges; it also seeks to prevent single judges from

[5] The same understanding, that the Urgent Deficiencies Act requires three judges for all applications to enjoin Commission orders while § 266 of the Judicial Code requires a three-judge court only for applications for interlocutory injunctions, is shown in the remarks of Mr. Justice Van Devanter at the Hearing before the Subcommittee of the Senate Committee on the Judiciary on S. 2060 and S. 2061, 68th Cong., 1st Sess., p. 33 (S. 2060 later became the Act of February 13, 1925):

"Section 238 as amended and reenacted in the bill would permit cases falling within four particular classes, and those only, to come from the district courts directly to the Supreme Court. The first and fourth classes are confined to antitrust and interstate commerce cases covered by the second section of the expedition act of February 11, 1903, and the provision in the act of October 22, 1913, respecting the enforcement, suspension, etc., of orders of the Interstate Commerce Commission. These cases are heard in the district court by three judges, one of whom must be a circuit judge. This and the character of the cases make it suggest that they should go directly to the Supreme Court rather than through the circuit courts of appeals. The third class is confined to cases wherein the enforcement of a State statute or of an order of a State board or commission is suspended by an interlocutory injunction. Applications for such injunctions are heard in the district court by three judges, one being a circuit judge. These injunctions now go directly to the Supreme Court for review, and the bill continues that procedure. . . ."

See also Mr. Justice Van Devanter's remarks at Hearing before House Committee on the Judiciary on H. R. 8206, 68th Cong., 2d Sess., p. 15.

issuing permanent injunctions.[6] To that end, Congress has required the use of a three-judge court and we are bound to carry out the letter and the spirit of that requirement. That two judges might, in a particular instance, give the same protection against single-judge action as three judges does not justify ignoring or relaxing the plain requirement that three judges hear and determine all applications to enjoin the enforcement of Commission orders. If such an amendment to the Act is to be made, it must be made by Congress rather than by this Court.

Since the judgment entered by two judges in this case was void and without statutory authority, we have no alternative but to vacate the judgment and dismiss the appeal. Appellants will be free, of course, to suggest that the District Court be reconvened in accordance with the Act so that three judges may hear and determine the application to enjoin the Commission order in issue.

So ordered.

MR. JUSTICE RUTLEDGE dissents.

[6] See also 50 Stat. 752, 28 U. S. C. § 380a, providing that no interlocutory or permanent injunction restraining the enforcement of, or setting aside, any Act of Congress on the ground of unconstitutionality shall be issued by a district court, unless the application shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge.

HARRIS *v.* UNITED STATES.

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

No. 34. Argued December 12, 13, 1946.—Decided May 5, 1947.

1. Upon warrants charging violations of the Mail Fraud Statute and the National Stolen Property Act, five federal agents arrested an accused in the living room of an apartment which was in his exclusive possession. Without a search warrant, they searched the apartment (living room, bedroom, kitchen and bath) intensively for five hours, for two canceled checks and any other means by which the crimes charged might have been committed. Beneath some clothes in a bedroom bureau drawer, they discovered a sealed envelope marked "personal papers" of the accused. This was torn open and found to contain several draft cards which were property of the United States and the possession of which was a federal offense. Upon the evidence thus obtained, the accused was convicted of violations of the Selective Training & Service Act of 1940 and § 48 of the Criminal Code. *Held:* The evidence was not obtained in violation of the provision of the Fourth Amendment against unreasonable searches and seizures, nor did its use violate the privilege of the accused against self-incrimination under the Fifth Amendment. Pp. 150–155.
2. A search incidental to an arrest may, under appropriate circumstances, extend beyond the person of the one arrested to the premises under his immediate control. P. 151.
3. A search incidental to an arrest, which is otherwise reasonable, is not rendered invalid by the fact that the place searched is a dwelling rather than a place of business. P. 151.
4. The search in this case was not rendered invalid by the fact that it extended beyond the room in which the accused was arrested. P. 152.
5. The search in this case was not more intensive than was reasonably demanded by the circumstances. Pp. 152–153.
6. The objects sought and those actually seized in this case were properly subject to seizure. P. 154.
7. It is of no significance in this case that the draft cards which were seized were unrelated to the crimes for which the accused was arrested. P. 154.

8. Since possession of the draft cards by the accused was a serious and continuing offense against federal laws, upon discovery of the cards a crime was being committed in the very presence of the agents conducting the search. Pp. 154–155.
9. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated. P. 155.
10. That abuses sometimes occur is no basis for giving sinister coloration to procedures which are basically reasonable. P. 155.

151 F. 2d 837, affirmed.

Petitioner was convicted in the District Court for violation of the Selective Training & Service Act and § 48 of the Criminal Code. The Circuit Court of Appeals affirmed. 151 F. 2d 837. This Court granted certiorari. 328 U. S. 832. *Affirmed*, p. 155.

Herbert K. Hyde and *Roy St. Louis* argued the cause, and *Mr. Hyde* filed a brief, for petitioner.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Robert S. Erdahl, Beatrice Rosenberg* and *Leon Ulman.*

Mr. Chief Justice Vinson delivered the opinion of the Court.

Petitioner was convicted on sixteen counts of an indictment [1] charging the unlawful possession, concealment and

[1] The indictment contained nineteen counts. Petitioner was convicted on the second, which charged the fraudulent concealment of 8 Notice of Classification Cards, DSS Form 57, and 11 Registration Certificates, DSS Form 2; the third, which charged fraudulent possession with intent to convert to his own use the above-mentioned property; the fourth through tenth, charging the unlawful alteration of a Notice of Classification card; the twelfth and fourteenth through

alteration of certain Notice of Classification Cards and Registration Certificates in violation of § 11 of the Selective Training and Service Act of 1940,[2] and of § 48 of the Criminal Code.[3] Prior to the trial, petitioner moved to suppress the evidence, which served as the basis for the conviction, on the grounds that it had been obtained by means of an unreasonable search and seizure contrary to the provisions of the Fourth Amendment[4] and that to permit the introduction of that evidence would be to violate the self-incrimination clause of the Fifth Amend-

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nineteenth, charging the unlawful possession of an altered Notice of Classification Card. Petitioner was acquitted on the first count, which charged theft of government property. Count 11, which charged alteration of a Notice of Classification card, and count 13, which charged possession of an altered card, were dismissed. Petitioner was sentenced to imprisonment for a term of five years on each of the sixteen counts indicated, the sentences to run concurrently.

[2] 54 Stat. 885, 894–895, 50 U. S. C. App. § 311. Section 623.61–2 of the Selective Service Regulations states that "It shall be a violation of these regulations for any person to have in his possession" a Notice of Classification not regularly issued to him or to alter or forge any Notice of Classification. Section 11 of the Act makes the failure to perform any duty required by the Regulations punishable by imprisonment for not more than five years or a fine of not more than $10,000.00 or both.

[3] 35 Stat. 1098, 18 U. S. C. § 101. Insofar as pertinent, the section provides: "Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any . . . property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than $5,000, or imprisoned not more than five years, or both; . . ."

[4] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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ment.[5] The motion to suppress was denied, and petitioner's numerous objections to the evidence at the trial were overruled. The Circuit Court of Appeals affirmed the conviction. 151 F. 2d 837. Certiorari was granted because of the importance of the questions presented.

Two valid warrants of arrest were issued. One charged that petitioner and one Moffett had violated the Mail Fraud Statute [6] by causing a letter addressed to the Guaranty Trust Company of New York to be placed in the mails for the purpose of cashing a forged check for $25,000.00 drawn on the Mudge Oil Company in pursuance of a scheme to defraud. The second warrant charged that petitioner and Moffett, with intent to defraud certain banks and the Mudge Oil Company, had caused a $25,000.00 forged check to be transported in interstate commerce, in violation of § 3 of the National Stolen Property Act.[7]

Five agents of the Federal Bureau of Investigation, acting under the authority of the two warrants, went to the apartment of petitioner in Oklahoma City and there arrested him. The apartment consisted of a living room, bedroom, bathroom and kitchen. Following the arrest, which took place in the living room, petitioner was handcuffed and a search of the entire apartment was undertaken. The agents stated that the object of the search was to find two $10,000.00 canceled checks of the Mudge Oil Company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. There was evidence connecting petitioner with that theft. In addition, the search was said to be for the purpose of locating "any means that might

[5] Insofar as pertinent, the Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

[6] 35 Stat. 1130–1131, 18 U. S. C. § 338.

[7] 53 Stat. 1178–1179, 18 U. S. C. § 413 *et seq.*

have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type." [8]

One agent was assigned to each room of the apartment and, over petitioner's protest, a careful and thorough search proceeded for approximately five hours. As the search neared its end, one of the agents discovered in a bedroom bureau drawer a sealed envelope marked "George Harris, personal papers." The envelope was torn open and on the inside a smaller envelope was found containing eight Notice of Classification cards and eleven Registration Certificates bearing the stamp of Local Board No. 7 of Oklahoma County. It was this evidence upon which the conviction in the District Court was based and against which the motion to suppress was directed. It is conceded that the evidence is in no way related to the crimes for which petitioner was initially arrested and that the search which led to its discovery was not conducted under the authority of a search warrant.[9]

In denying the motion to suppress, the District Court wrote no opinion. The Circuit Court of Appeals affirmed

[8] The agents who testified in the proceedings in the trial court clearly stated that the object of the search was the means employed in committing the crimes charged in the warrants of arrest. None of the subsequent statements of the agents, if read in their context, are in conflict with that assertion.

[9] It appears that the checks were never found. Respondent concedes that, in addition to the draft cards, seven pens and a quantity of tissue paper capable of being employed as instruments of forgery were seized. Also taken were twenty-seven pieces of celluloid which at the trial were demonstrated to be useful in picking a lock. It was respondent's theory that petitioner had obtained the canceled checks by theft from the offices of the Mudge Oil Company and that entry into the offices had been achieved in that manner. Petitioner alleged in his motion to suppress that various other items were taken, including sheets of blank paper, expense bills and receipts, personal mail, letters, etc.

the conviction, finding that the search was carried on in good faith by the federal agents for the purposes expressed, that it was not a general exploratory search for merely evidentiary materials, and that the search and seizure were a reasonable incident to petitioner's arrest.[10]

If it is true, as petitioner contends, that the draft cards were seized in violation of petitioner's rights under the Fourth Amendment, the conviction based upon evidence so obtained cannot be sustained. *Boyd* v. *United States,* 116 U. S. 616 (1886); *Weeks* v. *United States,* 232 U. S. 383 (1914); *Agnello* v. *United States,* 269 U. S. 20 (1925); *Segurola* v. *United States,* 275 U. S. 106 (1927). This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment ". . . are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . ." *Gouled* v. *United States,* 255 U. S. 298, 304 (1921).

This Court has also pointed out that it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. "Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Company* v. *United States,* 282 U. S. 344, 357 (1931).

The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin [11] and has long been an integral part of the law-enforcement

[10] 151 F. 2d 837.

[11] See opinion of Cardozo, J., in *People* v. *Chiagles,* 237 N. Y. 193, 142 N. E. 583 (1923); *Trial of Henry and John Sheares,* 27 How. St. Tr. 255, 321 (1798).

procedures of the United States [12] and of the individual states.[13]

The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello* v. *United States, supra,* at 30, it was said: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted." [14] It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.[15]

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[12] Examples of the practice are to be found in numerous cases in this Court and in the lower federal courts. *Weeks* v. *United States, supra; Agnello* v. *United States, supra; Carroll* v. *United States,* 267 U. S. 132 (1925); *United States* v. *Lee,* 274 U. S. 559 (1927); *Marron* v. *United States,* 275 U. S. 192 (1927); *Go-Bart Importing Company* v. *United States, supra; United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Parks* v. *United States,* 76 F. 2d 709 (1935); *United States* v. *71.41 Ounces Gold,* 94 F. 2d 17 (1938); *Matthews* v. *Correa,* 135 F. 2d 534 (1943).

[13] *Argetakis* v. *State,* 24 Ariz. 599, 212 Pac. 372 (1923); *Commonwealth* v. *Phillips,* 224 Ky. 117, 5 S. W. 2d 887 (1928); *Banks* v. *Farwell,* 21 Pick. (Mass.) 156 (1839). And see cases cited in 32 A. L. R. 697; 51 A. L. R. 434.

[14] Similar expressions may be found in the cases cited in notes 12 and 13. There is nothing in the *Go-Bart* and *Lefkowitz* cases, *supra,* which casts doubt on this proposition.

[15] Stricter requirements of reasonableness may apply where a dwelling is being searched. *Davis* v. *United States,* 328 U. S. 582 (1946); *Matthews* v. *Correa, supra,* at 537.

Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested.[16] Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.

Similar considerations are applicable in evaluating petitioner's contention that the search was, in any event, too intensive. Here again we must look to the particular circumstances of the particular case. As was observed by the Circuit Court of Appeals: "It is not likely that the checks would be visibly accessible. By their very nature they would have been kept in some secluded spot . . . ." The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that

[16] Searches going beyond the room of arrest were upheld in the *Agnello* and *Marron* cases, *supra*. The searches found to be invalid in the *Go-Bart* and *Lefkowitz* cases were so held for reasons other than the areas covered by the searches. It has not been the understanding of the lower federal courts that the search in every case must be so confined. See, for example: *United States* v. *Lindenfeld*, 142 F. 2d 829 (1944); *Matthews* v. *Correa, supra; United States* v. *71.41 Ounces Gold, supra.*

the search in this case went beyond that which the situation reasonably demanded.

This is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime. *Amos* v. *United States,* 255 U. S. 313 (1921); *Byars* v. *United States,* 273 U. S. 28 (1927); *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690 (1940). Here the agents entered the apartment under the authority of lawful warrants of arrest. Neither was the entry tortious nor was the arrest which followed in any sense illegal.

Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company* v. *United States, supra; United States* v. *Lefkowitz, supra.* In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search in good faith for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose.

Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.[17] Clearly the checks and other means and instrumentalities of the crimes charged in the warrants toward which the search was directed as well as the draft cards which were in fact seized fall within that class of objects properly subject to seizure. Certainly this is not a case of search for or seizure of an individual's private papers, nor does it involve a prosecution based upon the expression of political or religious views in such papers.[18]

Nor is it a significant consideration that the draft cards which were seized were not related to the crimes for which petitioner was arrested. Here during the course of a valid search the agents came upon property of the United States in the illegal custody of the petitioner. It was property of which the Government was entitled to possession.[19]

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[17] *Boyd* v. *United States, supra,* at 623–624; *Weeks* v. *United States, supra,* at 392–393; *Gouled* v. *United States, supra,* at 309; *Carroll* v. *United States, supra,* at 149–150; *Agnello* v. *United States, supra,* at 30; *Marron* v. *United States, supra,* at 199; *United States* v. *Lefkowitz, supra,* at 465–466. The same distinction is drawn in numerous cases in the lower federal courts: *Matthews* v. *Correa, supra,* at 537; *United States* v. *Lindenfeld, supra,* at 832; *In re Ginsburg,* 147 F. 2d 749, 751 (1945).

[18] *Entick* v. *Carrington,* 19 How. St. Tr. 1030, 1073–1074 (1765).

[19] *Davis* v. *United States, supra* at 590. And see *Boyd* v. *United States, supra,* 623–624; *Wilson* v. *United States,* 221 U. S. 361, 380 (1911).

In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.[20]

The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory. This Court has always been alert to protect against such abuse. But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable. We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's rights under the Constitution.

Affirmed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur, dissenting.

Because I deem the implications of the Court's decision to have serious threats to basic liberties, I consider it important to underscore my concern over the outcome of this

[20] *Milam* v. *United States,* 296 F. 629 (1924); *United States* v. *Old Dominion Warehouse,* 10 F. 2d 736 (1926); *United States* v. *Two Soaking Units,* 48 F. 2d 107 (1931); *Paper* v. *United States,* 53 F. 2d 184 (1931); *Benton* v. *United States,* 70 F. 2d 24 (1934); *Matthews* v. *Correa, supra.*

case. In *Davis* v. *United States*, 328 U. S. 582, the Court narrowed the protection of the Fourth Amendment [1] by extending the conception of "public records" for purposes of search without warrant.[2] The Court now goes far beyond prior decisions in another direction—it permits rummaging throughout a house without a search warrant on the ostensible ground of looking for the instruments of a crime for which an arrest, but only an arrest, has been authorized. If only the fate of the Davises and the Harrises were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the black-marketeer. I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future,

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] While this case presents a situation not involved in the *Davis* case, or in *Zap* v. *United States*, 328 U. S. 624, so that the Court's conclusion cannot rest on those cases, it is appropriate to note that neither of those cases carries the authority of a majority of the Court. Aside from the fact that a constitutional adjudication of recent vintage and by a divided Court may always be reconsidered, I am loath to believe that these decisions by less than a majority of the Court are the last word on issues of such far-reaching importance to constitutional liberties.

implications which portend serious threats against precious aspects of our traditional freedom.

If I begin with some general observations, it is not because I am unmindful of Mr. Justice Holmes' caution that "General propositions do not decide concrete cases." *Lochner* v. *New York,* 198 U. S. 45, 76. Whether they do or not often depends on the strength of the conviction with which such "general propositions" are held. A principle may be accepted "in principle," but the impact of an immediate situation may lead to deviation from the principle. Or, while accepted "in principle," a competing principle may seem more important. Both these considerations have doubtless influenced the application of the search and seizure provisions of the Bill of Rights. Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.

The provenance of the Fourth Amendment bears on its scope. It will be recalled that James Otis made his epochal argument against general warrants in 1761.[3]

[3] For reports of Otis' famous argument, see 2 Adams, Works pp. 523–25; Tudor, Life of James Otis, c. VI; Quincy's Massachusetts Reports pp. 471 *et seq.* (see also pp. 51–55); American History Leaflets, No. 33. And see the tribute of John Adams to Otis, Samuel Adams, and Hancock in 8 Old South Leaflets p. 57 (No. 179).

"The seizure of the papers of Algernon Sidney, which were made use of as the means of convicting him of treason, and of those of Wilkes about the time that the controversy between Great Britain and the American Colonies was assuming threatening proportions, was probably the immediate occasion for this constitutional provision. See Leach *v.* Money, Burr. 1742; S. C., 1 W. Bl. 555, 19 State Trials, 1001, and Broom, Const. Law, 525; Entick *v.* Carrington, 2 Wils. 275;

Otis' defense of privacy was enshrined in the Massachusetts Constitution of 1780 in the following terms:

> "XIV. Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws."

In the meantime, Virginia, in her first Constitution (1776), incorporated a provision on the subject narrower in scope:

> "X. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

When Madison came to deal with safeguards against searches and seizures in the United States Constitution, he did not draw on the Virginia model but based his proposal on the Massachusetts form. This is clear proof that Congress meant to give wide, and not limited, scope to this protection against police intrusion.

S. C., 19 State Trials, 1030, and Broom, Const. Law, 558; May, Const. Hist., ch. 10; Trial of Algernon Sidney, 9 State Trials, 817." Cooley, Principles of Constitutional Law (1st ed.) 212, n. 2.

Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence. John Adams surely is a competent witness on the causes of the American Revolution. And he it was who said of Otis' argument against search by the police, not unlike the one before us, "American independence was then and there born." 10 Adams, *Works* 247. That which lay behind immunity from police intrusion without a search warrant was expressed by Mr. Justice Brandeis when he said that the makers of our Constitution

> "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

To be sure, that was said by him in a dissenting opinion in which he, with Mr. Justice Holmes, Mr. Justice Butler and Mr. Justice Stone applied the prohibition of the Fourth Amendment to wiretapping without statutory authority. *Olmstead* v. *United States,* 277 U. S. 438, 478. But with only an occasional deviation, a series of decisions of this Court has construed the Fourth Amendment "liberally to safeguard the right of privacy." *United States* v. *Lefkowitz,* 285 U. S. 452, 464. (See an analysis of the cases in the Appendix to this opinion.) Thus, the federal rule established in *Weeks* v. *United States,* 232 U. S. 383, as against the rule prevailing in many States, renders evidence obtained through an improper search inadmissible no matter how relevant. See *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585, and Chafee, The Progress of the Law 1919–1922, 35 Harv. L. Rev. 673, 694 *et seq.* And

long before the *Weeks* case, *Boyd* v. *United States,* 116 U. S. 616, gave legal effect to the broad historic policy underlying the Fourth Amendment.[4] The *Boyd* opinion has been the guide to the interpretation of the Fourth Amendment to which the Court has most frequently recurred.

It is significant that the constitution of every State contains a clause like that of the Fourth Amendment and often in its precise wording. Nor are these constitutional provisions historic survivals. New York was alone in not having a safeguard against unreasonable search and seizure in its constitution. In that State, the privilege of privacy was safeguarded by a statute. It tells volumes that in 1938, New York, not content with statutory protection, put the safeguard into its constitution.[5] If

[4] Compare the answers to certified questions given by this Court in *Gouled* v. *United States,* 255 U. S. 298, with the forecast made by a student of the subject of known partiality in favor of civil liberties. Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 385–87. As pointed out by Professor Zechariah Chafee, Jr., in each instance where the *Gouled* case differs from Mr. Fraenkel's forecast, "the Court gave increased force to the constitutional guarantee." Chafee, The Progress of the Law 1919–1922, 35 Harv. L. Rev. 673, 699.

[5] It is not without interest to note the first appearance of provisions dealing with search and seizure in State constitutions: Alabama: I, 9 (1819); Arizona: II, 8 (1911); Arkansas: II, 9 (1836); California: I, 19 (1849); Colorado: II, 7 (1876); Connecticut: I, 8 (1818); Delaware: I, 6 (1792); Florida: I, 7 (1838); Georgia: I, 18 (1865); Idaho: I, 17 (1889); Illinois: VIII, 7 (1818); Indiana: I, 8 (1816); Iowa: I, 8 (1846); Kansas: I, 14 (1855); Kentucky: XII (1792); Louisiana: Tit. VII, Art. 108 (1864); Maine: I, 5 (1819); Maryland: Decl. of Rights, XXIII (1776); Massachusetts: Part the First, Art. XIV (1780); Michigan: I, 8 (1835); Minnesota: I, 10 (1857); Mississippi: I, 9 (1817); Missouri: XIII, 13 (1820); Montana: III, 7 (1889); Nebraska: I, 7 (1875); Nevada: I, 18 (1864); New Hampshire: I, XIX (1784); New Jersey: I, 6 (1844); New Mexico: II, 10 (1910); North Carolina: Decl. of Rights, XI (1776);

one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.

The Fourth Amendment, we have seen, derives from the similar provision in the first Massachusetts Constitution. We may therefore look to the construction which the early Massachusetts Court placed upon the progenitor of the Fourth Amendment:

> "With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law." *Commonwealth* v. *Dana,* 2 Met. (Mass.) 329, 336.

The plain import of this is that searches are "unreasonable" unless authorized by a warrant, and a warrant

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North Dakota: I, 18 (1889); Ohio: VIII, 5 (1802); Oklahoma: II, 30 (1907); Oregon: I, 9 (1857); Pennsylvania: Decl. of Rights, X (1776); Rhode Island: I, 6 (1842); South Carolina: I, 22 (1868); South Dakota: VI, 11 (1889); Tennessee: XI, 7 (1796); Texas: Decl. of Rights, 5 (1836), I, 7 (1845); Utah: I, 14 (1895); Vermont: c. I, XI (1777); Virginia: Bill of Rights, 10 (1776); Washington: I, 7 (1889); West Virginia: II, 3 (1861–63); Wisconsin: I, 11 (1848); Wyoming: I, 4 (1889).

hedged about by adequate safeguards. "Unreasonable" is not to be determined with reference to a particular search and seizure considered in isolation. The "reason" by which search and seizure is to be tested is the "reason" that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant.

It is noteworthy that Congress has consistently and carefully respected the privacy protected by the Fourth Amendment. Because they realized that the dangers of police abuse were persisting dangers, the Fathers put the Fourth Amendment into the Constitution. Because these dangers are inherent in the temptations and the tendencies of the police, Congress has always been chary in allowing the use of search warrants. When it has authorized them it has circumscribed their use with particularity. In scores upon score of Acts, Congress authorized search by warrant only for particular situations and in extremely restricted ways. Despite repeated importunities by Attorneys General of the United States, Congress long refused to make search by warrant generally available as a resource in aid of criminal prosecution. It did not do so until the first World War, and even then it did not do so except under conditions carefully circumscribed.

The whole history of legislation dealing with search and seizure shows how warily Congress has walked precisely because of the Fourth Amendment. A search of the entire premises for instruments of crime merely as an incident to a warrant of arrest has never been authorized by Congress. Nor has Congress ever authorized such search without a warrant even for stolen or contraband goods. On the contrary, it is precisely for the search of such goods

that specific legislative authorization was given by Congress. Warrants even for such search required great particularity and could be issued only on adequate grounds. (For a table of Congressional legislation, with indication as to its scope, see the Appendix to the dissenting opinion in the *Davis* case, 328 U. S. at 616.)

This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature.

The Court's reasoning, as I understand it, may be briefly stated. The entry into Harris' apartment was lawful because the agents had a warrant of arrest. The ensuing search was lawful because, as an incident of a lawful arrest, the police may search the premises on which the arrest took place since everything in the apartment was in the "possession" of the accused and subject to his control. It was lawful, therefore, for the agents to rummage the apartment in search for "instruments of the crime." Since the search was lawful, anything illicit discovered in the course of the search was lawfully seized. In any event, the seizure was lawful because the documents found were property of the United States and their possession was a continuing crime against the United States.

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Much is made of the fact that the entry into the house was lawful. But we are not confined to issues of trespass. The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry. The Amendment asserts the "right of the people to be secure" not only "in their persons, houses," but also in their "papers, and effects, against unreasonable searches and seizures." It is also assumed that because the search was allegedly for instruments of the crime for which Harris was arrested it was *ipso facto* justified as an incident of the arrest. It would hardly be suggested that such a search could be made without warrant if Harris had been arrested on the street. How, then, is rummaging a man's closets and drawers more incidental to the arrest because the police chose to arrest him at home? For some purposes, to be sure, a man's house and its contents are deemed to be in his "possession" or "control" even when he is miles away. Because this is a mode of legal reasoning relevant to disputes over property, the usual phrase for such non-physical control is "constructive possession." But this mode of thought and these concepts are irrelevant to the application of the Fourth Amendment and hostile to respect for the liberties which it protects. Due regard for the policy of the Fourth Amendment precludes indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest.

To find authority for ransacking a home merely from authority for the arrest of a person is to give a novel and ominous rendering to a momentous chapter in the history of Anglo-American freedom. An Englishman's home, though a hovel, is his castle, precisely because the law secures freedom from fear of intrusion by the police except under carefully safeguarded authorization by a magistrate.

To derive from the common law right to search the person as an incident of his arrest the right of indiscriminate search of all his belongings, is to disregard the fact that the Constitution protects both unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of authority to search.

But even if the search was reasonable, it does not follow that the seizure was lawful. If the agents had obtained a warrant to look for the cancelled checks, they would not be entitled to seize other items discovered in the process. *Marron* v. *United States,* 275 U. S. 192, 196.[6] Harris would have been able to reclaim them by a motion to suppress evidence. Such is the policy of the Fourth Amendment, recognized by Congress and reformulated in the New Rules of Criminal Procedure adopted only last year. See Rule 41 (e) superseding the Act of June 15, 1917, 40 Stat. 228, 229. The Court's decision achieves the novel and startling result of making the scope of search without warrant broader than an authorized search.

These principles are well established. While a few of the lower courts have uncritically and unwarrantedly extended the very limited search without warrant of a person upon his lawful arrest, such extension is hostile to the policy of the Amendment and is not warranted by the precedents of this Court.

"It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd* v. *United States,* 116 U. S. 616, 638, 641. Thus, it is unconstitutional to seize a person's private papers, though the search

[6] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

in which they were recovered was perfectly proper. *E. g., Gouled* v. *United States,* 255 U. S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, *e. g., Amos* v. *United States,* 255 U. S. 313; *Byars* v. *United States,* 273 U. S. 28; *Taylor* v. *United States,* 286 U. S. 1. And a search may be improper because of the object it seeks to uncover, *e. g., Weeks* v. *United States,* 232 U. S. 383, 393–94, or because its scope extends beyond the constitutional bounds, *e. g., Agnello* v. *United States,* 269 U. S. 20.

"The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment. Only rarely have its dicta appeared to give undue scope to the right of search on arrest, and *Marron* v. *United States, supra* [275 U. S. 192], is the only decision in which the dicta were reflected in the result. That case has been a source of confusion to the lower courts. Thus, the Circuit Court of Appeals for the Second Circuit felt that the *Marron* case required it to give a more restricted view to the prohibitions of the Fourth Amendment than that court had expounded in *United States* v. *Kirschenblatt,* 16 F. 2d 202, see *Go-Bart Co.* v. *United States, sub nom., United States* v. *Gowen,* 40 F. 2d 593, only to find itself reversed here, *Go-Bart Co.* v. *United States, supra* [282 U. S. 344], partly on the authority of the *Kirschenblatt* decision which, after the *Marron* case, it thought it must disown. The uncritical application of the right of search on arrest in the *Marron* case has surely been displaced by *Go-Bart Co.* v. *United States, supra,* and even more drastically by *United States* v. *Lefkowitz, supra* [285 U. S. 452], unless one is to infer that an earlier case qualifies later decisions although these later decisions have explicitly confined the earlier case." *Davis* v. *United States,* 328 U. S. at 612–13 (dissenting opinion).

It is urged that even if the search was not justified, once it was made and the illicit documents discovered, they could be seized because their possession was a "continuing offense" committed "in the very presence of the agents." Apparently, then, a search undertaken illegally may retrospectively, by a legal figment, gain legality from what happened four hours later. This is to defeat the prohibition against lawless search and seizure by the application of an inverted notion of trespass *ab initio*. Here an unconstitutional trespass *ab initio* retrospectively acquires legality. Thus, the decision finds satisfaction of the constitutional requirement by circular reasoning. Search requires authority; authority to search is gained by what may be found during search without authority. By this reasoning every illegal search and seizure may be validated if the police find evidence of crime. The result can hardly be to discourage police violation of the constitutional protection.

If the search is illegal when begun, as it clearly was in this case if past decisions mean anything, it cannot retrospectively gain legality. If the search was illegal, the resulting seizure in the course of the search is illegal. It is no answer to say that possession of a document may itself be a crime. There is no suggestion here that the search was based on even a suspicion that Harris was in possession of illicit documents. The search was justified and is justified only in connection with the offense for which there was a warrant of arrest. But unless we are going to throw to the winds the latest unanimous decisions of this Court on the allowable range of search without warrant incidental to lawful arrest, *Go-Bart Co.* v. *United States*, 282 U. S. 344, and *United States* v. *Lefkowitz*, 285 U. S. 452, this was an unlawful search which rendered unavailable as evidence everything seized in the course of it. That the agents might have obtained a warrant to make the search only emphasizes the illegal-

ity of their conduct. In the words of Mr. Justice Holmes, speaking for the Court, the precious constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. Nor does the fact that the goods seized are contraband make valid an otherwise unlawful search and seizure. *Agnello* v. *United States,* 269 U. S. 20. Indeed it was for contraband goods that search warrants, carefully hedged about, were first authorized by Congress.

The only exceptions to the safeguard of a warrant issued by a magistrate are those which the common law recognized as inherent limitations of the policy which found expression in the Fourth Amendment—where circumstances preclude the obtaining of a warrant (as in the case of movable vehicles), and where the warrant for the arrest of a person carries with it authority to seize all that is on the person, or is in such open and immediate physical relation to him as to be, in a fair sense, a projection of his person. That is the teaching of both the *Go-Bart* and the *Lefkowitz* cases, which effectually retract whatever may have been the loose consideration of the problem in *Marron* v. *United States,* 275 U. S. 192. Thus, the *Go-Bart* case emphasized that the things seized in the *Marron* case were "visible and accessible and in the offender's immediate custody." 282 U. S. 344, 358. By "immediate custody" was not meant that figurative possession which for some legal purposes puts one in "possession" of everything in a house. The sentence following that just quoted excludes precisely the kind of thing that was done here. "There was no threat of force or general search or rummaging of the place." *Ibid.*

In our case, five agents came to arrest Harris on a charge of violating the Postal Laws and the National Stolen Property Act. Though the arrest was consummated in

the living room, the agents were told to make "a thorough search" of the entire apartment. In the bedroom they lifted the carpets, stripped the bed-linen, turned over the mattress. They combed the contents of the linen closet and even looked into Harris' shoes. The Selective Service cards, the items whose seizure is here in controversy, were discovered only after agents tore open a sealed envelope labeled "personal papers" which they had found under some clothes in a drawer of a small bureau in the bedroom. If there was no "rummaging of the place" in this case it would be difficult to imagine what "rummaging of the place" means.

Again, in the *Lefkowitz* case, the *Marron* case was carefully defined and limited:

> "There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made." 285 U. S. at 465.

Surely no comparable situation is now here. There was no search warrant, no crime was "openly being committed" in the presence of the officers, the seized documents were not "in plain view" or "picked up by the officers as an incident of the arrest." Here a "thorough search" was made, and made without warrant.

To say that the *Go-Bart* and the *Lefkowitz* cases—both of them unanimous decisions of the Court—are authority for the conduct of the arresting agents in this case is to find that situations decisively different are the same.

It greatly underrates the quality of the American people and of the civilized standards to which they can be summoned to suggest that we must conduct our criminal justice on a lower level than does England, and that our police must be given a head which British courts deny theirs. A striking and characteristic example of the solicitous care of English courts concerning the "liberty of the subject" may be found in the recent judgments in *Christie* v. *Leachinsky*. In that case the House of Lords unanimously ruled that if a policeman arrests without warrant, although entertaining a reasonable suspicion of felony which would justify arrest, but does not inform the person of the nature of the charge, the police are liable for false imprisonment for such arrest. These judgments bear mightily upon the central problem of this case, namely, the appropriate balancing, in the words of Lord Simonds, of "the liberty of the subject and the convenience of the police." *Christie* v. *Leachinsky*, [1947] 1 All E. R. 567, 576.[7]

[7] The extent to which such subordination of the police to law finds support in informed English opinion is reflected by the comments of the Solicitors' Journal. After noting that, in the view of Lord Simon, "Any other general rule would be contrary to our conception of individual liberty, though it might be tolerated in the time of the *Lettres de Cachet* in the eighteenth century in France or under the Gestapo," the Journal observes: "The importance of the reaffirmation of this principle cannot be exaggerated. The powers of private persons to arrest where a felony has been committed and there is reasonable ground for thinking that the person detained has committed it are important now that crimes of violence are more numerous, and the statutory powers of arrest without warrant under, e. g., the Malicious Damage Act, 1861, the Larceny Act, 1916, the Curtis Act of 1876, and many other Acts are more used than is generally appreciated. Of no less importance in such times as these is the assertion of our individual liberties to counteract any tendency which may appear for police powers to be exceeded." 91 Solicitors' Journal 184–85 (April 12, 1947).

The English attitude was clearly evinced also in the famous *Savidge* case. "Both the original incident and its sequel illustrate the sensitiveness of English opinion to even a suggestion of oppression by the police." IV Reports of the National Commission on Law Observance and Enforcement ("Lawlessness in Law Enforcement") P. 261. For "the high standards of conduct exacted by Englishmen of the police" (*id.* at 259) see the debates in the House of Commons, 217 Hans. Deb. (Commons) cols. 1303 *et seq.* (May 17, 1928), and 220 *id.* cols. 35 and 805 *et seq.* (July 20, 1928) and the Report of the Tribunal of Inquiry on the *Savidge* case, Cmd. 3147, 1928. There are those who say that we cannot have such high standards of criminal justice because the general standards of English life ensure greater obedience to law and better law enforcement. I reject this notion, and not the least because I think it is more accurate to say that the administration of criminal justice is more effective in England because law enforcement is there pursued on a more civilized level.

Of course, this may mean that it might be more difficult to obtain evidence of an offense unexpectedly uncovered in a lawless search. It may even mean that some offenses may go unwhipped of the law. If so, that is part of the cost for the greater gains of the Fourth Amendment. The whole point about the Fourth Amendment is that "Its protection extends to offenders as well as to the law abiding," because of its important bearing in maintaining a free society and avoiding the dangers of a police state. *United States* v. *Lefkowitz, supra* at 464. But the impediments of the Fourth Amendment to effective law enforcement are grossly exaggerated. Disregard of procedures imposed upon the police by the Constitution and the laws is too often justified on the score of necessity. This case is a good illustration how lame an excuse it is that con-

duct such as is now before us is required by the exigencies of law enforcement. Here there was ample opportunity to secure the authority of law to make the search and later authority from a magistrate to seize the articles uncovered in the course of the search. *Taylor* v. *United States,* 286 U. S. 1, 6; *United States* v. *Kaplan,* 89 F. 2d 869, 871. The hindrances that are conjured up are counsels of despair which disregard the experience of effective law enforcement in jurisdictions where the police are held to strict accountability and are forbidden conduct like that here disclosed.

Stooping to questionable methods neither enhances that respect for law which is the most potent element in law enforcement, nor, in the long run, do such methods promote successful prosecution. In this country police testimony is often rejected by juries precisely because of a widely entertained belief that illegal methods are used to secure testimony. Thus, dubious police methods defeat the very ends of justice by which such methods are justified. No such cloud rests on police testimony in England. Respect for law by law officers promotes respect generally, just as lawlessness by law officers sets a contagious and competitive example to others. See IV Reports of the National Commission on Law Enforcement and Observance ("Lawlessness in Law Enforcement") *passim,* especially pp. 190–92. Moreover, by compelling police officers to abstain from improper methods for securing evidence, pressure is exerted upon them to bring the resources of intelligence and imagination into play in the detection and prosecution of crime.

No doubt the Fourth Amendment limits the freedom of the police in bringing criminals to justice. But to allow them the freedom which the Fourth Amendment was designed to curb was deemed too costly by the Founders. As Mr. Justice Holmes said in the *Olmstead* case, "we must consider the two objects of desire,

both of which we cannot have, and make up our minds which to choose." 277 U. S. at 470. Of course arresting officers generally feel irked by what to them are technical legal restrictions. But they must not be allowed to be unmindful of the fact that such restrictions are essential safeguards of a free people. To sanction conduct such as this case reveals is to encourage police intrusions upon privacy, without legal warrant, in situations that go even beyond the facts of the present case. If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene. It is for this reason—the dangerous tendency of allowing encroachments on the rights of privacy—that this Court in the *Boyd* case gave to the Fourth Amendment its wide protective scope.

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the "Report upon the Illegal Practices of the United States Department of Justice," which aroused the public concern of Chief Justice Hughes [8] (then at the bar), and by the little book entitled "The Deportations De-

[8] Address, Harvard Law School Association, June 21, 1920, *Some Observations on Legal Education and Democratic Progress,* p. 23: "We cannot afford to ignore the indications that, perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded. Very recently information has been laid by responsible citi-

lirium of Nineteen-Twenty" by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor.

More than twenty years ago, before democracy was subjected to its recent stress and strain, Judge Learned Hand, in a decision approved by this Court in the *Lefkowitz* case, expressed views that seem to me decisive of this case:

> "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." *United States* v. *Kirschenblatt,* 16 F. 2d 202, 203.

[For dissenting opinions of MURPHY and JACKSON, JJ., see *post,* pp. 183, 195.]

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zens at the bar of public opinion of violations of personal rights which savor of the worst practices of tyranny."

For a contemporaneous judicial account of searches and seizures in violation of the Fourth Amendment in connection with the Communist raids of January 2, 1920, see Judge George W. Anderson's opinion in *Colyer* v. *Skeffington,* 265 F. 17.

APPENDIX

Analysis of Decisions Involving Searches and Seizures, from *Weeks* v. *United States*, 232 U. S. 383, up to *Davis* v. *United States*, 328 U. S. 582*

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
Weeks v. *United States*, 232 U. S. 383 (1914).	Use of mails to distribute lottery tickets.	Arrested without a warrant and not during commission of crime.	Personal papers and lottery tickets, taken from defendant's home.	None	None	None	District court had improperly admitted in evidence some of articles seized; conviction reversed.
Schenck v. *United States*, 249 U. S. 47 (1919).	Conspiracy to violate Espionage Act of 1917.	Indictment	Leaflets counseling draft evasion.	Leaflets counseling draft evasion. Warrant was directed to search of Socialist headquarters from which leaflets were mailed by defendant.	do	do	Evidence properly admitted by trial court for use against defendant.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385 (1920).	Contempt of court for failure to produce books and documents required by subpoena. (One of defendants was a corporation.) Order was based on evidence secured as indicated in columns 3–7.	No arrest	Books and papers seized under color of invalid subpoena.	None	do	do	Order directing production of evidence, which was based on knowledge secured in violation of Fourth Amendment, was error, and conviction for failure to obey order reversed. (White, C. J., and Pitney, J., dissenting.)
Gouled v. *United States*, 255 U. S. 298 (1921).	Conspiracy and use of mails to defraud United States.	Indictment	Four documents taken from defendant's office.	Three of the papers. (The other was taken by stealth from the office by a government agent.)	do	do	On certification, held that papers were inadmissible. Search warrant may issue only when interest of public or complainant in the article is primary, or when its possession is unlawful; it may not issue merely to secure evidence.
Amos v. *United States*, 255 U. S. 313 (1921).	Removal of whiskey without payment of tax; sale of whiskey on which no tax had been paid.	do	Whiskey in question, as result of search without a warrant in defendant's absence. (Officers admitted by defendant's wife.)	None	do	do	Evidence improperly admitted; conviction reversed.
Burdeau v. *McDowell*, 256 U. S. 465 (1921).	Civil suit for return of property in hands of Assistant to Attorney General.	No arrest	Plaintiff's books and papers had been stolen from plaintiff's possession by a party unrelated to the Federal Government.	do	do	do	District court had held that retention of paper for use as evidence was in violation of Fourth and Fifth Amendments; this Court reversed. (Brandeis and Holmes, JJ., dissenting.)

*For cases related but not immediately pertinent, see *Olmstead* v. *United States*, 277 U. S. 438; *Goldman* v. *United States*, 316 U. S. 129; *United States* v. *White*, 322 U. S. 694; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186.

APPENDIX—Continued

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
Essgee Co. v. *United States*, 262 U. S. 151 (1923).	Violation of import laws. (Corporate and individual defendants; only latter, of course, were arrested.)	Warrants	Corporate papers and books	Corporate papers and books produced under subpoena.	None	None	District court admitted evidence against both corporate and individual defendants. This Court affirmed.
Carroll v. *United States*, 267 U. S. 132 (1925).	Transportation of alcoholic beverages.	Arrested during commission of crime.	Alcoholic beverages	None	Whiskey uncovered during search of car in which it was being transported at time of arrest.	do	Evidence was properly admitted; conviction affirmed. (McReynolds and Sutherland, JJ., dissenting.)
Steele v. *United States*, 267 U. S. 498, 505 (1925) (two cases).	1. Action for return of seized liquor.	1. No arrest	1. Liquor	1. Liquor. (Warrant was directed to address not specifically stated to be that of building searched.)	1. None	1. None	1. Evidence properly secured and need not be returned.
	2. Possession of liquor in violation of Prohibition Act.	2. Information	2. Liquor	2. Liquor. (Warrant was directed to prohibition officer. Question of reasonable cause for its issuance was not left to jury.) Alcoholic wines.	2. None	2. None	2. Evidence properly secured and properly admitted by district court; judgment affirmed.
Dumbra v. *United States*, 268 U. S. 435 (1925).	Motion to quash search warrant.	No arrest	Alcoholic wines	Alcoholic wines	None	None	Warrant properly issued on reasonable ground; refusal of district court to quash search warrant affirmed.
Agnello v. *United States*, 269 U. S. 20 (1925).	Possession and sale of cocaine without registration or payment of tax.	Arrested during commission of crime.	Can of cocaine seized at home of one of defendants while he was being arrested several blocks away.	None	do	do	Evidence improperly admitted; conviction, affirmed by the C. C. A., here reversed.
Byars v. *United States*, 273 U. S. 28 (1927).	Possession of counterfeit alcoholic beverage stamps.	Indictment	Counterfeit alcoholic beverage stamps.	No Federal warrant issued. But warrant was issued by state judge to state officers to search for liquor. Federal officer accompanied them on search and uncovered stamps.	do	Counterfeit alcoholic beverage stamps. (See column 5.)	Conviction in district court, affirmed in the C. C. A., here reversed, because evidence was improperly admitted.
McGuire v. *United States*, 273 U. S. 95 (1927).	Possession of intoxicating liquor.	Information	Intoxicating liquor	Intoxicating liquor. (Most of liquor thus seized was immediately destroyed, with only samples retained for evidence.)	do	None	On certificate from C. C. A. after conviction, held that evidence was properly admitted. Butler, J., concurring in result.
United States v. *Lee*, 274 U. S. 559 (1927).	Conspiracy to violate Prohibition Act.	Arrested while engaging in crime.	71 cases of grain alcohol. Cases were seized on American vessel more than 12 miles from shore.	None	71 cases of grain alcohol	do	Defendant's conviction, reversed by the C. C. A. on grounds of illegal search, sustained by this Court.

APPENDIX—Continued

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
Segurola v. *United States*, 275 U. S. 106 (1927).	Transportation of intoxicating liquor.	Arrested during commission of crime.	Intoxicating liquor	None	The liquor	None	Conviction, affirmed by C. C. A., affirmed by this Court.
United States v. *Berkeness*, 275 U. S. 149 (1927).	Civil suit to abate nuisance.	No arrest	Liquor	Liquor. Warrant was invalid for failure of allegation of sale on the premises as basis for its issue.	None	do	District court judgment excluding evidence, affirmed by C. C. A., affirmed by this Court.
Marron v. *United States*, 275 U. S. 192 (1927).	Violation of Prohibition Act.	Indictment. (Crime committed in presence of arresting officers. Articles seized, as described in columns 4–7, were taken at time of arrest.)	Intoxicating liquor, ledger, and papers. (Ledger was in closet in back of bar which contained some of the liquor; papers (bills) were on table near cash register.)	The intoxicating liquor	Ledger and bills. Court held that, while seizure was not authorized by the warrant, ledger and bills were properly seized as within the "immediate possession and control" of offender.	See explanation in 282 U. S. at 358, that the articles "were visible and accessible" and that there was no "rummaging of the place." And see 285 U. S. at 465.	Evidence properly admitted; conviction sustained by C. C. A. affirmed here.
Gambino v. *United States*, 275 U. S. 310 (1927).	Transportation of intoxicating liquor.	Crime committed in presence of arresting officers (state police).	Intoxicating liquor	None	Liquor seized as result of search of car in which defendants were when arrested. But Court found no probable cause for arrest.	None	Evidence improperly admitted; conviction, affirmed by the C. C. A., reversed here.
Go-Bart Co. v. *United States*, 282 U. S. 344 (1931).	Possession, transportation, sale, etc., of intoxicating liquor.	Invalid warrant	Office papers and records secured by use of keys taken from defendants at time of their arrest, and on false statement that they had a warrant for the papers.	do	None. (See column 3.)	do	Evidence must be returned to defendants; judgments of district court and the C. C. A. reversed.
Husty v. *United States*, 282 U. S. 694 (1931).	Possession and transportation of intoxicating liquor.	Arrested during commission of crime.	Intoxicating liquor	do	Intoxicating liquor uncovered during search of automobile reasonably believed to contain such contraband.	do	Movable vehicle authorizes search on probable cause. Evidence properly admitted.
United States v. *Lefkowitz*, 285 U. S. 452 (1932).	Conspiracy to violate Prohibition Act, including use of premises for sale and solicitation of orders.	Warrant of U. S. Commissioner.	Variety of papers taken from desks, cabinets, and wastebasket. Among these papers were lists of names and addresses, stationery, bills directed to customers, letters of solicitation, etc.	do	None. (Papers in wastebasket were, of course, in open view.)	do	District court denied motions for return of papers; C. C. A. reversed, and this Court affirmed judgment of C. C. A.

APPENDIX—Continued

1. Name of case	2. Charge on arrest	3. Authority for arrest	4. Articles seized	5. Articles seized under warrant	6. Articles seized incident to lawful arrest	7. Articles seized incident to authorized search for other articles	8. Decision
Taylor v. *United States*, 286 U. S. 1 (1932).	Illegal possession of intoxicating liquor.	Arrest made on basis of evidence uncovered during search.	122 cases of liquor. Agents investigated and noticed odor of alcohol coming from garage. Defendant had been under suspicion. Agents broke into garage and uncovered cache of liquor. Defendant was arrested when he came to garage during search.	None	None	None	Evidence of seized liquor improperly admitted; conviction and C. C. A. affirmance reversed.
Grau v. *United States*, 287 U. S. 124 (1932).	Unlawful manufacture and possession of liquor.	Indictment	Still, its appurtenances, and 350 gallons of whiskey.	Still, its appurtenances, and 350 gallons of whiskey. But warrant issued on mere allegations that defendant had been seen hauling cans often used for liquor, and bringing cane sugar onto premises; that full cans were removed from premises; and that odors of fumes of cooking mash were noticeable. There was no allegation of any sale on premises.	do	do	Evidence of seized goods improperly admitted; conviction in trial court and affirmance of C. C. A. reversed. (Stone and Cardozo, JJ., dissenting.)
Sgro v. *United States*, 287 U. S. 206 (1932).	Possession and sale of intoxicating liquor.	Information	Intoxicating liquor	Intoxicating liquor. But warrant was invalid. When first issued, it was not executed within 10 days; reissued without new evidence or affidavits.	do	do	Evidence of seized liquor improperly admitted; conviction and its affirmance by C. C. A. reversed. (McReynolds, J., concurring in special opinion; Stone and Cardozo, JJ., dissenting.)
Nathanson v. *United States*, 290 U. S. 41 (1933).	Importation of liquor without payment of import duties.	Information, filed after seizure.	do	Intoxicating liquor. But warrant issued by state judge at request of customs agent on mere allegation of belief by customs agent that defendant had violated the law.	do	do	Evidence of seized liquor improperly admitted; conviction and affirmance by C. C. A. reversed.
Scher v. *United States*, 305 U. S. 251 (1938).	Possession and transportation of distilled alcohol on which tax had not been paid.	Arrest during commission of crime.	Distilled alcohol on which tax had not been paid.	None	Liquor seized during search of car which officers had followed into garage adjoining defendant's house.	do	Evidence properly admitted; conviction and judgment of C. C. A. affirmed.

MR. JUSTICE MURPHY, dissenting.

The Court today has resurrected and approved, in effect, the use of the odious general warrant or writ of assistance, presumably outlawed forever from our society by the Fourth Amendment. A warrant of arrest, without more, is now sufficient to justify an unlimited search of a man's home from cellar to garret for evidence of any crime, provided only that he is arrested in his home. Probable cause for the search need not be shown; an oath or affirmation is unnecessary; no description of the place to be searched or the things to be seized need be given; and the magistrate's judgment that these requirements have been satisfied is now dispensed with. In short, all the restrictions put upon the issuance and execution of search warrants by the Fourth Amendment are now dead letters as to those who are arrested in their homes.

That this decision converts a warrant for arrest into a general search warrant lacking all the constitutional safeguards is demonstrated most plainly by the facts. Two valid warrants were issued for the arrest of petitioner and one C. R. Moffett. The first warrant charged them with a violation of the mail fraud statute, § 215 of the Criminal Code; it was alleged that they sent a letter through the mails in connection with the execution of a scheme to defraud by negotiating and cashing a forged check drawn on the Mudge Oil Co. in the sum of $25,000. The second warrant charged that they caused the same check to be transported in interstate commerce in violation of § 3 of the National Stolen Property Act.

Two agents of the Federal Bureau of Investigation went to petitioner's apartment, armed with these warrants for arrest. Petitioner was placed under arrest in the living room of his apartment and was safely handcuffed. The agents, together with three others who had arrived in the meantime, then began a systematic ransacking of the

apartment. Operating without the benefit of a search warrant, they made a search which they admitted was "as thorough as we could make it." For five hours they literally tore the place apart from top to bottom, going through all of petitioner's clothes and personal belongings, looking underneath the carpets, turning the bed upside down, searching through all the bed linen, opening all the chest and bureau drawers, and examining all personal papers and effects. Nothing was left untouched or unopened.

The agents testified that they were searching for "two $10,000 canceled checks of the Mudge Oil Company which our investigation established had been stolen from the offices of the Mudge Oil Company" and which might have been used in connection with forging the $25,000 check in issue. It was also admitted that they were searching "for any means that might have been used to commit these two crimes [charged in the warrants for arrest], such as burglar tools, pens, or anything that could be used in a confidence game of this type"; "we thought we might find a photostatic copy [of the $25,000 check]"; "anything which would indicate a violation of the mail fraud statute and the National Stolen Property Act"; "anything you could find in connection with the violation of the law for which he [petitioner] was then arrested." One of them also admitted that they were "searching for goods, wares, merchandise, articles, or anything in connection with the use of the mails to defraud, and also in connection with the violation of Section 415 of Title 18."

Suffice it to say that they found no checks. The agents admitted seizing seven pens, tissue paper and twenty-seven pieces of celluloid, the latter being found wrapped in a towel in a drawer of the bedroom dresser. Petitioner charges, and it is undenied, that the agents also seized blank stationery of various hotels, blank ruled sheets of paper, several obsolete fountain pens, expense bills and

receipts, personal letters, a bill of sale for petitioner's automobile, note books, address books and some mineral deeds.

Most significant of all, however, was the unexpected discovery and seizure, at the end of this long search, of a sealed envelope marked "George Harris, personal papers." This envelope, which was found in a dresser drawer beneath some clothes, contained eleven draft registration certificates and eight notices of draft classification. Petitioner was then charged with the unlawful possession, concealment and alteration of these certificates and notices and found guilty. Nothing has ever developed as to the forged $25,000 check, which was the basis of petitioner's original arrest. No evidence of the crimes charged in the warrants for arrest has been found; no prosecution of petitioner for those crimes has developed.

It is significant that the crime which was thus unexpectedly discovered—namely, the illegal possession of the draft certificates and notices—could not have been brought to light in this case through the use of ordinary constitutional processes. There was no *prima facie* evidence to support the issuance of a warrant for petitioner's arrest for the crime of possessing these items. Nor was there any probable cause or any basis for an oath or affirmation which could justify a valid search warrant for these items. Their presence in petitioner's apartment could be discovered only by making an unlimited search for anything and everything that might be found, a search of the type that characterizes a general search warrant or writ of assistance. And it was precisely that type of search that took place in this case.

The Court holds, however, that the search was justified as an incident to petitioner's lawful arrest on the mail fraud and stolen property charges. It is said that law enforcement officers have the right, when making a valid arrest, to search the place and to seize the fruits and in-

strumentalities of the crime for which the arrest was made. And since the search here was made, at least in part, to find the instrumentalities of the alleged crimes, the search was valid and petitioner cannot be heard to complain of what was found during the course of that search. This conclusion bears further analysis, however.

It is undoubtedly true that limited seizures may be made without the benefit of search warrants under certain circumstances where a person has been arrested in his home. Due accommodation must be made for the necessary processes of law enforcement. Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence. *Weeks* v. *United States,* 232 U. S. 383, 392; *Agnello* v. *United States,* 269 U. S. 20, 30. But where no properly limited search warrant has been issued, this Court has been scrupulously insistent on confining very narrowly the scope of search and seizure. The mere fact that a man has been validly arrested does not give the arresting officers untrammeled freedom to search every cranny and nook for anything that might have some relation to the alleged crime or, indeed, to any crime whatsoever. Authority to arrest, in other words, gives no authority whatever to search the premises where the arrest occurs and no authority to seize except under the most restricted circumstances.

Illustrative of the strict limitations which this Court has placed upon searches and seizures without a warrant in connection with a lawful arrest are the three cases of *Marron* v. *United States,* 275 U. S. 192; *Go-Bart Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452. In the *Marron* case, an individual was arrested while actually engaged in running an illegal saloon in pursuance of a conspiracy; a prohibition agent secured a warrant for a search of the premises and for the

seizure of intoxicating liquors and articles for their manufacture. Liquor was found in a closet. While searching in the closet, the agents noticed a ledger showing inventories of liquor and receipts relating to the business. Alongside the cash register they found bills for utilities furnished to the premises. They took the ledger and the bills. This Court held that while the seizure of the ledger and bills could not be justified under the search warrant, because not mentioned therein, their seizure was proper as an incident to the arrest inasmuch as they were necessary to the carrying on of the illegal business.

The *Marron* case at first was widely misunderstood as having held that most of the restrictions had been removed on searches of premises incident to arrests. *United States* v. *Gowen,* 40 F. 2d 593; *United States* v. *Poller,* 43 F. 2d 911. This misunderstanding was removed by the *Go-Bart* case, which made it clear that the items seized in the *Marron* case were visible and accessible and in the offender's immediate custody; it was further pointed out that there was no threat of force or general search or rummaging of the place in the *Marron* case. The inherent limitations of the *Marron* holding were demonstrated by the facts and decision in the *Go-Bart* case. There the defendant Bartels was placed under lawful arrest in his office on a charge of conspiracy to sell intoxicating liquors. Gowen, the other defendant, arrived and he also was placed under lawful arrest. Gowen was then forced to open a desk and a safe, which were searched by the agents along with other parts of the office. A large quantity of papers belonging to the defendants was seized. This Court held that such a seizure was unconstitutional, the search being general and unlimited in scope and being undertaken in the hope that evidence of the crime might be found.

In the *Lefkowitz* case, the defendants were placed under lawful arrest in their office on a charge of conspiracy to violate the liquor laws. The arresting officers then pro-

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ceeded to search the desks, the towel cabinet and the waste baskets, seizing various books, papers and other articles. All of this was done without a search warrant. Once again the Court held that the Constitution had been violated. It was pointed out that the searches were exploratory and general and made solely to find evidence of the defendant's guilt of the alleged conspiracy or some other crime; the papers and other articles seized were unoffending in themselves.

Tested in the light of the foregoing principles and decisions, the search in the instant case cannot be justified. Even more glaring than the searches in the *Go-Bart* and *Lefkowitz* cases, the search here was a general exploratory one undertaken in the hope that evidence of some crime might be uncovered. The agents were searching for more than the fruits and instrumentalities of the crimes for which the arrest was made. By their own repeated testimony, they were searching for "anything" in connection with the alleged crimes, for "anything" that would indicate a violation of the laws in question. And their seizure of the draft certificates and notices demonstrates that they were also on the lookout for evidence of any other crime. In the absence of a valid warrant, such an unlimited, ransacking search for "anything" that might turn up has been condemned by this Court in constitutional terms time and time again. Nothing in any of the previous decisions of this Court even remotely approves or justifies this type of search as an incident to a valid arrest; in this respect, today's decision flatly contradicts and, in effect, overrules the *Go-Bart* and *Lefkowitz* cases.

Moreover, even if we assume that the agents were merely looking for the fruits and instrumentalities of the crimes for which the arrest was made, the Constitution has been violated. There are often minute objects connected with the commission of a crime, objects that can

be hidden in a small recess of a home or apartment and that can be discovered only by a thorough, ransacking search. Where the discovery of such objects requires an invasion of privacy to the extent evident in this case, the dangers inherent in such an invasion without a warrant far outweigh any policy underlying this method of crime detection. A search of that scope inevitably becomes, as it has in this case, a general exploratory search for "anything" in connection with the alleged crime or any other crime—a type of search which is most roundly condemned by the Constitution.

Thus when a search of this nature degenerates into a general exploratory crusade, probing for anything and everything that might evidence the commission of a crime, the Constitution steps into the picture to protect the individual. If it becomes evident that nothing can be found without a meticulous uprooting of a man's home, it is time for the law enforcement officers to secure a warrant. And if such a search has any reasonableness at all, it is a reasonableness that must be determined through the informed and deliberate judgment of a magistrate. "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States* v. *Lefkowitz, supra,* 464.

To insist upon a search warrant in the circumstances of this case is not to hobble the law enforcement process. Here there was no necessity for haste, no likelihood that the contents of the apartment might be removed or destroyed before a valid search warrant could be obtained. Indeed, the agents did get a warrant to search petitioner's office and automobile. It would have been no undue burden on them to obtain a warrant to search the apartment,

guarding it in the meantime. Certainly the Constitution is not dependent upon the whim or convenience of law enforcement officers. Search should not be made without a warrant, in other words, where the opportunity for the issuance of a warrant exists. *Carroll* v. *United States,* 267 U. S. 132, 156; *Taylor* v. *United States,* 286 U. S. 1, 6.

The decision of the Court in this case can have but one meaning so far as searches are concerned. It effectively takes away the protection of the Fourth Amendment against unreasonable searches from those who are placed under lawful arrest in their homes. Small, minute objects are used in connection with most if not all crimes; and there is always the possibility that some fruit of the crime or some item used in the commission of the offense may take the form of a small piece of paper. Using the subterfuge of searching for such fruits and instrumentalities of the crime, law enforcement officers are now free to engage in an unlimited plunder of the home. Some of them may be frank enough, as in this case, to admit openly that the object of their search is "anything" that might connect the accused with the alleged crime. Others may be more guarded in their admissions. But all will realize that it is now far better for them to forego securing a search warrant, which is limited in scope by the Fourth Amendment to those articles set forth with particularity in the warrant. Under today's decision, a warrant of arrest for a particular crime authorizes an unlimited search of one's home from cellar to attic for evidence of "anything" that might come to light, whether bearing on the crime charged or any other crime. A search warrant is not only unnecessary; it is a hindrance.

The holding that the search in this case was proper and reasonable thus expands the narrow limitations on searches incident to valid arrests beyond all recognition.

What has heretofore been a carefully circumscribed exception to the prohibition against searches without warrants has now been inflated into a comprehensive principle of freedom from all the requirements of the Fourth Amendment. The result is that a warrant for arrest is the equivalent of a general search warrant or writ of assistance; as an "incident" to the arrest, the arresting officers can search the surrounding premises without limitation for the fruits, instrumentalities and anything else connected with the crime charged or with any other possible crime. They may disregard with impunity all the historic principles underlying the Fourth Amendment relative to indiscriminate searches of a man's home when he is placed under arrest. See *Boyd* v. *United States,* 116 U. S. 616, 624–632; *Weeks* v. *United States, supra; Byars* v. *United States,* 273 U. S. 28. They may disregard the fact that the Fourth Amendment was designed in part, indeed perhaps primarily, to outlaw such general warrants, that there is no exception in favor of general searches in the course of executing a lawful warrant for arrest. As to those placed under arrest, the restrictions of the Fourth Amendment on searches are now words without meaning or effect.

Nor is the flagrant violation of the Fourth Amendment in this case remedied by the fact that the arresting officers, during the course of their ransacking search, uncovered and seized certain articles which it was unlawful for petitioner to possess. It has long been recognized, of course, that certain objects, the possession of which is in some way illegal, may be seized on appropriate occasions without a search warrant. Such objects include stolen goods, property forfeited to the Government, property concealed to avoid payment of duties, counterfeit coins, burglar tools, gambling paraphernalia, illicit liquor and the like. *Boyd* v. *United States, supra,* 623–624;

United States v. *Lefkowitz, supra,* 465–466; *Gouled* v. *United States,* 255 U. S. 298, 309. But the permissible seizure of such goods is necessarily dependent upon the seizure occurring (1) during the course of a reasonable, constitutional search, (2) as the result of ready observance of the surrounding premises by the arresting officers, or (3) as the result of the use of such objects in the commission of a crime in the presence of the officers. Never has it been suggested by this Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess. To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society.

The seizure here, as noted, did not occur during the course of a reasonable, constitutional search. Nor did it result from the ready observance of the surrounding premises; the draft certificates and notices were discovered only after a most meticulous ransacking. It is said, however, that the possession of these items by petitioner constituted a continuing offense committed in the presence of the arresting officers. This may be a dialectical way of putting the matter, but it would not commend itself to the common understanding of men. From a practical standpoint, these certificates and notices were not being possessed in the presence of the officers. They were hidden away in the bottom of a dresser drawer beneath some clothes. No arresting officer could possibly be aware of their existence or location unless he possessed some supernatural faculty. Indeed, if an arresting officer is to be allowed to search for and seize all hidden things the possession of which is unlawful, on the theory that the possession is occurring in his presence, there would be nothing

left of the Fourth Amendment. Law enforcement officers would be invited to ignore the right to privacy executing warrants of arrest and searching without restraint and without regard to constitutional rights for those hidden items which were being illegally "possessed" in their "presence."

The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods. And "good faith" on the part of the arresting officers cannot justify a lawless search, nor support a lawless seizure. In forbidding unreasonable searches and seizures, the Constitution made certain procedural requirements indispensable for lawful searches and seizures. It did not mean, however, to substitute the good intentions of the police for judicial authorization except in narrowly confined situations. History, both before and after the adoption of the Fourth Amendment, has shown good police intentions to be inadequate safeguards for the precious rights of man. But the Court now turns its back on that history and leaves the reasonableness of searches and seizures without warrants to the unreliable judgment of the arresting officers. As a result, the rights of those placed under arrest to be free from unreasonable searches and seizures are precarious to the extreme.

Now it may be that the illegality of the search and of the seizure in this case leads to the immunizing of petitioner from prosecution for the illegal possession of the draft certificates and notices. But freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their

right to privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized.

It is likely that the full impact of today's decision will not be apparent immediately. Petitioner is not an important or notorious criminal; and the investigation may have been undertaken with the best of motives. But apart from the fact that the Constitution was designed to protect the unimportant as well as the important, including those of criminal tendencies, the implications of what has been done in this case can affect the freedom of all our people. The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition as it can be used by a government determined to undo forgers and defrauders. See *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203. History is not without examples of the outlawry of certain political, religious and economic beliefs and the relentless prosecution of those who dare to entertain such beliefs. And history has a way of repeating itself. It therefore takes no stretch of the imagination to picture law enforcement officers arresting those accused of believing, writing or speaking that which is proscribed, accompanied by a thorough ransacking of their homes as an "incident" to the arrest in an effort to uncover "anything" of a seditious nature. Under the Court's decision, the Fourth Amendment no longer stands as a bar to such tyranny and oppression. On the contrary, direct encouragement is given to this abandonment of the right of privacy, a right won at so great a cost by

those who fought for freedom through the flight of time.

As Judge Learned Hand recently said, "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion." *United States* v. *Di Re*, 159 F. 2d 818, 820.

MR. JUSTICE FRANKFURTER and MR. JUSTICE RUTLEDGE join this dissent.

MR. JUSTICE JACKSON, dissenting.

This case calls upon the Court to say whether any right to search a home is conferred on officers by the fact that within that home they arrest one of its inhabitants. The law in this field has not been made too clear by our previous decisions. I do not criticize the officers involved in this case, because this Court's decisions afford them no clear guidance.

The Fourth Amendment first declares in bold broad terms: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Our trouble arises because this sentence leaves debatable what particular searches are unreasonable ones. Those who think it their duty to make searches seldom agree on this point with those who find it in their interest to frustrate searches.

The Amendment, having thus roughly indicated the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistently with the right so declared, to make searches: ". . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized."

Here endeth the command of the forefathers, apparently because they believed that by thus controlling search warrants they had controlled searches. The forefathers, however, were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one.

Of course, a warrant to take a person into custody is authority for taking into custody all that is found upon his person or in his hands. Some opinions have spoken in generalities of this right to search such property incidentally to arrest of the person as including whatever was in the arrested person's "possession."

Repeated efforts have been made to expand this search to include all premises and property in constructive possession by reason of tenancy or ownership. While the language of this Court sometimes has been ambiguous, I do not find that the Court heretofore has sustained this extension of the incidental search. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *United States* v. *Lefkowitz,* 285 U. S. 452. In this respect, it seems to me, the decision of today goes beyond any previous one and throws a home open to search on a warrant that does not in any respect comply with the constitutional requirements of a search warrant and does not even purport to authorize any search of any premises.

The decision certainly will be taken, in practice, as authority for a search of any home, office or other premises if a warrant can be obtained for the arrest of any occupant and the officer chooses to make the arrest on the premises. It would seem also to permit such search incidentally to an arrest without a warrant if the circumstances make such arrest a lawful one. It would also appear to sanc-

tion a search of premises even though the arrest were for the most petty of misdemeanors. It leaves to the arresting officer choice of the premises to be searched insofar as he can select the place among those in which the accused might be found where he will execute the warrant of personal arrest. Thus, the premises to be searched are determined by an officer rather than by a magistrate, and the search is not confined to places or for things "particularly described" in a warrant but, in practice, will be as extensive as the zeal of the arresting officer in the excitement of the chase suggests. Words of caution will hedge an opinion, but they are not very effective in hedging searches.

The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all.

I am unable to suggest any test by which an incidental search, if permissible at all, can in police practice be kept within bounds that are reasonable. I hear none. I do not agree with other Justices in dissent that the intensity of this search made it illegal. It is objected that these searchers went through everything in the premises. But is a search valid if superficial and illegal only if it is thorough? It took five hours on the part of several officers. But if it was authorized at all, it can hardly become at some moment illegal because there was so much stuff to examine that it took overtime. It is said this search went beyond what was in "plain sight." It would seem a little capricious to say that a gun on top of a newspaper could be taken but a newspaper on top of a gun insulated it from seizure. If it were wrong to open a sealed envelope in this case, would it have been right if the mucilage failed to stick? The short of the thing is that we cannot say

that a search is illegal or legal because of what it ends in. It is legal or illegal because of the conditions in which it starts.

I cannot escape the conclusion that a search, for which we can assign no practicable limits, on premises and for things which no one describes in advance, is such a search as the Constitution considered "unreasonable" and intended to prohibit.

In view of the long history of abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable, we should not make inroads on the rights protected by this Amendment. The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate. If these conditions are necessary limitations on a court's power expressly to authorize a search, it would seem that they should not be entirely dispensed with because a magistrate has issued a warrant which contains no express authorization to search at all.

Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.

Syllabus.

149 MADISON AVENUE CORP. ET AL. *v.* ASSELTA ET AL.

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

No. 497. Argued February 11, 1947.—Decided May 5, 1947.

1. A wage agreement entered into by direction of the National War Labor Board providing that employees should be paid fixed weekly wages for workweeks of specified length, in excess of 40 hours, and that the "hourly rate" was to be determined by dividing weekly earnings by the number of hours employed plus one-half of the number of hours actually worked in excess of 40, which actually was applied so as to result in a scheduled workweek in excess of 40 hours without effective provision for overtime pay until employees had completed the scheduled workweek, *held* not in conformity with the overtime pay requirements of § 7 (a) of the Fair Labor Standards Act. Pp. 203–210.
2. The "hourly rate" derived from the formula prescribed in the agreement was not the "regular rate" of pay within the meaning of the Fair Labor Standards Act. Pp. 203–210.
3. *Walling* v. *Belo Corp.*, 316 U. S. 624, and *Walling* v. *Halliburton Co.*, 331 U. S. 17, distinguished. P. 209.

156 F. 2d 139, affirmed.

Respondents sued their employer, petitioner here, to recover sums allegedly due them under the Fair Labor Standards Act, and were awarded judgment in the District Court. 65 F. Supp. 385. The Circuit Court of Appeals affirmed. 156 F. 2d 139. This Court granted certiorari. 329 U. S. 817. *Affirmed,* p. 210. Judgment modified, *post,* pp. 210, 795.

Robert R. Bruce argued the cause for petitioners. With him on the brief were *Walter Gordon Merritt* and *John J. Boyle.*

Wilbur Duberstein argued the cause for respondents. With him on the brief was *Frederick E. Weinberg.*

Briefs were filed as *amici curiae* by *Samuel I. Rosenman, Godfrey Goldmark* and *Richard S. Salant* for the Midtown Realty Owners' Association, Inc., and *Murray I. Gurfein* for the 128 West 30th Street Corporation et al., urging reversal.

Acting Solicitor General Washington, William S. Tyson, Bessie Margolin and *Morton Liftin* filed a brief for the Wage & Hour Administrator, United States Department of Labor, as *amicus curiae,* urging affirmance.

Mr. Chief Justice Vinson delivered the opinion of the Court.

This employee suit was brought in the District Court to recover overtime compensation, liquidated damages, and a reasonable attorney's fee pursuant to §§ 7 (a) and 16 (b) of the Fair Labor Standards Act of 1938.[1] Recovery was allowed in the District Court, 65 F. Supp. 385, and that judgment was affirmed in the Circuit Court of Appeals. 156 F. 2d 139. We granted certiorari to consider the

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* Insofar as pertinent, § 7 (a) 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—

. . . . . .

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16 (b) provides in part:

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . ."

important questions presented relating to the application of the overtime provisions of the above-mentioned statute.

Respondents are service and maintenance employees who, during the period in question, worked in a loft building owned by petitioner 149 Madison Avenue Corporation and managed by petitioner Williams & Co. It has been stipulated that respondents were engaged in the production of goods for commerce.[2] We are here concerned with the period of employment extending from April 21, 1942, to December 10, 1943.

Prior to April 21, 1942, employment relations between the petitioners and respondents were governed by a collective wage agreement, known as the Sloan Agreement.[3] According to its terms, employees were paid flat weekly wages for workweeks of specified length which, in the case of most of the respondents, amounted to $25 for 47 hours of weekly employment. No hourly rates were specified, nor was any attempt made to compensate employees at the rate of time and one-half for hours worked in excess of 40 in any week.

As the expiration date of the Sloan Agreement drew near, negotiations between the interested parties were initiated for the purpose of reaching agreement on a new contract. After preliminary conferences proved fruitless, the case was certified to the War Labor Board. That

[2] Petitioners have raised no objection as to the amount of the recovery allowed the respondents by the District Court if it be assumed that the lower courts otherwise correctly determined their liability.

[3] The Sloan Agreement was negotiated between the Realty Advisory Board on Labor Relations, Incorporated, as agent for various owners of loft, office and apartment buildings located in the Borough of Manhattan in the City of New York, and Local 32–B of the Building Service Employees International Union on behalf of its members. The same parties negotiated the agreement in question.

agency stated its recommendations in a directive order issued July 29, 1942; and on September 1, 1942, the parties entered into the agreement in question, known as the National War Labor Board Agreement. It had been agreed that the terms of the new contract were to be made retroactive to April 20, 1942, the expiration date of the Sloan agreement.

The new contract provided for a workweek of 54 hours applicable to watchmen and a workweek of 46 hours for other regular employees. Weekly wages were established to compensate the 54 or 46 hours of labor, which sums were stated to include both payments for the regular hours of employment and time and one-half for the hours in excess of 40. To derive the hourly rate from the weekly wage, the following formula was included:

"The hourly rates for those regularly employed more than forty (40) hours per week shall be determined by dividing their weekly earnings by the number of nours employed plus one-half the number of hours actually employed in excess of forty (40) hours."

Although a literal reading of the above language might seem to indicate the establishment of a variable hourly rate dependent upon the number of hours actually worked in any given week, such was not the practical construction of the parties. Instead of making use of the number of hours actually worked, only the hours the employee was scheduled to work and the weekly wage for such scheduled workweek entered into the calculation of the non-overtime hourly rate.[4] The hourly rate as derived from the formula remained constant, therefore, regardless of whether the employee worked the scheduled number of hours during the week or a greater or lesser number. In effect, the

[4] In case of an employee hired for a regular 46 hour week at a weekly wage of $27.50, the "hourly rate" was derived from the formula by means of the following calculation: $\$27.50 \div [46+\frac{1}{2}(46-40)] = \$.561$ per hour. In effect, the formula rate is obtained, not by dividing

agreement instead of directly stating a fixed hourly rate in terms of a stipulated amount per hour provided a formula whereby such a fixed hourly rate could be calculated.

Under the agreement, weekly compensation varied according to the number of hours worked in that week. Thus, in case an employee was unable to work all his scheduled hours due to an "excusable cause," he was paid at the formula rate with the provision, however, that six of the hours worked should be compensated as overtime regardless of whether the total of hours actually worked was greater or less than 40 in that week. If the employee's absence was not excusable, he was apparently paid a sum for the week obtained by multiplying the number of hours actually worked times the formula rate, being given credit for overtime only in case the number of hours worked exceeded 40.[5] The agreement provided that all regular employees except watchmen should be compensated at a rate one and three-quarters times the hourly rate derived from the formula for hours worked in excess of 46. Watchmen were to be paid twice the formula rate for hours worked in excess of 54. Part-time workers employed for less than the scheduled workweek were hired at a specified schedule of hourly rates obtained by dividing the weekly wage paid the regular employees by the number of hours in the regular workweek.

It was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite

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the weekly wage by 46, the number of hours scheduled to be worked, but by dividing that sum by 49, a divisor determined by the formula. In the case of a watchman hired for a 54 hour week at the same weekly wage, the formula rate was determined by this calculation: $\$27.50 \div [54 + \frac{1}{2}(54-40)] = \$.4508$ per hour.

[5] The agreement made no specific provision for situations involving unexcused absences. The above-described procedure seems to have been applied in practice, however.

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variety of employment situations a single, rigid form of wage agreement. *Walling* v. *Belo Corp.*, 316 U. S. 624 (1942). Section 7 (a) of the Act requires, however, that any wage agreement falling within its purview must establish an hourly "regular rate" not less than the statutory minimum and provide for overtime payments of at least one and one-half times the "regular rate." A wage plan is not rendered invalid simply because, instead of stating directly an hourly rate of pay in an amount consistent with the statutory requirements, the parties have seen fit to stipulate a weekly wage inclusive of regular and overtime compensation for a workweek in excess of 40 hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom. The crucial questions in this case, however, are whether the hourly rate derived from the formula here presented was, in fact, the "regular rate" of pay within the statutory meaning and whether the wage agreement under consideration, in fact, made adequate provision for overtime compensation.

We have held that the words "regular rate," while not expressly defined in the statute, ". . . mean the hourly rate actually paid for the normal, non-overtime workweek." *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 40 (1944). The regular rate is thus an "actual fact," and in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424 (1945). It is the contention of the respondents that the rate derived by the use of the contract formula was not the regular rate of pay; that the regular rate actually paid was substantially that obtained by dividing the weekly wage payable for the working of the scheduled workweek by the number of hours in such scheduled workweek; and that, consequently, the plan made no adequate provision for over-

time compensation until employees regularly hired as watchmen had worked a total of 54 hours in one week and until other regular employees had worked a total of 46 hours. We believe that the record provides ample support for that view.

Thus, in determining a schedule of hourly rates payable to part-time workers employed less than 40 hours a week, no use whatsoever was made of the hourly rate derived from the formula. Part-time workers were paid a rate determined by dividing the weekly wage paid to the regular employees by the number of hours in the regular workweek despite the fact that, according to the terms of the formula, the weekly wage included both regular and overtime pay. Insofar as part-time workers were concerned, the agreement clearly indicated an intention to compensate an hour's labor by payment of a pro-rata share of the weekly wage.

Nor was there consistent application of the hourly rate as determined by the formula to the work of regular employees hired for a full 46-hour week. Where such an employee was absent for an "excusable cause," his weekly compensation was not determined by multiplying the formula rate by the hours worked. Rather, six of the hours the employee worked were always treated as overtime and compensated at the rate of one and one-half times the formula rate regardless of the total hours actually worked, thus resulting in average hourly compensation considerably in excess of the formula rate. The payment of "overtime" compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which the "overtime" compensation is calculated. Cf. *Walling* v. *Helmerich & Payne, Inc., supra.* While the average hourly rate actually received by the employee in this situation was not precisely that which would have resulted from dividing the weekly wage by 46, it ordinarily approached that figure much more closely

than it did the so-called hourly rate established by the formula.[6] This method of payment reveals further evidence of an attempt to pay a pro-rata share of the weekly wage for an hour's labor regardless of the number of hours worked up to 46.

The agreement provided that hours worked in excess of the scheduled 46-hour week should be compensated at the rate of one and three-quarters of the formula rate.[7] While the formula rate seems to have been consistently applied in such situations, it is significant to observe that the amount received by the worker under these circumstances approximates very closely that which he would have received had he been paid an hourly rate determined by dividing the weekly wage payable for the scheduled workweek by 46 with payment of time and one-half for hours worked in excess of 46.[8] This approximation was

[6] Thus the employee Anderson worked only 39 hours in the week of Feb. 14, 1943, the 7 hours of absence apparently being due to an "excusable cause." Under the agreement, which would entitle him to six hours of "overtime" pay, he should have received weekly compensation in the amount of $23.56. The actual average hourly rate during that week accordingly would be $.604. If Anderson had been paid on an hourly basis determined by dividing the weekly wage paid for a scheduled workweek by the number of hours in such workweek, he would have received $.598, whereas, had he been paid the straight formula rate he would have received $.561 per hour. So also, the petitioner Peterson in the week of Dec. 13, 1942, was absent 16 hours for excusable causes. The payroll records reveal he earned $18.50 or an actual average hourly rate of $.617 as compared to $.598, the average rate for a scheduled workweek, and to $.561, the formula rate.

[7] In the case of watchmen, who were assigned a scheduled week of 54 hours, twice the formula rate was paid for hours worked in excess of 54.

[8] Thus if an employee hired for a regular workweek of 46 hours at $27.50 worked 50 hours in one week, his total weekly compensation would amount to $31.43 if compensated in accordance with the terms of the agreement. If, instead, the employee were hired on a straight weekly basis at the same weekly wage with provision for time and

not fortuitous. In the directive order of the National War Labor Board the origin and purpose of these provisions are discussed, and the following statement is made: "Overtime over forty-six (46) hours is paid at a rate of time and three-quarters in an effort approximately to equal *the overtime to which an employee would ordinarily be entitled, if it were computed on the basis of time and a half after a forty-six (46) hour week.*" [9]

Petitioners have argued that none of these provisions provides a conclusive demonstration that the formula rate was not the actual regular rate of pay. It is said that part-time employees were paid a pro-rata hourly rate since they had no opportunity to earn overtime compensation; that the method of paying regular employees in case of excusable absences was merely a laudable effort on the part of the employer to compensate more fully than the Act requires when an employee failed to work his scheduled week because of illness or like causes; and that the time and three-quarters provision represented an additional premium for employees called upon to work hours

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one-half the average hourly rate, for hours worked in excess of 46, he would receive $31.09 as total weekly compensation for 50 hours of work. If a watchman, scheduled to work a 54-hour week at $27.50 actually worked 58 hours he would receive $31.11 weekly compensation if calculated according to the agreement, or $30.55 if calculated on a straight weekly basis with time and one-half for hours worked in excess of 54.

[9] (Emphasis supplied.) The agreement in question also contained the following provision: "Per diem rates of pay of any employee shall be arrived at by dividing the applicable weekly wage by the normal number of days per week worked by that employee in the building in question." This provision is obviously at odds with the statement in the agreement that the weekly wage stipulated for a scheduled workweek included both regular pay and overtime for hours worked over 40. There is nothing in the record, however, to indicate that the per diem provisions were actually applied. Petitioner explains its presence in the agreement as an inadvertent hold-over from the earlier Sloan Agreement.

substantially in excess of the non-overtime week. We cannot ignore the fact, however, that the agreement on its face fails to provide for the consistent application of the formula rates in those situations where such rates should be expected to control. These deviations take on additional significance when it is observed that in every situation, with the relatively unimportant exception of that involving unexcused absences,[10] the amount paid was either precisely or substantially that which employees would have been paid had the contract called for employment on a straight 46-hour week with payment of time and one-half only for hours worked in excess of 46.

Further light is thrown upon the nature of the wage agreement by a consideration of the plan in actual operation. During the period between April 21 and September 1, 1942, when the contract in question was the subject of negotiation, it was understood that the old Sloan Agreement should remain in effect but that the terms of the new contract should be given retroactive application to April 20. The Sloan Agreement provided for a minimum wage of $25 for a workweek of 47 hours with no provision for overtime for hours worked in excess of 40. It is obvious, therefore, that between the above-mentioned dates the employees were paid on a basis clearly repugnant to the requirements of § 7 (a) of the Fair Labor Standards Act. Petitioners urge, however, that by making the retroactive payments as required by the agreement, any illegality in the method of payment during the period of negotiations was eliminated. But in attempting to satisfy the retroactive liability, petitioners completely ignored the formula rates and paid each of the respondents $2.50 for each week worked during the period, representing the increase in the minimum weekly wage for the scheduled workweek established by the new agreement,

[10] See note 5 *supra*.

without attempting further adjustment. Petitioners admit that "Undoubtedly some employees who worked no overtime in certain weeks were overpaid; other who worked beyond the scheduled workweek of 47 hours then prevailing may not have been paid enough." It is apparent that the amount of wages paid the respondents for work performed during the period of negotiations was in no sense determined by application of hourly rates derived from the formula.[11]

The parties have called our attention to much other evidence which, it is asserted, reveals the practical construction given to the terms of the agreement in question. We do not feel that it is necessary to review these matters at length. It is sufficient to state that, after considering the terms of the agreement and the operation of the plan in actual practice, we have come to the conclusion that the agreement in this case was one calling for a workweek in excess of 40 hours without effective provision for overtime pay until the employees had completed the scheduled workweek and that the "hourly rate" derived from the use of the contract formula was not the "regular rate" of pay within the meaning of the Fair Labor Standards Act. This is not a case like *Walling* v. *Belo Corp., supra,* or *Walling* v. *Halliburton Oil Well Cementing Co.,* 331 U. S. 17 (1947). Unlike those cases, there was here no provision for a guaranteed weekly wage with a stipulation of an hourly rate which under the circumstances presented

[11] A somewhat similar situation prevailed with respect to an increase of $1.40 in the weekly wage granted on October 10, 1943, and made retroactive to April 21, 1943. It appears that petitioners made some effort to make adjustments consistent with the formula in payment to employees who had worked hours in excess of the scheduled workweek. It is conceded, however, that no such adjustments were made with respect to those who worked less than their scheduled hours in weeks during the retroactive period, such employees being paid the full weekly increase for each week employed regardless of hours actually worked.

could properly be regarded as the actual regular rate of pay.

We hold for the reasons stated above that the District Court and the Circuit Court of Appeals properly determined that the wage agreement in question failed to satisfy the statutory requirements. *Walling* v. *Helmerich & Payne, Inc., supra; Walling* v. *Youngerman-Reynolds Hardwood Co., supra; Walling* v. *Harnischfeger Corp.*, 325 U.S. 427 (1945).

Affirmed.

[Note: By an order of the Court announced on June 16, 1947, *post*, p. 795, the judgment in this case was modified so as to provide that the judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with authority in that Court to consider any matters presented to it under the Portal-to-Portal Act of 1947, approved May 14, 1947.]

COMMISSIONER OF INTERNAL REVENUE *v.* MUNTER.

NO. 674. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued April 10, 1947.—Decided May 5, 1947.

1. Under Internal Revenue Code §§ 22 (a), 115 (a), (b), upon a reorganization of two corporations into a new corporation, accumulated earnings and profits of the predecessor corporations which are undistributed in the reorganization are deemed to be acquired by the successor corporation and upon distribution by it are taxable as income, notwithstanding the participation of new investors in the successor corporation. Pp. 215–216.

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*Together with No. 675, *Commissioner of Internal Revenue* v. *Munter*, also on certiorari to the same Court.

2. To what extent the accumulated earnings and profits of the predecessor corporations have been retained by the successor in this case is for the Tax Court to determine upon a factual analysis. Pp. 216–217.

157 F. 2d 132, reversed.

The Tax Court sustained the Commissioner's determination of deficiencies in respondents' income taxes. 5 T. C. 108. The Circuit Court of Appeals reversed. 157 F. 2d 132. This Court granted certiorari. 329 U. S. 709. *Reversed and remanded,* p. 217.

Lee A. Jackson argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss, Stanley M. Silverberg* and *I. Henry Kutz.*

Samuel Kaufman argued the cause for respondents. With him on the brief was *David Glick.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The Commissioner assessed deficiencies against respondents for failure to report as 1940 income dividends paid to them on stock of Crandall-McKenzie & Henderson, Inc., which respondents had bought earlier in that year.[1] These dividends are taxable as income to the respondents if the corporation paid them out of its earnings and profits. Int. Rev. Code §§ 22 (a), 115 (a), (b). Since its organization in 1928, the corporation had not accumulated earnings and profits sufficient to pay the 1940 dividend in full.[2] But the Commissioner found that the

[1] The Tax Court incorporated by reference a fact stipulation of the parties as its finding of fact. Each of the respondents had bought 10,000 shares of the 38,922 shares of the corporation then outstanding. The dividends declared in 1940 amounted to $35,166.25, of which each of the taxpayers received $12,500.

[2] At one point in the stipulation it was indicated that the new corporation had "no earnings or profits accumulated from December 4,

two old corporations which were merged in 1928 to form this new corporation had at that time, and turned over to the new corporation, accumulated earnings and profits sufficient to cover these dividends. One of these old corporations, L. Henderson & Sons, Inc., had about $75,000 in earnings and profits accumulated since 1913; the other, Crandall-McKenzie Company, had about $330,000. Liability of respondents for these deficiencies depends upon whether the new corporation acquired and retained a sufficient amount of these earnings and profits of its predecessors to cover the 1940 dividends.

The 1928 merger took place under the following circumstances. Stockholders of Henderson and certain stockholders of Crandall-McKenzie agreed together with a firm of underwriters to effect a merger of the two corporations into a new one. The underwriters agreed to buy for cash 52% of the stock of the new corporation for public sale. In execution of this agreement the new corporation was formed and acquired all the assets of Henderson and Crandall-McKenzie. The six stockholders of Henderson accepted stock in the new corporation as full payment for surrendering their old company stock. Holders of nearly one-half of the stock of old Crandall-McKenzie did not accept new corporation stock but were paid some $355,000 in cash for their old stock.[3] The other old Crandall-McKenzie stockholders

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1928 to December 31, 1939," and no earnings or profits in the taxable year 1940. But elsewhere in the stipulation it appears there may have been some $32,000 earnings and profits accumulated between 1928 and 1940. The Tax Court apparently did not resolve these contradictory statements.

[3] Some of the Crandall-McKenzie stockholders were paid $356.00 plus per share; others were paid $315.53 per share for identical stock.

A part of the old Crandall-McKenzie stock for which cash was paid was bought for $300,000 cash by one old Crandall-McKenzie stockholder from another while the reorganization was being transacted. The stockholder who made this purchase thereupon surrendered his

were satisfied to accept only new corporation stock. When the reorganization was complete the new corporation stock had been distributed as follows: 14,607 shares to old Crandall-McKenzie stockholders, 9,524 shares to old Henderson stockholders, and 25,869 shares to the general public through the participating underwriters.

The Tax Court found that there was a failure of proof that the earnings and profits of the old corporations had been distributed in 1928. Relying upon the rule of *Commissioner* v. *Sansome,* 60 F. 2d 931, which, for tax purposes, treats a reorganized corporation as but a continuation of its predecessors, the Tax Court determined that the new corporation acquired all the earnings and profits of its predecessors in 1928. Then, without analyzing the earnings and distribution history of the new corporation after its inception in 1928 and prior to the 1940 distribution, the Tax Court concluded that the new corporation's accumulated earnings and profits were sufficient in 1940 to make the questioned dividends taxable to respondents as income. 5 T. C. 108. The Circuit Court of Appeals for the Third Circuit reversed, 157 F. 2d 132, following its earlier decision in *Campbell* v. *United States,* 144 F. 2d 177, which had narrowly limited the *Sansome* rule. The theory of the *Campbell* decision, so far as relevant to the only question directly presented here, was that change in ownership brought about by the participation of new investors in the reorganization made the new corporation such an entirely different entity that it could not properly be called, even for tax purposes, a continuation of its

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original Crandall-McKenzie holdings, together with his recently purchased shares, to the new corporation in exchange for shares in the new corporation and $300,000 cash. We do not decide whether the sale from one old stockholder to another represents a transaction separate from the reorganization. Whatever may be the ultimate significance of this point, it does not affect the result we reach here.

predecessors.[4] Thus, it was concluded, earnings and profits of the predecessors were not acquired by the new corporation.

We granted certiorari because of an alleged conflict with the *Sansome* rule. 329 U. S. 709. In the state of the record presented we find it necessary to decide no more than whether the distinction of the *Sansome* rule made by the *Campbell* case is correct.

A basic principle of the income tax laws has long been that corporate earnings and profits should be taxed when they are distributed to the stockholders who own the distributing corporation. See Int. Rev. Code §§ 22, 115 (a), (b). The controlling revenue acts in question, however, exempt from taxation distributions of stock and money distributions, at least in part, made pursuant to a reorganization such as transpired here in 1928. See Revenue Act of 1928, § 112 (b), (c), (i) (1) (A); § 115 (c), (h), 45 Stat. 791, 816–818, 822–823. Thus unless those earnings and profits accumulated by the predecessor corporations and undistributed in this reorganization are deemed to have been acquired by the successor corporation and taxable upon distribution by it, they would escape the taxation which Congress intended. See § 112 (h), Revenue Act of 1928; *Murchison's Estate* v. *Commissioner,* 76 F. 2d 641; *United States* v. *Kauffmann,* 62 F. 2d 1045.

In *Commissioner* v. *Sansome, supra,* it was held that implicit in the tax exemption of reorganization distributions was the understanding that the earnings and profits

[4] There were two independent grounds for the decision in the *Campbell* case. One ground was that the earnings and profits of the predecessor corporation there had actually been distributed in the course of the reorganization. The Circuit Court of Appeals stated expressly that it did not rest its decision in the instant case on this theory.

so exempt were acquired by the new corporation and were taxable as income to stockholders when subsequently distributed. Congress has repeatedly expressed its approval of the so-called *Sansome* rule as a correct interpretation of the purpose of the tax laws governing reorganizations.[5] And Congress has apparently been satisfied with Treasury Regulations which follow the *Sansome* doctrine.[6]

Of course, when, as in the *Sansome* case, all the stockholders of the old corporation swap all their old stock for identical proportions of the new, there can be no doubt that the earnings and profits of the old have not been distributed and are passed on to the successor corporation. But if the predecessors' earnings and profits are not distributed in the course of the reorganization, they do not disappear simply because the successor corporation has some assets and owners in addition to those of the old corporation or corporations. See *Putnam* v. *United States,* 149 F. 2d 721, 726. The congressional purpose to tax all stockholders who receive distributions of corporate earnings and profits cannot be frustrated by any reorganization which leaves earnings and profits undistributed in whole or in part. Insofar

[5] The Senate Committee recommending adoption of § 115 (h) of the Revenue Act of 1936 cited the *Sansome* case with approval. It described the new section as not changing "existing law." The Committee recommended the amendment only "in the interest of greater clarity." S. Rep. No. 2156, 74th Cong., 2d Sess. (1936) 19. See also § 115 (h) Revenue Act 1938, 52 Stat. 447; H. R. Rep. 2894, 76th Cong., 3d Sess. (1940) 41; S. Rep. 2114, 76th Cong., 3d Sess. (1940) 25.

[6] U. S. Treas. Reg. 94, Art. 115–11 (1936); U. S. Treas. Reg. 103, § 19.115–11 (1940). See *Taft* v. *Commissioner,* 304 U. S. 351, 357; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Douglas* v. *Commissioner,* 322 U. S. 275, 281–282; *Boehm* v. *Commissioner,* 326 U. S. 287, 291–292.

as accumulated earnings and profits have been distributed contemporaneously with the reorganization so as to become taxable to the distributees, they, of course, cannot be said to have been acquired by the successor corporation. But insofar as payments to the predecessor corporations or their stockholders do not actually represent taxable distributions of earnings and profits, those earnings and profits must be deemed to have become available for taxable distribution by the successor corporation.

It would be inappropriate for us to make the factual analysis of this record necessary to trace the earnings and profits involved in the 1928 reorganization in the absence of such a determination by the Tax Court and review by the Circuit Court of Appeals. See *Helvering* v. *Rankin,* 295 U. S. 123, 131–132; *Helvering* v. *Safe Deposit & Trust Co.,* 316 U. S. 56, 66–67; *Commissioner* v. *Scottish American Investment Co.,* 323 U. S. 119, 124. It might be that upon a full factual analysis the Tax Court would conclude that the new corporation acquired and had retained earnings and profits of Henderson sufficient to cover the 1940 distribution. Or the Tax Court may find it necessary to make further analysis of the 1928 distributions to Crandall-McKenzie's old stockholders. In this connection it is urged that the cash paid for part of the Crandall-McKenzie stock in 1928 constituted a taxable distribution of some or all of the accumulated earnings and profits. The Tax Court, however, has previously declined to consider these cash payments as such a distribution of earnings and profits in the absence of proof that the recipients had been taxed for them. But even if it were proved that old Crandall-McKenzie stockholders had been so taxed, the face amount of that tax would not necessarily reflect the earnings and profits distribution they received. For example, part or all of their tax may have represented capital gain as

distinguished from earnings and profits.[7] Or the distribution may be found to have constituted a liquidation under § 115 of the Revenue Act of 1928.[8] It may be necessary on remand, therefore, for the Tax Court to consider, in the light of §§ 112 (c) and 115 of the Revenue Act of 1928, how much, if any, of the 1928 cash distribution to Crandall-McKenzie stockholders represented earnings and profits deductible from the earnings and profits transferred to the new corporation available for the 1940 dividend payments.

The decision of the Circuit Court of Appeals is reversed with directions that the cause be remanded to the Tax Court for proceedings not inconsistent with this opinion.

So ordered.

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[7] Section 112 (c) (1) of the Revenue Act of 1928 provides in effect if a cash or property distribution is made in the course of a reorganization "then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property." But § 112 (c) (2) makes taxable as dividend income that portion of the gain which represents the distributee's share of the distributing corporation's earnings and profits.

[8] Section 115 (c) of the Revenue Act of 1928 governs the taxability of distributions in liquidation.

RICE ET AL. *v.* SANTA FE ELEVATOR CORP. ET AL.

NO. 470. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued February 13, 14, 1947.—Decided May 5, 1947.

1. By the 1931 amendments to §§ 6 and 29 of the United States Warehouse Act, Congress terminated the dual system of regulation provided by the original Act and substituted an exclusive system of federal regulation of warehouses licensed under the Federal Act with reference to the subjects covered thereby, except to the extent that express exceptions in the Federal Act subject certain phases of the business to state regulation. Pp. 229–236, p. 234, n. 12.
2. Warehouses licensed under the United States Warehouse Act need not obtain state licenses or comply with state laws regulating those phases of the business which are regulated under the Federal Act, except those phases of the business which the Federal Act expressly subjects to state law. Pp. 234–236, p. 234, n. 12.
3. As amended, the Federal Act is not merely paramount over state law in the event of conflict, but completely supersedes the state law, except to the extent that it fails to cover the field or makes express exceptions in favor of state law. Pp. 234–236, p. 234, n. 12.
4. The test of applicability of state laws is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State. P. 236.
5. By this test, each of the following matters is beyond the reach of state law, since Congress has declared its policy with reference to them in the United States Warehouse Act (p. 236):
   (1) Just and reasonable rates. Pp. 224, 236.
   (2) Discrimination. Pp. 225, 236.
   (3) Dual position of warehousemen. Pp. 225, 236.
   (4) Mixing high quality public grain with inferior grain owned by warehouseman, delay in loading grain. Pp. 226, 236.
   (5) Sacrificing or rebating storage charges, retaining desirable transit tonnage, utilizing preferred storage space. Pp. 227, 236.

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*Together with No. 472, *Illinois Commerce Commission et al.* v. *Santa Fe Elevator Corp. et al.*, also on certiorari to the same Court.

(6) Maintenance of unsafe and inadequate elevators; inadequate and inefficient warehouse service. Pp. 227, 236.

(7) Operating without a state license. Pp. 228, 236.

(8) Abandonment of warehousing service. Pp. 228, 236.

(9) Failure to file and publish rate schedules; rendering warehousing service without filing and publishing schedules. Pp. 229, 236.

6. In the absence of any actual conflict with the Federal Act, the states are free to continue to regulate matters which are not regulated by the Federal Act, *e. g.*:

(1) Failure to secure prior approval of state officials for management, construction, engineering, supply, financial and other contracts between the warehouseman and its affiliates. P. 236.

(2) Failure to secure prior approval of contracts and leases between the warehouseman and other public utilities. Pp. 236–237.

(3) Failure to secure approval of issuance of securities. Pp. 236–237.

156 F. 2d 33, affirmed in part, reversed in part.

A district court dismissed suits brought by a warehouseman licensed under the United States Warehouse Act to enjoin further proceedings on a complaint filed by one of his customers with the Illinois Commerce Commission alleging violations of the Illinois Public Utilities Act, Ill. Rev. Stats. 1945, ch. 111 2/3, the Illinois Grain Warehouse Act, Ill. Rev. Stats. 1945, ch. 114, §§ 189 *et seq.*, and Art. XIII of the Illinois Constitution, and to enjoin the Attorney General of Illinois from instituting proceedings against the warehouseman to enforce any order of the Commission in the matter. The Circuit Court of Appeals reversed, on the ground that the United States Warehouse Act superseded state regulation of warehousemen licensed thereunder as to the matters presented in the complaint. 156 F. 2d 33. This Court granted certiorari. 329 U. S. 701. The writs were dismissed as to certain parties including the Great Lakes Elevator Corporation. 330 U. S. 810. *Affirmed in part, reversed in part and remanded,* p. 238.

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Lee A. Freeman argued the cause and filed a brief for petitioners in No. 470.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for petitioners in No. 472. With him on the brief was *George F. Barrett,* Attorney General.

Leo F. Tierney argued the cause for respondents. With him on the brief were *Ferre C. Watkins, Charles F. Meyers, Floyd E. Thompson, Frederick Mayer, Carl Meyer* and *Louis A. Kohn.*

Acting Solicitor General Washington, Assistant Attorney General Berge, Robert C. Barnard, W. Carroll Hunter and *Lewis A. Sigler* filed a brief for the United States, as *amicus curiae,* urging affirmance.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

Respondents in these two cases are warehousemen engaged in the business of operating public warehouses for the storage of grain in Illinois. Their warehouses are operated under licenses issued by the Secretary of Agriculture pursuant to the United States Warehouse Act, 39 Stat. 486, as amended, 7 U. S. C. § 241 *et seq.* The Rice partnership, one of the petitioners, is an owner, shipper, and dealer in grain and is a customer of respondents. The Illinois Commerce Commission, another petitioner, has certain regulatory jurisdiction, to which we will later refer, over public grain warehouses and other public utility companies.

In 1944 Rice filed a complaint with the Commission, charging respondents [1] with maintaining unjust, unreason-

[1] The Chicago Board of Trade was also joined as a defendant in the proceedings before the Illinois Commerce Commission. The issues

able, and excessive rates and charges contrary to the Illinois Public Utilities Act, Ill. Rev. Stats. 1945, ch. 111 2/3. It charged them with discrimination in storage rates in favor of the Federal Government and its agencies and against other customers, contrary to the Public Utilities Act and the Illinois Grain Warehouse Act, Ill. Rev. Stats. 1945, ch. 114, § 189 *et seq.* It alleged that respondents were both warehousemen and dealers in grain and by reason of those dual and conflicting positions had received undue preferences and advantages to the detriment of and in discrimination against petitioners and other customers of respondents,[2] all in violation of provisions of the Public Utilities Act, the Grain Warehouse Act, or the Illinois Constitution of 1870, Article XIII. It charged respondents with having failed to provide reasonable, safe, and adequate public grain warehouse service and facilities, with issuing securities, with abandoning service, and with entering into various contracts with

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raised concerning it are considered in the companion cases decided this day, *Rice* v. *Board of Trade,* and *Illinois Commerce Commission* v. *Board of Trade, post,* p. 247.

[2] The preferences were alleged to have arisen from the practice of respondents in "(a) Mixing high quality public grain with inferior grain owned or acquired by the defendant warehouseman to reduce grain delivered to the point of minimum quality within the established grain trade [sic]. (b) Sacrificing part of storage charges to offset purchases and sales of grain and otherwise manipulating and rebating storage charges on grain stored in private warehouse space. (c) Furnishing transit tonnage to owners of public grain of the most undesirable type, while withholding for their own use the most desirable transit tonnage, thereby placing the owners of public grain at a distinct disadvantage in merchandising grain in storage. (d) Providing for storage of public grain in old wooden warehouses carrying exorbitant insurance premium rates, while storing the warehousemen's own grain in modern warehouses with reasonable insurance premium rates. (e) Unduly and imprudently delaying loading of grain after return of warehouse receipt issued by the particular warehouseman, the tender of proper charges and the receipt of instructions to load grain for delivery."

their affiliates without prior approval of the Commission; with rendering storage and warehousing services without having filed and published their rates; with operating without a state license; and with mixing public grain with grains of different grades—all in violation of provisions of the Public Utilities Act or the Grain Warehouse Act. Among the remedies sought were the fixing of just, reasonable, and non-discriminatory rates, the prohibition of unlawful discriminatory practices, the establishment of reasonable, safe and adequate storage and warehousing service, and the assessment of penalties for violations of Illinois law, including the cancellation of grain warehouse licenses.

Respondents moved to dismiss on the ground that the United States Warehouse Act superseded the authority of the Commission to regulate in the manner sought by the complaint. The Commission denied the motion and set the cause for a hearing on the merits. Thereupon respondents brought these suits in the District Court to enjoin further proceedings before the Commission and to enjoin the Attorney General of Illinois from instituting any proceedings against respondents to enforce any order of the Commission in the matter. Motions of petitioners to dismiss were granted. On appeal the Circuit Court of Appeals reversed, holding that the United States Warehouse Act superseded state regulation of respondents as to the matters presented in petitioners' complaint.[3] 156 F. 2d 33. The cases are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented.

The United States Warehouse Act, as originally enacted in 1916 (39 Stat. 486), made federal regulation in this field subservient to state regulation. It provided in § 29 that "nothing in this Act shall be construed to conflict

[3] Accord: *In re Farmers Co-op. Assn.*, 69 S. D. 191, 8 N. W. 2d 557.

with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen . . . ." And § 6 required an applicant for a federal warehouse license to provide a bond "to secure the faithful performance of his obligations as a warehouseman" under state as well as under federal law.

In 1931 Congress amended the Act. 46 Stat. 1463. Section 29 was amended [4] to provide that although the

[4] The Secretary of Agriculture who recommended the 1931 amendment to § 29 gave the following reasons:

"The amendment suggested relative to section 29 aims to make the Federal warehouse act independent of any State legislation on the subject. As the law now reads, it can be nullified by State legislation. There are conflicts at present between the State laws and the Federal act. For instance, under certain State laws warehousemen are permitted to ship the products from their warehouses to a terminal or other warehouse while the receipts are outstanding. The prime purpose of the Federal warehouse act is to make it possible to finance, properly, agricultural products while in storage. No banker can safely loan on a warehouse receipt representing a product to be in a certain warehouse when, as a matter of fact, it may be moved under authority of State law to some other and distant warehouse. The Federal warehouse act, as now worded, specifically prohibits removal of the product prior to the return of the receipts. This department emphatically believes that this requirement of the Federal act is sound and the banking fraternity generally shares that same feeling. It is at once apparent to you, of course, that if the Federal act may be nullified by State laws with respect to a feature as important as this that the value of Federal warehouse receipts might be destroyed. For that reason, then, we have suggested amending section 29 so as to make the Federal warehouse act independent of any State legislation on warehousing."

Hearing before Senate Committee on Agriculture and Forestry on H. R. 7, 71st Cong., 3d Sess., p. 10. And see *id.*, pp. 22–26.

Independent Gin & W. Co. v. *Dunwoody*, 40 F. 2d 1, arose under the law as originally enacted. It was a suit brought by warehousemen, who were licensed under the Federal Act, to enjoin officials of Alabama from enforcing provisions of Alabama warehouse law. These were

Secretary of Agriculture "is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen," and their personnel, "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." Section 6 was amended to omit the requirement that the bond be conditioned on compliance with requirements of state law.

First. The chief matters which are the basis of the complaint before the Commission are treated as follows by the Illinois law and by the Federal Act:

(1) Just and reasonable rates. The complaint charges that respondents' rates are unjust and unreasonable. Under the Illinois statute public utility rates must be just and reasonable; and the Commission after a hearing may fix rates which meet that standard. §§ 32, 36, 41, Public Utilities Act. The Secretary of Agriculture is authorized by the Federal Act to license warehousemen [5] on condition that they conform to the requirements of the Act and the rules and regulations prescribed thereunder.[6] §§ 4, 9. Every receipt of a licensed warehouse must disclose "the rate of storage charges." § 18 (e). Before a license is granted the applicant must file his proposed rates with the Secretary. Reg. 5, § 3. He must also file

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provisions requiring payment of a graduated license or privilege tax, for the giving of a bond, for the obtaining of a license and for submission to state regulation concerning the suitability and adequacy of the warehouse structure, the character of records to be kept, the inspection of the warehouse buildings and the audit of the books. Agr. Code Ala. 1927, §§ 388–407. The Federal Act was construed not to exclude such state regulation.

[5] Section 2 of the Act includes in the definition of "warehouse" every building "in which any agricultural product is or may be stored for interstate or foreign commerce . . . ."

[6] The regulations are contained in 7 C. F. R., Part 102.

any proposed changes in rates before making them effective. *Id.* Rates which are "unreasonable or exorbitant" are prohibited. *Id.* And the Secretary may, after hearing, suspend or revoke the license if "unreasonable or exorbitant charges have been made for services rendered." § 25; Reg. 2, § 7.

(2) Discrimination. The complaint alleges that respondents discriminate against the public and in favor of the Federal Government and its agencies by granting the latter preferential storage rates. The power of the Illinois Commission to fix rates, to which we have referred, includes the power to eliminate discriminatory rates. And see Grain Warehouse Act § 15. The Federal Act requires the publication and disclosure of licensed warehousemen's rates, as we have seen. Section 13 of the Federal Act makes it the duty of a licensed warehouseman to receive agricultural products for storage "in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities." And by § 25 the Secretary is granted authority to suspend or revoke any license of a warehouseman "for any violation of or failure to comply with any provision of this Act . . . ."

(3) Dual position of warehousemen. The complaint charged violations of Illinois law by acts of respondents in storing and dealing in their own grain while storing grain for the public. See *Hannah* v. *People,* 198 Ill. 77, 64 N. E. 776. The Federal Act requires every receipt issued for agricultural products by a licensed warehouseman to disclose "if the receipt be issued for agricultural products of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership . . . ." § 18 (i). In addition, the receipts for grain must contain "in event the relationship existing between the warehouseman and any depositor is not that of strictly disinterested custodianship, a statement setting forth the

actual relationship . . . ." Reg. 4, § 1 (a) (3). Moreover, § 5a (7) of the Commodity Exchange Act, 49 Stat. 1491, 1498, 7 U. S. C. § 7a (7) provides that receipts issued under the United States Warehouse Act "shall be accepted in satisfaction of any futures contract . . . without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law . . . ."

(4) Mixing high quality public grain with inferior grain owned by respondents, delay in loading grain. The complaint charges that these practices [7] are part of the abuses flowing from the conflicting positions of respondents as public grain warehousemen and dealers in grain. They are alleged to violate the rule of *Hannah* v. *People, supra,* and provisions of the Public Utilities Act which prohibit any preference or advantage to any person and which disallow any act of prejudice or disadvantage to any person. § 38. And see Grain Warehouse Act § 17. Section 13 of the Federal Act, as we have seen, provides that every licensed warehouseman "shall receive for storage" any agricultural product "without making any discrimination between persons desiring to avail themselves of warehouse facilities." Section 15 provides for the inspection and grading of fungible agricultural products by federal inspectors. Section 16 permits licensed warehousemen "if authorized by agreement or by custom" to mingle fungible products with other products "of the same kind and grade." Section 16 likewise prohibits the mixing of fungible products "of different grades." [8] Section 30 provides fine and imprisonment for any person who fraud-

[7] See note 2, *supra.*

[8] The regulations promulgated under the Federal Act implement these provisions. Reg. 5, § 12 provides that licensed warehousemen shall accept grain for storage and deliver grain out of storage in ac-

ulently classifies, grades, or weighs any agricultural product stored under the provisions of the Act. Section 21 provides that a warehouseman in absence of some lawful excuse shall deliver "without unnecessary delay" the stored products on proper demand.

(5) Sacrificing or rebating storage charges, retaining desirable transit tonnage, utilizing preferred storage space. These practices, charged in the complaint,[9] are alleged to be other manifestations of the evils of a public warehouseman also being a dealer in grain. They are said to be violative of the principles announced in *Central Elevator Co.* v. *People,* 174 Ill. 203, 208–209, 51 N. E. 254, 256. And these practices are said to be acts of prejudice or disadvantage outlawed by § 38 of the Public Utilities Act which we have already mentioned. On the other hand, the Federal Act, as we have seen, requires every licensed warehouseman to "receive for storage" any agricultural product "without making any discrimination between persons desiring to avail themselves of warehouse facilities." § 13.

(6) Maintenance of unsafe and inadequate elevators; inadequate and inefficient warehouse service. The complaint alleges that as a result of these practices fire insurance premiums have become exorbitant and prohibitive; that owners of grain have suffered damages due to the deterioration of grain. The Illinois Commission is granted broad powers over the maintenance of facilities which are adequate and efficient (§§ 32, 49, Public Utilities Act) including the power to order the making of additions, exten-

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cordance with the grades of such grain determined by a federal inspector. Reg. 5, § 16 provides that such warehousemen shall deliver to the lawful holder of a receipt grain of the grade and quantity named in the receipt. Reg. 5, § 18 provides that grain of different grades may not be mixed except, *inter alia,* when the identity of the grain to be stored is to be preserved.

[9] See note 2, *supra.*

sions, repairs, improvements, or changes. *Id.*, § 50. By § 3 of the Federal Act the Secretary of Agriculture is authorized "to determine whether warehouses for which licenses are applied for or have been issued under this Act are suitable for the proper storage of any agricultural product . . . ." Section 3 also grants the Secretary authority to prescribe the duties of warehousemen "with respect to their care of and responsibility for agricultural products stored" in licensed warehouses.[10] No license will be granted if the warehouse is found "not suitable for the proper storage of grain." Reg. 2, § 5. Every warehouseman must exercise "such care in regard to grain in his custody as a reasonably careful owner would exercise under the same circumstances and conditions." Reg. 5, § 8. Every warehouseman must keep "his warehouse reasonably clean at all times and free from straw, rubbish, or accumulations of materials that will increase the fire hazard or interfere with the handling of grain." Reg. 5, § 15.

(7) Operating without a state license. The complaint charges that respondents may not lawfully operate without a license from Illinois. See Grain Warehouse Act § 3. The Federal Act gives the Secretary of Agriculture authority to issue licenses on terms and conditions specified. §§ 3, 4, 5.

(8) Abandonment of warehousing service. The complaint alleges that respondents have abandoned services without consent of the Illinois commission. Approval of the Commission to abandon or discontinue service is required. § 49a, Public Utilities Act. Licenses issued under the Federal Act "shall terminate as therein [§§ 4, 9]

[10] And see § 23 requiring reports to the Secretary "concerning such warehouse and the condition, contents, operation, and business thereof" and providing that the licensee "shall conduct said warehouse in all other respects in compliance with this Act and the rules and regulations made hereunder."

provided, or in accordance with the terms of this Act and the regulations thereunder . . . ." § 5. By § 25 the Secretary is authorized to suspend or revoke a license for any violation of the Act or the regulations. Among the grounds for revocation specified in the regulations is ceasing to conduct the licensed warehouse. Reg. 2, § 7.

(9) Failure to file and publish rate schedules; rendering warehousing service without filing and publishing schedules. These matters, charged in the complaint, are regulated by §§ 33 and 35 of the Public Utilities Act. Under the Federal Act a warehouseman must file his rate schedules before a license issues; proposed changes in them must be filed before made; the current schedule of charges must be posted in a conspicuous place in the principal office where receipts issued by the warehouseman are delivered to the public. Reg. 5, § 3; Reg. 2, § 6.

As we have seen, Congress in 1931 made the "power, jurisdiction, and authority" of the Secretary of Agriculture conferred by the Act "exclusive with respect to all persons securing a license" under the Act, so long as the license remains in effect. It is argued by respondents that § 29 should be construed to mean that the subjects which the Secretary's authority touches may not be regulated in any way by any state agency, though the scope of federal regulation is not as broad as the regulatory scheme of the State and even though there is or may be no necessary conflict between what the state agency and the federal agency do. On the other hand, petitioners argue that since the area taken over by the Federal Government is limited, the rest may be occupied by the States; that state regulation should not give way unless there is a precise coincidence of regulation or an irreconcilable conflict between the two.

It is clear that since warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain, *United States* v. *Hastings,* 296 U. S. 188,

Congress may, if it chooses, take unto itself all regulatory authority over them (see *New York Central R. Co.* v. *New York & Pa. Co.*, 271 U. S. 124), share the task with the States, or adopt as federal policy the state scheme of regulation. See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 430–436. The question in each case is what the purpose of Congress was.

Congress legislated here in a field which the States have traditionally occupied. See *Munn* v. *Illinois*, 94 U. S. 113; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 148–149. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611; *Allen-Bradley Local* v. *Wisconsin Employment Board*, 315 U. S. 740, 749. Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U. S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad Commission*, 236 U. S. 439; *Charleston & W. C. R. Co.* v. *Varnville Co.*, 237 U. S. 597; *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Napier* v. *Atlantic Coast Line R. Co.*, *supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U. S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory

measures has left the police power of the States undisturbed except as the state and federal regulations collide. *Townsend* v. *Yeomans,* 301 U. S. 441; *Kelly* v. *Washington,* 302 U. S. 1; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202.

A forceful argument is made here for the view that the Illinois regulatory scheme should be allowed to supplement the Federal Act and that the Illinois Commission should not be prevented from acting on any of the matters covered by Rice's complaint, unless what the Commission does runs counter in fact to the federal policy. That is to say, the actual operation of the state system may be harmonious with the "measure of control" over warehousemen which the Federal Act imposes. *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 23. That, it is said, can only be determined after the Illinois Commission has acted.

That argument is illustrated in several ways. The Illinois Commission may fix rates; the Secretary of Agriculture cannot. He may, to be sure, suspend or revoke licenses if unreasonable or exorbitant charges are made. If the Commission fixes unreasonable or exorbitant rates, there will be a conflict with the Federal Act and the state rate order must fall. But until it is known what the Commission will do, no conflict with the Federal Act can be shown. If indeed it reduces rates, as may be presumed, no conflict with the Federal Act will likely exist. Another illustration concerns the dual position of the warehousemen. It is pointed out that all the Federal Act requires is disclosure; that the more basic state policy of uprooting the practice of public warehousemen storing and dealing in their own grain is not inconsistent with the federal policy of disclosure. Another illustration relates to the preferential and discriminatory practices in connection with the rebate of storage charges, retention of desirable

transit tonnage, and the utilization of preferred storage space. All the Federal Act requires is that warehousemen receive products for storage without making discriminations between persons. What the Illinois Commission promulgates or requires, if the proceedings before it are allowed to go ahead, might indeed strengthen and bolster the federal regulatory scheme and in no way dilute, impair or oppose it. Such reasoning could be applied to each of the nine charges which we have summarized, even including, perhaps, the requirements for a state license and the filing and publishing of rate schedules. See *Union Brokerage Co.* v. *Jensen, supra.*

At first blush that construction of the Federal Act has great plausibility. It preserves intact the federal system of warehouse regulation, leaves the State free to protect local interests, and strikes down state power only in case what the State does in fact dilutes or diminishes the federal program.

But the special and peculiar history of the Warehouse Act indicates to us that such a construction would thwart the federal policy which Congress adopted when it amended the Act in 1931. Prior to that time, as we have pointed out, the Federal Act by reason of its express terms had been subservient to state laws relating to warehouses and warehousemen. Congress in 1931 found that condition unfavorable and undertook to change it. If Congress had done no more than to eliminate from § 29 the language which resulted in the Act's subservience, there would be a strong case for holding that state regulatory systems were not to be affected unless they collided with the Act. That construction would receive reinforcement from the provision in § 29 that the Secretary "is authorized to cooperate with State officials charged with the enforcement of State laws" relating to warehouses and warehousemen. Cf. *Union Brokerage Co.* v. *Jensen,*

supra, p. 209. But Congress did not choose that simple expedient. It went further and added to § 29 the mandatory words "the power, jurisdiction, and authority" of the Secretary conferred under the Act "shall be exclusive with respect to all persons" licensed under the Act. And the original provisions of § 6 requiring a bond from licensees securing the faithful performance of their obligations as warehousemen under state law were deleted.

These actions were explained in the Committee Reports.

The previous subservience of the Act to state law was said to have militated "against the full value of Federal warehouse receipts for collateral purposes." [11] S. Rep. No. 1775, 71st Cong., 3d Sess., p. 2. The amendment to § 6 followed "naturally" the revision of § 29. *Id.* The amendment to § 29 was designed to make "the Federal act independent of State laws" and to "place the Federal act on its own bottom." *Id.* While a warehouseman need not operate under the Act, if he chose to be licensed under it, he would then "be authorized to operate without regard to State acts and be solely responsible to the Federal act." *Id.* Warehousemen, having made their choice

[11] The Senate Report also stated, p. 2:

"Bankers have repeatedly pointed out that this section of the warehouse act is its weakest feature. This amendment will clarify and remove many uncertainties from the credit man's viewpoint. As the law now reads, for fear the Federal act may be negatived by State legislation or regulation, a banker is obliged to follow closely the laws of the 48 different States, the regulations thereunder, and the administrative rulings thereunder. This is an impossible task. The suggested amendment will place the Federal act independent of State acts and should enhance the value of receipts for collateral purposes."

And see H. R. Rep. No. 4, 71st Cong., 1st Sess. As stated in note 4, *supra*, the amendment was recommended by the Secretary of Agriculture "so as to make the Federal warehouse act independent of any State legislation on warehousing."

to operate under state or federal law, should "then be permitted to operate without interference on the part of any agency." *Id.*, pp. 2–3. Or, as stated by the House Committee, the purpose of the amendment to § 29 was to make the Act "independent of any State legislation on the subject." H. R. Rep. No. 2314, 70th Cong., 2d Sess., p. 4.

That is strong language. It makes unambiguous what was meant by the deletion from § 6 of any requirement that federal licensees comply with state laws regulating warehousemen. It makes clear the significance to be attached to the special wording of § 29. The amendments to § 6 and § 29, read in light of the Committee Reports, say to us in plain terms that a licensee under the Federal Act can do business "without regard to State acts"; that the matters regulated by the Federal Act cannot be regulated by the States; that on those matters a federal licensee (so far as his interstate or foreign commerce activities are concerned) is subject to regulation by one agency and by one agency alone.[12] That is to say, Congress did more than make the Federal Act paramount over state law in the event of conflict. It remedied the difficulties which had been encountered in the Act's administration by terminating the dual system of regulation. Cf. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U. S. 152. As stated by the Supreme Court of South Dakota, warehousemen electing to come under the Federal Act need serve but one master, and that one the federal agency. *In re Farmers Cooperative Assn.,* 69 S. D. p. 202, 8 N. W. 2d p. 562. The cooperation which the Secretary was authorized to undertake with state officials was cooperation in harmonizing the exclusively federal and the exclusively state systems of regulation.

[12] That is, of course, subject to those express exceptions in the Warehouse Act which subject phases of the business to state law. See *e. g.,* §§ 18 and 20.

In this view of the Act, Congress formulated a policy on numerous phases of the warehouse business.[13] The policy on rates was not the fixing of them but control over them through issuance, suspension, or revocation of licenses. Dual or conflicting positions of warehousemen were regulated by disclosure, by general prohibitions against discrimination between customers, by control over the license. Unsafe and inadequate warehouses were protected by the power of the Secretary to determine whether the warehouses of applicants or licensees were suitable. Mixing of grain was authorized under specified conditions and prohibited under others. On each of the nine matters charged in the complaint and listed above Congress legislated. And as we read the Act, Congress in effect said that the policy which it adopted in each of the nine was exclusive

[13] The basic program reflected in the Act was described in H. R. Rep. No. 60, 64th Cong., 1st Sess., p. 1, as follows:

"The outbreak of the European war emphasized the fact that the farm marketing machinery of this country is seriously weak, insufficient, and inadequate—a condition which already had been more or less recognized by students of farm economics. From a very thorough study of our system of marketing there will appear: (1) A lack of adequate storage facilities; (2) a lack of proper control and regulation of such storage systems as exist; (3) an absence of uniformity in their methods of operation and the form of receipts issued; (4) a multiplicity of standards for grading and classification, or in some cases an entire absence of such standards for grading and classification; (5) a lack of disinterested graders, classifiers, and weighers; (6) a lack of proper relationship between the storage and banking systems of the country.

"The inauguration under this bill of a permissive system of warehouses licensed and bonded under authority of the Federal Government for the storage of staple and nonperishable agricultural products upon which uniform receipts may be issued, the weights and grades of the products specified therein having been previously determined by licensed weighers and graders in accordance with Government standards, would go far in the direction of standardizing warehouse construction, storage conditions, insurance, accounting, financing, and the handling and marketing of farm products."

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of all others; and that if a licensed warehouseman complied with each requirement, he did all that he need do. He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act. We recently noted that Congress can act so unequivocally as to make clear that it intends no regulation except its own. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767. In these fields Congress has done just that by the 1931 amendments.

Thus, by eliminating dual regulation and substituting regulation by one agency, Congress sought to achieve "fair and uniform business practices" which, as noted in *Federal Compress Co.* v. *McLean, supra,* p. 23, was the purpose of the amended Act.

The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State. By that test each of the nine matters we have listed is beyond the reach of the Illinois Commission, since on each one Congress has declared its policy in the Warehouse Act. The provisions of Illinois law on those subjects must therefore give way by virtue of the Supremacy Clause. U. S. Const., Art. VI, Cl. 2.

Second. There were matters, other than those we have mentioned, which were charged in the complaint before the Commission.

(1) Failure to secure prior approval of the Illinois Commission for management, construction, engineering, supply, financial and other contracts between respondents and affiliates. Such approval is said to be required by § 8 (a) (3) of the Public Utilities Act.

(2) Failure to secure prior approval of contracts and leases between respondents and other public utilities. Such approval is said to be required by § 27 of the Public Utilities Act.

(3) Failure to secure approval of issuance of securities payable at periods of more than twelve months after date. Such approval is said to be required by § 21 of the Public Utilities Act.

These regulatory measures, it is said, are designed to prevent unwarranted drains on utility funds or the creation of unsound financial structures which would affect the ability of warehousemen to render adequate service at reasonable rates.

The United States Warehouse Act contains no provisions relating expressly to these three matters. And we are told that the Secretary of Agriculture has made no attempt to exercise any jurisdiction over them. But possibilities of conflict and repugnancy are conjured up. It is stated, for example, that the Secretary might determine that a warehouseman could not offer suitable warehouse service without an addition to his warehouse, that the financing of an addition might require the warehouseman to issue securities, that state disapproval of the issue might prevent the licensee from making the required additions. But it will be time to consider such asserted conflicts between the State and Federal Acts when and if they arise. Any such objections are at this stage premature. Congress has not foreclosed state action by adopting a policy of its own on these matters. Into these fields it has not moved. By nothing that it has done has it preempted those areas. And see *Federal Compress Co.* v. *McLean, supra,* p. 23. In more ambiguous situations than this we have refused to hold that state regulation was superseded by a federal law. *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U. S. 261.

We accordingly affirm in part and reverse in part the judgment of the Circuit Court of Appeals and remand the cause to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

More than seventy years ago this Court upheld the regulation of grain warehousing rates by Illinois and did so despite the relation of the great grain elevators to interstate commerce. *Munn* v. *Illinois,* 94 U. S. 113; and see *Budd* v. *New York,* 143 U. S. 517. State regulation of grain elevators had become so much part of our economic and political fabric, and so important was it deemed that the State laws remain in full force, that when Congress, in 1916, passed the first Warehouse Act (Part C of the Act of August 11, 1916, 39 Stat. 446, 486), it made that Act subordinate to the requirements of State laws. The Court now holds that by the 1931 Amendment to that Act, 46 Stat. 1463, Congress not only made the federal legislation independent of State law to the full scope of federal regulation, but also nullified the extensive network of State laws regulating warehouses, even though such laws, in their actual operation, in nowise conflict with the operation of the federal law. The Court thereby uproots a vast body of State enactments which in themselves do not collide with the licensing powers of the Secretary of Agriculture. It does so on the ground that Congress, by the 1931 Amendment, provided that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect."

The decision of the case turns on the "power, jurisdiction, and authority" that Congress has deposited with the Secretary of Agriculture to the exclusion of action by a State. I could understand, though that is not my view, a holding that once a warehouseman chooses to obtain a federal license, he is quit of amenability to State law relating to the business of warehousing as such. On the other hand, the Amendment of 1931 may be read, without violence to its language, as designed not to displace all State regulation of warehousing, but merely to prevent conflict or even concurrence as to the very matters with which the Secretary of Agriculture can deal. This would leave State law to operate where it could without impinging on the limited regulatory functions assumed by the Federal Government. Such is my view. The Court's conclusion is a kind of admixture of these two views. Today's decision, apparently, does not altogether free federally licensed warehouses from State warehouse regulation, nor yet subject them to State laws, even though these State laws may harmoniously function without impinging on the licensing powers of the Secretary. To my way of thinking, the justification for conceding an undefined area to the States equally justifies leaving to the States all that is not irreconcilable with the full exercise of the licensing authority given to the Secretary of Agriculture.

The facts of the case are not in dispute. Rice, an owner and shipper of grain, filed with the Illinois Commerce Commission a complaint charging respondent warehouse owners with violations of the Illinois Public Utility Act (Ill. Rev. Stats. 1945, c. 111–2/3), the Illinois Grain Warehouse Act (Ill. Rev. Stats. 1945, c. 114 §§ 293–326 (a)), and Art. XIII of the Illinois Constitution. The violations charged include operation without a State license, exaction of unreasonable rates, failure to publish rates, failure to provide appropriate facilities, improper

mixing of grades, discrimination in rates, and conflict of interests as grain-dealer and warehouseman. The respondents moved to dismiss the complaint on the ground that federal license placed them under the exclusive jurisdiction of the United States Warehouse Act, and the State's authority was entirely superseded. Upon denial of this motion by the Illinois Commerce Commission, respondents applied to the United States District Court for an injunction against further State proceedings. What is before us is the ruling of the Circuit Court of Appeals that the District Court had erred in not granting the injunction.

This Court now orders the proceedings before the Illinois Commerce Commission to be enjoined, without knowledge on our part what it is that Illinois would exact of respondents. It has not yet been decided by the authoritative voice of Illinois law, the Supreme Court of Illinois, which of her regulatory requirements would survive respect by that Court for the controlling federal Act. This Court has heretofore acted on the wise rule that it will not "assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 746. The suit in the District Court was, in any event, premature. It should, on familiar principles, be ordered held in the District Court until the claim of Illinois may be authoritatively ascertained in the State courts, thereby perhaps avoiding a claim of conflict between State and federal legislation. Compare the series of cases from *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, to *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101.

On the merits of the controversy our problem is to determine what freedom to regulate its grain warehouses has been left to Illinois, after Congress exercised its constitu-

tional power over such warehouses by adopting a licensing system to be administered by the Secretary of Agriculture under closely defined authority. Underlying the problem is the important fact that we are concerned with an economic enterprise which, while it has important radiations beyond State bounds, does not thereby lose special relations to the State in which it is conducted. And so we have once more the duty of judicially adjusting the interests of both the Nation and the State, where Congress has not clearly asserted its power of preemption so as to leave no doubt that the separate interests of the States are left wholly to national protection.

The general considerations to be taken into account in striking a balance, and not to be acknowledged merely platonically, have been indicated in my opinion in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767. Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.

Assuming that the undefined scope of Illinois law covers all the relief sought before the Illinois Commission, it is not suggested that there is actual conflict between the limited federal control through the licensing device and the policy of Illinois. Indeed, it seems to be admitted that the enforcement of the State Act might well effectuate, at least in some aspects, the policy of the federal statute. Moreover, despite a statement in the House Report that the purpose of the 1931 Amendment was to make the Act "independent of any State legislation on the subject" (H. Rep. No. 2314, 70th Cong., 2d Sess., p. 4), the Court does not find that in making "the power,

jurisdiction, and authority conferred upon the Secretary of Agriculture . . . exclusive with respect to all persons securing a license" Congress insulated such licensed warehousemen from further regulation by a State. What the Court holds is that if Congress has touched a subject matter it becomes untouchable by the State, though there is neither paper nor operating conflict between federal and State spheres of authority. Thus, while Congress has not given to the Secretary of Agriculture rate-fixing power, Congress, it is said, has inferentially deprived Illinois of the power she has exercised for seventy years to fix grain warehouse rates.

I cannot agree. As to rates, for example, Congress has merely given the Secretary power to revoke a license if its holder charges "unreasonable or exorbitant" rates. The practical assumption, I submit, is not that Congress has put an end to the tried machinery for rate-fixing by the States without putting another in its place. It is rather that it would permit its licensing authority to avail itself of the facilities of the established rate-fixing agencies of the States and cooperate with them in ascertaining whether Illinois licensees *are* charging "unreasonable and exorbitant" rates. Such would be the practicalities of government where both State and Nation have converging yet separate interests, and such authorized collaboration between national and State governments should be the assumption in construing the Act unless Congress has left no doubt that it was so bent on avoidance of all possible conflict that it left no room for concert. Indeed, the very section which confers "exclusive" authority upon the Secretary of Agriculture authorizes him "to cooperate with State officials charged with the enforcement of State laws relating to warehouses . . . ." 46 Stat. 1465.

By the United States Warehouse Act, Congress did not undertake a general, affirmative regulation of warehouses,

even remotely comparable to its regulation of other public utilities. The Act was initiated as warehouse receipts legislation, written with the Uniform Warehouse Receipts Act in mind. Neither the language nor the history of the 1931 Amendment marks a departure from the basic design and policy of the legislation. Congress did not see fit to establish a compulsory, uniform, nation-wide system for the regulation of grain warehouses, essential links though they be in the chain of interstate commerce. Nor did Congress authorize the Secretary of Agriculture to formulate and enforce such a system. Even in its limited aspect, the Act does not apply to all warehouses affecting interstate commerce. Indeed, Congress exercised no compulsion over any warehouse. Congress merely offered to those who desired it the privilege of being a federal licensee. Anyone who wished might continue to operate as a warehouseman without a federal license. As to these there is no question but that State law controls. And even those who obtain a federal license cannot be compelled to perform any positive duties. Except for certain penalties for fraud, the only sanction for disobedience of the few duties imposed is loss of the license.

Congress was content to allow two warehousemen in similar circumstances to operate under different rules if one chose to seek a federal license and the other did not. It offered perquisites incident to such a license to a warehouseman who wanted them. Such a scheme does not persuasively indicate a purpose to free such a federal licensee from regulations to which others are subject and which are not in practical conflict with the requirements of the federal law. For instance, has Congress really expressed with reasonable clarity its purpose to forbid to the States the fixing of warehouse rates and thus deprive the States of a long-standing regulatory power which the United States chose not to assume? Is it not more con-

sistent with a proper regard for the interplay of State and national interests to assume that Congress was imposing a minimum of regulation for those who accepted federal licenses rather than to assume that by inferential sterilization of State laws Congress meant to make its optional and restricted requirements the maximum? The "power, jurisdiction, and authority" of the Secretary of Agriculture which after 1931 was to be "exclusive" are given full and fair scope if made to refer only to powers that the Secretary can effectively exercise. There is exclusion of State power as to what the Act, substantively speaking, includes, but not exclusion of a vast potential field of warehouse regulation, not within the active range of federal administration, simply because Congress dealt with a small part of it, and that only conditionally.

Nor is there anything in the history of the federal Act which requires such destructive consequences to a long-standing body of State enactments. When the 1916 Act was passed, Congress emphasized the need for State regulation by subordinating federal action to such regulation. By 1931 forty States had laws regulating warehouses, laws which at least in some aspect did not conflict with the powers vested in the Secretary of Agriculture. An impressively large number of States fixed warehouse rates. The Court now finds in the legislative history of the 1931 Amendment a purpose to wipe out all these regulations as to the holders of federal licenses.

That Amendment eliminated the subservience of the federal Act to the laws of the States, for such subservience really nullified the practical purposes at which Congress aimed in 1916 by a voluntary federal licensing system. The purpose was to make "the Federal act independent of State laws," and to "place the Federal act on its own bottom." While such language in a Committee Report, treated merely as words, might be interpreted as an im-

plicit, roughshod decimation of State authority over any aspect of warehousing which the federal licensing system touched, howsoever meagerly and indirectly, it is more consonant with a due regard for federal-State relations to find that the dominating object of the legislation controls what was meant by "independent of State laws." For the dominant object was removal of those matters which were entrusted to the Secretary of Agriculture from subordination to State action. By saving the authority which it had given to the Secretary of Agriculture from being rendered futile by State laws, Congress ought not to be held to have nullified State laws whose continuing force would not hamper the Secretary of Agriculture in exercising the powers that Congress gave him. Evidence is lacking that Congress felt that the correction of the inadequacy which had revealed itself regarding the 1916 Act required withdrawal of federal license holders from the requirements of non-conflicting State regulation. So long as full scope can be given to the amendatory legislation without undermining non-conflicting State laws, nothing but the clearest expression should persuade us that the federal Act wiped out State fixation of rates and other State requirements deeply rooted in their laws. When neither the mischief at which the 1931 Amendment was directed, nor the policy, terms and structure of warehousing legislation by Congress in its entirety necessitate it, disregard of the delicate balance of Federal-State relations ought not to be attributed to Congress.

If so fundamental a change were designed, it would normally be reflected in the financial provisions made by Congress, and in the reports on the administration of the Act. The appropriations for administering the United States Warehouse Act show no substantial increase as a consequence of the 1931 Amendment. For the years pre-

ceding and those immediately following the Amendment, the appropriations were:

1929 (45 Stat. 539, 563)	$240,320
1930 (45 Stat. 1189, 1214)	256,000
1931 (46 Stat. 392, 419)	241,000
1932 (46 Stat. 1242, 1270)	312,200
1933 (47 Stat. 609, 638)	313,020
1934 (47 Stat. 1432, 1460)	296,220
1935 (48 Stat. 467, 494)	271,383*

Moreover, those charged with the enforcement of the Act seem to have been unmindful of the far-reaching consequences now imputed to it. The reports of the Secretary of Agriculture, of the Chief of the Bureau of Agricultural Economics, and of the Chief of Agricultural Marketing Service, for the years after 1931, disclose administrative attitudes and practices no different from those of preceding years. No mention is made of the State laws which, the Court now holds, were superseded though not conflicting with federal administration. In citing the advantages incident to a federal license, no mention appears of so important an item as relief from existing State regulations.

The history of the federal act shows that at no time has Congress deemed it desirable to introduce compulsory uniformity of warehouse regulation. By freeing federal licensees from overriding State regulation Congress was not by indirection seeking to create such a uniform system. But the effect of the interpretation now given to the 1931 Amendment is the establishment of uniformity of non-regulation, in that it introduces *laissez faire* outside the very narrow scope of the Secretary's powers. It is easy to exaggerate the danger of undesirable consequences flowing

*The more substantial increases in appropriation after 1935 seem to be due to an increase in the volume of licensing, not to an extension of the fields of supervision.

from a rejected construction. But surely one does not draw on idle fears in suggesting that as a result of today's decision the gates of escape from deeply rooted State requirements will be open, although Congress itself has not authorized federal authority to take over the regulation of such activities and though their State enforcement does not at all conflict with, but rather promotes, the limited oversight of warehouses thus far assumed by the Federal Government. The Court displaces settled and fruitful State authority though it cannot replace it with federal authority.

RICE ET AL. v. BOARD OF TRADE OF THE CITY OF CHICAGO.

NO. 471. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued February 14, 1947.—Decided May 5, 1947.

1. By the Commodity Exchange Act, the United States has not so occupied and preempted the field of regulation of boards of trade designated "contract markets" as to deprive the states of authority to regulate trading in futures, except to the extent that the state regulations may conflict with the federal regulations. Pp. 250–255.
2. Until a state has adopted applicable rules on the subject, it cannot be known whether the state regulations will conflict with the federal regulations and any claim of supersedure is premature. Pp. 255–256.

156 F. 2d 33, reversed.

A district court dismissed complaints seeking to enjoin proceedings before the Illinois Commerce Commission in which the Chicago Board of Trade had been joined as a defendant. The Circuit Court of Appeals reversed. 156 F. 2d 33. This Court granted certiorari. 329 U. S. 701. *Reversed,* p. 256.

*Together with No. 473, *Illinois Commerce Commission et al.* v. *Board of Trade of the City of Chicago,* also on certiorari to the same Court.

Lee A. Freeman argued the cause and filed a brief for petitioners in No. 471.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for petitioners in No. 473. With him on the brief was *George F. Barrett,* Attorney General.

Howard Ellis argued the cause for respondent. With him on the brief was *Weymouth Kirkland.*

Acting Solicitor General Washington, Assistant Attorney General Berge, Robert C. Barnard, W. Carroll Hunter and *Lewis A. Sigler* filed a brief for the United States, as *amicus curiae,* urging affirmance.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

These are companion cases to *Rice* v. *Santa Fe Elevator Corp.* and *Illinois Commerce Commission* v. *Santa Fe Elevator Corp., ante,* p. 218, decided this day. Respondent in these cases, the Chicago Board of Trade, was joined as a defendant in the proceeding brought by Rice before the Illinois Commerce Commission. As we have noted in our opinion in the companion cases, the Rice complaint charged the defendant warehousemen with maintaining excessive, unreasonable and discriminatory rates and practices, with operating inadequate and unsafe facilities and services, and with failure to comply with other requirements of Illinois law. The Board of Trade, organized under a special Act of the Illinois legislature, operates a commercial grain exchange and has adopted rules and regulations governing transactions on the exchange. The complaint of Rice charges (1) that the rules and regulations of the Board are unreasonable and unsatisfactory in that, among other things,

they favor warehousemen and sellers of grain and discriminate against grain buyers; and (2) that the Board has from time to time adopted rules and regulations, relating to the warehousing of grain in public warehouses and the custody of grain in private warehouses without securing the prior approval of the Illinois Commission. Under Illinois law, it is alleged, such rules may not become operative without approval by the Commission; and the Commission in turn has authority to adopt and promulgate rules of its own. Ill. Rev. Stat. 1945, ch. 114, § 194b.[1] Relief asked on this phase of the proceeding was a declaration that the Board's rules, which did not have the prior approval of the Commission, were void; and an order that the Board adopt and submit rules which were fair, equitable, adequate and specific.

The Board moved to dismiss the proceeding before the Commission on the ground that the Commodity Exchange Act, 49 Stat. 1491, as amended, 7 U. S. C. § 1 *et seq.*, and the regulations thereunder superseded the provisions of Illinois law which Rice sought to invoke. That motion was denied. Thereupon, these suits were instituted in the District Court to enjoin the proceedings before the Illinois Commerce Commission. The District Court dismissed the complaints. The Circuit Court of Appeals reversed. 156 F. 2d 33. The cases are here on certiorari.

The Chicago Board of Trade is "the greatest grain market in the world." *Board of Trade* v. *Olsen*, 262 U. S.

[1] That section provides: "No rule or regulation of any board of trade or grain exchange which relates to the warehousing of grain in any public grain warehouse, or which relates to the custody of grain in any private warehouse, or the use or negotiation of custodian's receipts for such grain, shall be or become operative until such rule or regulation is approved by the Illinois Commerce Commission, and the Illinois Commerce Commission may adopt and promulgate reasonable rules and regulations consistent with the provisions of this Act for the purpose of making this Act effective."

1, 33. Its activities have been regulated by Congress by the Future Trading Act, 42 Stat. 187, by the Grain Futures Act, 42 Stat. 998, and by the Commodity Exchange Act. See H. R. Rep. No. 421, 74th Cong., 1st Sess. The Board of Trade claims a status under the Commodity Exchange Act which, it is contended, precludes the Illinois Commission from entertaining the Rice complaint.

The Commodity Exchange Act provides comprehensive regulation of trading in futures on commodity exchanges which are designated as "contract markets" by the Secretary of Agriculture. The Secretary is authorized to designate any board of trade as a contract market on its compliance with prescribed terms and conditions. § 5. The Chicago Board of Trade has been so designated. The Act contemplates that each contract market will adopt rules governing transactions in futures contracts. Approval of a board of trade as a contract market may be made only when "the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." § 5 (d). The Act contains provisions which prohibit certain types of trading practices (see for example §§ 4b, 4c, 4h) and other provisions (as for example those dealing with excessive speculation, see § 4a) which limit or control buying and selling on contract markets. But we are not particularly concerned with those phases of the federal regulatory scheme. So far as the problem of supersedure is concerned, this Act is unlike the one considered in the companion cases, as we shall see. Moreover, the subject matter of the complaint filed by Rice with the Illinois Commission against the Board of Trade relates only to the warehousing of grain. On that matter the Act has only two specific provisions.

It provides in the first place that receipts issued under the United States Warehouse Act, 39 Stat. 486, as amended, 7 U. S. C. § 241 *et seq.*, shall be accepted with-

out discrimination in satisfaction of futures contracts made on or subject to the rules of the contract market, even though the warehouseman is not also licensed under state law or enjoys different privileges than those accorded by state law, provided *inter alia,* that "the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes." § 5a (7). Moreover, each contract market has some control over warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of the contract market. Thus the contract market must require the warehouse operators "to make such reports, keep such records, and permit such warehouse visitation" as the Secretary may prescribe. § 5a (3). All rules and regulations of a contract market, and all changes and proposed changes, must be filed with the Secretary. § 5a (1).

Enough of the Act has been summarized to show that it imposes on contract markets, under the supervision of the Secretary, (1) duties of preventing or controlling certain trading practices and of supervising transactions in futures contracts, and (2) some responsibility for standardizing deliverable warehouse receipts and assuring their integrity. The failure or refusal of a board of trade to comply with the provisions of the Act or any of the rules and regulations of the Secretary is cause for suspension or revocation of the authority of the board to act as a contract market. § 5b. And see § 6 (a). Criminal penalties are provided for certain violations of the Act, or of rules or regulations of the Secretary, by a board of trade or any of its directors, officers, agents or employees. §§ 6b, 9. The Secretary has the power to "make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade . . . ." § 8.

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And the Secretary is given broad rule-making powers. § 8a (5).

The Secretary has promulgated numerous rules and regulations covering a variety of subjects pertaining to contract markets and their activities.[2] The following are relevant here, since they relate to the warehousing of grain: (1) a requirement that each contract market file information concerning warehouses in which or out of which commodities are deliverable in satisfaction of futures contracts made on the contract market, § 1.43; and (2) a provision that each contract market shall require operators of warehouses whose receipts are deliverable in satisfaction of futures contracts made on or subject to the rules of the contract market (a) to keep specified records, (b) to furnish information concerning stocks of commodities in warehouses, (c) to permit visitation of the premises and inspection of the books and records by duly authorized representatives of the Federal Government. § 1.44.

In pursuance of the latter regulation of the Secretary, the Board of Trade enacted the rules and regulations which Rice challenged in the proceedings before the Illinois Commission. One rule provides that deliveries shall be made by delivery of warehouse receipts issued by warehouses which have been declared "regular" by the Board. Rule 281. The Board's regulations relating to warehousing of grain set forth the procedure and standards by which warehouses may be made "regular." [3]

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[2] The rules and regulations are to be found in 17 C. F. R., Part 1.

[3] These regulations provide, *inter alia*, that the warehouses must be "conveniently approachable by vessels of ordinary draft," have "customary shipping facilities," and charge rates not exceeding a specified maximum (Reg. 1620); must file a bond satisfactory to the Board (Reg. 1621); must have proprietors or managers in "unquestioned good financial standing and credit" (Reg. 1624); must be "connected by railroad tracks with one or more of the eastern railway lines" (Reg. 1625); and must be "provided with modern improve-

It is apparent that the federal scheme of regulation of futures trading extends to the whole futures contract—to its satisfaction, as well as to its execution. It is also apparent that the Act provides some control over (1) warehouse receipts which are acceptable in satisfaction of sales and purchases on the contract market, and (2) the qualifications of the warehouses whose receipts will be accepted for such deliveries. But there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, see *Rice* v. *Santa Fe Elevator Corp., supra,* a declaration by Congress that the system which it has adopted for the regulation of trading on contract markets is exclusive of state regulation. Here Congress has gone no further than to write into the Act prohibitions and controls and to give the force of law both to them and to rules and regulations of the Secretary made within the scope of his statutory authority. With exceptions which we will note, state regulations which conflict with the requirements of the Act or with the rules and regulations of the Secretary would be superseded under the familiar rule.

Congress treated the rules and regulations of the Board of Trade differently from those of the Secretary. It did not undertake to put behind them civil or criminal sanctions.[4] It merely furnished standards (or authorized the

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ments and appliances for the convenient and expeditious receiving, handling, and shipping of grain in bulk." (Reg. 1626.)

Any "regular" warehouse may be declared "irregular" by the Board at any time for violation of the laws of Illinois or the rules and regulations of the Board (Reg. 1623), or because of any important change in the conditions of any warehouse or disregard or evasion of the requirements governing regular warehouses (Reg. 1629).

[4] We therefore have no attempt here to endow private groups with law-making functions. Cf. *Schechter Corp.* v. *United States,* 295 U. S. 495; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 225–227; *Parker* v. *Brown,* 317 U. S. 341, 350–352.

Secretary to do so) to which the rules and regulations of the Board were to conform. And while there is provision in some instances for disapproval of the Board's rules by the Secretary of Agriculture (see § 4c), there is no provision for his approval or disapproval of the rules challenged in the Illinois proceeding. Insofar as those rules are concerned, all that the Act and the regulations of the Secretary do is to define the area in which the Board may provide standards for warehouses whose receipts are acceptable in satisfaction of futures contracts. By the terms of § 5a (7) the requirements fixed by the Board must be "reasonable" and they must relate to "location, accessibility, and suitability for warehousing and delivery purposes." If the Board transcends those bounds, it violates the Act. See § 6b. But within that area it has considerable discretion.[5]

Hence it seems to us that no action of the Illinois Commission within the zone where the Board has freedom to act would contravene the federal scheme of regulation.[6] It would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated

[5] In the present proceeding the question of the validity of the existing rules and regulations of the Board of Trade under the Commodity Exchange Act is not in issue, and we intimate no opinion upon it.

[6] It is suggested that the regulations of the Board of Trade or those which the Illinois Commerce Commission may impose on it are automatically invalid insofar as they relate to warehouses. For in *Rice* v. *Santa Fe Elevator Corp., supra,* we have held that the United States Warehouse Act excludes all state regulation, no matter how complementary, of those subjects touched by the federal regulatory scheme. But the situation here is quite different. In the first place, we are dealing with a measure of regulation over warehouse receipts not federal warehousemen; and the regulations which the Board of Trade is authorized to formulate do not carry civil or criminal sanctions. In the second place, Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negatived any inference that the Federal Government has preempted it by requirements of its own.

the standards of the Act or collided with rules of the Secretary. But such collision is not necessary; and we cannot assume that the Illinois Commission will take any action which in any way impairs the federal regulatory scheme.

There is other intrinsic evidence that Congress did not preclude state regulation which supplements or bolsters the federal scheme. Sections 4b and 4c of the Act make unlawful a variety of fraudulent and deceptive practices on contract markets. And § 4c provides that "nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections." These fraudulent practices, or many of them, have long been the occasion for the exercise by the States of their historic police powers. Federal regulation in those fields would therefore almost certainly conflict with state laws. Thus the provision in § 4c serves the function of preventing supersedure and preserving state control in two areas where state and federal law overlap. Where Congress used such care to preserve specific state authority, even when it duplicated federal regulation, it is a fair inference not only that supersedure was to take its natural course where rights not saved to the States were involved, *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U. S. 152, 175, but also that non-conflicting state authority was left undisturbed. Moreover the provision in § 12 of the Act that the Secretary "may cooperate with any department or agency of the Government, any State . . . or political subdivision thereof" supports the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements. See *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209.

Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether

there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it.

Reversed.

UNITED STATES *v.* FULLARD-LEO ET AL.

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

No. 429. Argued February 12, 1947.—Decided May 12, 1947.

1. On the facts of this case, including both an unbroken chain of private conveyances and a claim of right to exclusive possession since 1862, when possession of Palmyra Island was taken by respondents' predecessors in interest in the name of the King of Hawaii, and on the presumption of a lost grant, the Government's claim of title to Palmyra Island as successor to the Kingdom and Republic of Hawaii is denied and fee simple title to the island is quieted in respondents—notwithstanding their failure to show actual occupancy of this isolated island in the Pacific Ocean except for intermittent periods aggregating less than two and one-half years out of 77 years since the origin of their claim of title. Pp. 269–281.
2. A resolution adopted by the King and Cabinet Council of Hawaii in 1862 authorizing respondents' predecessors in interest to take possession of the island in the name of the King of Hawaii and the formalities of annexation are construed as requiring only that sovereignty over the island be acquired by the King and not as requiring that title to the island should vest in the King or as being

otherwise inconsistent with a presumption that a grant of title to the island was issued to respondents' predecessors in interest. Pp. 260–265.

3. Under the laws in effect in Hawaii at the time of the annexation of Palmyra Island in 1862, both the King and the Minister of the Interior with the authority of the King in the Cabinet Council had power to convey the lands to private citizens. Hawaiian Civil Code, 1859, §§ 39–48; Hawaiian Act of January 3, 1865, Rev. Laws, Hawaii, 1905, p. 1226, § 3. Pp. 266–269.
4. This Court takes judicial notice of the laws of Hawaii prior to its annexation as a part of our domestic laws. P. 269.
5. The rules under which the Hawaiian people lived under the monarchy or republic define, for the sovereign of today, the rights acquired during those periods. P. 269.
6. Hawaiian law, as it existed before the annexation of the Territory, is controlling on rights then acquired in land. P. 269.
7. In matters of local law, the federal courts defer to the decisions of the territorial courts of Hawaii; but, where a claimed title to public lands of the United States is involved, that is a federal question and the federal courts will construe the law for themselves and are not bound to follow Hawaiian decisions. Pp. 269–270.
8. The presumption of a lost grant to land recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title, even though the lost grant may not have been in fact executed. P. 270.
9. The rule applies to claims to land held adversely to the sovereign. Pp. 270–272.
10. The law of the Territory of Hawaii recognizes and has applied the doctrine of the lost grant in controversies between the Territory and a claimant to government land. Pp. 272–273.
11. Where, as in this case, there was power in the King or the officials of the Kingdom of Hawaii to convey a title to Palmyra Island during the years immediately following its annexation to the Kingdom of Hawaii and prior to many of the private conveyances in respondents' chain of title, the doctrine of a lost grant may be applied, in suitable circumstances, and its existence presumed in favor of respondents' predecessors in title. P. 273.
12. In order for the doctrine of a lost grant to be applicable, the possession must be under a claim of right, actual, open and exclusive. P. 273.

13. A claim for government lands stands upon no different principle in theory, so long as authority exists in government officials to execute the patent, grant or conveyance; but, as a practical matter, it requires a higher degree of proof. Pp. 273–274.
14. The sufficiency of actual and open possession of property to justify the presumption of a lost grant is to be judged in the light of the character and location of the property. P. 279.
15. While uninterrupted and long-continuing possession of a kind indicating the ownership of the fee is necessary to create the presumption of a lost grant, the rule does not require a constant, actual occupancy where the character of the property does not lend itself to such use. P. 281.

156 F. 2d 756, affirmed.

After Congress had authorized construction of naval aviation facilities on Palmyra Island by the Act of April 25, 1939, 53 Stat. 590, the Government sued to quiet title to the island. The District Court dismissed the suit. 66 F. Supp. 774. The Circuit Court of Appeals reversed, holding that the Hawaiian Kingdom acquired title in 1862 and that such title was ceded to the United States in 1898. 133 F. 2d 743. This Court denied certiorari. 319 U. S. 748. On remand, the District Court denied the Government's claim and quieted title to the island in respondents. 66 F. Supp. 782. The Circuit Court of Appeals affirmed. 156 F. 2d 756. This Court granted certiorari. 329 U. S. 697. *Affirmed,* p. 281.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Alvin O. West.*

A. G. M. Robertson argued the cause and filed a brief for respondents.

C. Nils Tavares, Attorney General of Hawaii, filed a brief for the Territory of Hawaii, as *amicus curiae,* in support of respondents.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari was allowed to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming a decree of the District Court of the United States for the District of Hawaii, 329 U. S. 697. The United States began the present proceedings by a petition, filed in the District Court, to quiet title in it to a group of islets in the Pacific, long known as Palmyra Island. Palmyra was annexed to the Kingdom of Hawaii on February 26, 1862, and the United States claims that it remained a part of the governmental lands of Hawaii and passed to the United States by the Joint Resolution of Congress of July 7, 1898, which annexed Hawaii to the United States and accepted for the United States all public, Government or Crown lands and all other public property then belonging to the Republic of Hawaii.[1] The lands and sovereignty of the Kingdom of Hawaii previously had passed directly to the Republic of Hawaii, through the intervening Provisional Government.

Palmyra Island is around one thousand miles south of the main Hawaiian group. It is the first considerable body of land in that direction and lies between the Hawaiian Islands and Samoa. The Palmyra group is a coral covered atoll of about fifty islets, some with trees, and extends—reefs, intervening water and land—5 2/3 sea miles in an easterly and westerly direction and 1 1/3 sea miles northwardly and southwardly. The observation spot for the map in the case is Latitude 5° 52′ 18″ N., Longitude 162° 05′ 55″ W. The British islands of Washington, Fanning and Christmas lie within a 500-mile radius to the southeast of Palmyra. Use of the islands by the respondents and their predecessors in title was intermittent. The question of title became important in 1939 when Congress authorized the construction at Palmyra of naval

[1] *Hawaii* v. *Mankichi,* 190 U. S. 197.

aviation facilities and appropriated $1,100,000 for their construction. 53 Stat. 590. Negotiations with these respondents, as owners, were undertaken in 1938 by the Navy Department for a lease of the property but were not completed. This suit was filed in 1939.

There have been two trials of this case. The records of both are before us, as the record of the first trial was made a part of the second. Certain contemporaneous written evidence of the early transactions was produced.

The findings of fact in the first trial show that two Hawaiian citizens, Johnson Wilkinson and Zenas Bent, made a representation concerning Palmyra Island to the King and the Cabinet Council. The minutes of a meeting of the Council which took place at Honolulu on February 26, 1862, are extant. The "representation" has not been found. The Council minutes show the following:

> "P. Kamehameha read a Representation from Z Bent & Mr Wilkinson, about the Island Palmyra, requesting that the Island should be considered a Hawaiian possession & be placed under the Hawaiian Flag
>
> "After some discussion it pleased the King to direct the Minister of the Interior, to grant what the Petitioners apply for, following the precedent of the Resolution regarding the Island Cornwallis & without exceeding the same."

The action of the Council was communicated to Wilkinson and Bent through a letter by the Minister of the Interior on March 1, 1862. In the letter it was said that the Hawaiian Government consented to the taking possession of Palmyra "for the purpose of increasing the trade and commerce of this Kingdom as well as offering protection to the interests of its subjects." Accompanying the letter was a commission empowering Bent "to take possession in our name of Palmyra Island." Explicit directions were

contained in the commission that Bent was to sign a declaration and leave it in a bottle buried at the foot of a pole wrapped with the Hawaiian flag. The commission was signed jointly by the King and the Minister of Interior. On June 16, 1862, Bent reported that he had carried out the commission and left a paper as directed. In the same report Bent told of the trees on the island and the kind of vegetables that would grow. He said that he had erected a dwelling house on the island and a curing house for biche de mer, a kind of edible sea slug that is prized in the Orient. It also said that he had left five men on the island and proposed to return in about ten days. Thereupon the Minister of the Interior duly issued a proclamation on June 18, as follows:

> "Whereas, On the 15th day of April, 1862, Palmyra Island, in latitude 5° 50′ North, and longitude 161° 53′ West, was taken possession of, with the usual formalities, by Captain Zenas Bent, he being duly authorized to do so, in the name of Kamehameha IV, King of the Hawaiian Islands. Therefore, This is to give notice, that the said island, so taken possession of, is henceforth to be considered and respected as part of the Domain of the King of the Hawaiian Islands."

A finding was made that certain comments on the expedition were published in the Honolulu papers between the representation to the Council and the proclamation which was only important in the present litigation as showing a contemporaneous understanding that possession was being taken of an island as part of the Domain of the King of the Hawaiian Islands.

As shown by the minutes of the Cabinet Council, the Minister of the Interior was directed to grant the application of Bent and Wilkinson "following the precedent of the Resolution regarding the Island Cornwallis & without exceeding the same." The meaning of these words is not

made clear by the record. The United States contends that the words limit any rights of Bent in Palmyra to "a five-year right to take guano," and that he never was "granted or intended to be granted a fee simple title." The trial court thought that the purpose of the Council might reasonably have been to limit the authority of Bent and Wilkinson to islands that were "not in possession of any other government or any other people." The reason for this supposition lies in the fact that the commission of May 31, 1858, to Samuel Clesson Allen, who discovered Cornwallis Island for Hawaii, to take possession of the island contained the words just quoted. On the same day that the commission was issued, a contract was made with Edward P. Adams for him to take guano for five years from any islands acquired for Hawaii by Allen in the schooner, "Kalama." Adams' request for the grant of a fee to a 7/8 interest in any island discovered, so far as shown by the record, was not acted upon by the Hawaiian legislative body.

Allen took possession of Cornwallis Island and submitted a report of his expedition on July 12, 1858, to the Minister of the Interior. Thereupon at a meeting of the Privy Council on July 27, 1858, the following resolution was passed:

> "Resolved that Cornwallis Island in latitude 16.43 North, and longitude 169.33 west from Greenwich, and Kalama Island, in latitude 16.44 North and longitude 169.21 west, having been taken possession of, with the usual formalities, on the 14th and 19th of June 1858, by Samuel C. Allen Esquire, in the name of Kamehameha IV, the said Islands are to be considered as part of His Majesty's Domain."

It will be noted that this resolution is substantially in the form of the later proclamation in regard to Palmyra.

The annexation of Cornwallis Island failed because of prior discovery by the United States and later, on October

16, 1858, the Minister of the Interior cancelled the contract which had been made with Adams.

Thus it will be seen that the meaning of the minutes concerning the acquisition of Palmyra, following the precedent of Cornwallis, is uncertain. The resolution annexing Cornwallis is substantially the same as the proclamation concerning Palmyra. The commission authorizing Bent to take possession of Palmyra is substantially the same as the commission to Allen that resulted in the discovery of Cornwallis. There is no evidence of a contract with Bent and Wilkinson similar to the guano contract made with Adams. We conclude that there is nothing in the requirement that the Palmyra acquisition should follow the precedent of the Cornwallis resolution to indicate anything more than that the sovereignty over Palmyra was to be acquired for Hawaii, as stated in the proclamation of possession. There is nothing to lead us to disagree with the trial court's finding as to Palmyra, as follows:

> "The words used in the formality of annexation and proclamation need not and likely would not have been different whether it was the intention that the act of annexion should constitute the vesting of a fee simple title to the lands in the King, or merely extend sovereignty over the domain annexed."

We find no evidence of a consistent plan or custom of the Kingdom of Hawaii relating to title to lands on islands when possession was taken for the Kingdom. The instructions to Wilkinson and Bent were:

> "I am authorized to state on the part of His Majesty's Government that they consent to the taking possession of the island of Palmyra, situated in Longitude 161° 53′ west and in Latitude 6° 4 North, as described by you in said memorial; for the purpose of increasing the trade and commerce of this Kingdom as well as offering protection to the interests of its subjects."

The trial court ended its findings of fact and conclusions of law on the first trial in these words:

> "My controlling finding is, that the sovereignty of the United States was extended over Palmyra Island by Annexation, but the Republic of Hawaii did not in fact or in form assert fee simple title to this land at the time of annexation, or at any other time, and it is sufficient to say, only, as a
>
> Conclusion
>
> I am decidedly of opinion that petitioner [The United States] does not exhibit a title which can be sustained in the Courts of the United States, and therefore, is not entitled to any relief prayed for."

On appeal, the Court of Appeals reversed. *United States* v. *Fullard-Leo,* 133 F. 2d 743. It concluded that the commission to Bent, heretofore referred to,

> "makes it abundantly clear that Bent was merely acting as agent of the King. Under the principles of international law, the taking of possession by Bent perfected the title of the King. 1 Hyde, International Law, 167 § 100; 1 Oppenheim, International Law, 276–278, §§ 221–224; Martin v. Waddell, 16 Pet. 367, 409, 41 U. S. 367, 409, 10 L. Ed. 997. Nothing in the resolution or the letter referred to is contrary to that view." *Id.,* 747.

It said there was no proof of subsequent alienation by any sovereign and that the evidence would not support a finding of a lost grant.

On remand of this case on the first appeal, the trial court entered further findings of fact and conclusions of law. It held:

> "I believe and so hold that the evidence in this case is not only entirely consistent with but can reasonably and logically be accounted for only upon the presump-

tion that a grant issued to Bent and Wilkinson by which the Hawaiian government parted with its title."

This can only mean that in the trial court's opinion, the Kingdom of Hawaii acquired sovereignty over Palmyra and Bent and Wilkinson obtained the private ownership of the islets. This holding was affirmed on appeal. *United States* v. *Fullard-Leo,* 156 F. 2d 756. Although only one of the questions presented on certiorari, our determination that the action of the Circuit Court of Appeals is correct disposes of the entire case.

Hawaii has been a territory of the United States since the Joint Resolution of Annexation of July 7, 1898. 30 Stat. 750. Before that the islands composing the present Territory of Hawaii had existed independent from the rest of the world and sovereign as far back as history and local tradition reaches.[2] When American Christian missionaries arrived at the Islands in 1820, the Hawaiian civilization merged with that of the rest of the known world. At that time the principal islands of the present Territory had been united a few years before into a monarchy under a strong leader, Kamehameha I. Notwithstanding his death, a short time before the coming of the missionaries, the kingdom welded by him from the several island communities continued as a recognized monarchy under his successors until its fall in 1893. A Provisional Government succeeded the monarchy and was in turn followed by the Republic of Hawaii, the foreign governmental authority mentioned in the Congressional Resolution of Annexation as ceding Hawaii to the United States. From Kamehameha I to annexation, Hawaii made steady advances in conforming its laws and economy to the manner of life of the other civilized nations of the world.

[2] *Hawaii* v. *Mankichi,* 190 U. S. 197, 216.

At the time of the annexation of Palmyra Island by the Kingdom of Hawaii, April 15, 1862, that monarchy possessed a system of land ownership and land laws that were adequate to establish titles and maintain a proper record thereof in accordance with the contemporaneous practices of Anglo-American law. The earlier nineteenth century laws of the Kingdom had been codified into a Civil Code in 1859. In this code the Minister of the Interior was given supervision of the public lands with power to dispose of them with the authority of the King in Cabinet Council. Civil Code of the Hawaiian Islands, 1859, c. VII, Art. I. By c. XXVI, Art. LI, a Bureau of Conveyances with books of registry was required and by c. XXV, Art. L, §§ 1241–48, provision was made for probate and administration. Under treaties with foreign nations, Hawaii permitted the sale of local lands of deceased aliens and the withdrawal of the proceeds by their heirs. *Id.*, pp. 461 and 471.

Kamehameha I, as King and Conqueror, was recognized by Hawaiian law as the sole owner of all the soil of the Islands. Through a system of feudal tenures, not too clearly defined, large portions of the royal domains were divided among the chiefs by Kamehameha I and his successors and this process of infeudation continued to the lowest class of tenants. This system of tenures created dissatisfaction among the chiefs and people because of the burdens of service and produce that the inferior owed to the superior. Consequently by a series of royal and legislative steps, the King and the House of Nobles and Representatives provided for a land system which finally resulted in a separation of the lands into lands of the Government, the Crown and the People.[3] This purpose finally

[3] Declaration of Rights, 1839.

Act to Organize Executive Departments and Joint Resolution, April 27, 1846, Hawaii, Statute Laws, 1845–46, vol. I, pp. 99, 277.

was manifested by the Act of June 7, 1848.[4] By this act, much of the land of Hawaii was allocated between the Crown and the Government. This division of lands became known as "The Great Mahele." [5] Nothing has been called to our attention limiting the power of the King to grant Crown Lands [6] prior to the Act of January 3, 1865. Compare *Jover* v. *Insular Government,* 221 U. S. 623, 633. The requirement that the Minister of the Interior maintain a record of all royal grants refers only to those for government land. Civil Code, 1859, § 44. By enactment of the King and the Legislative Assembly in 1865, the Crown Lands became inalienable except by future legislative action. See "Crown Lands," Revised Laws of Hawaii, 1905, pp. 1226–30. The private lands of the King or Crown Lands, confirmed to him by the Act of June 7, 1848, were taken over by the Government in 1895 and thus became government lands, also.

In order to establish private title to lands in the former tenants, a Board of Commissioners to Quiet Land Titles was created in 1846.[7] This Commission adopted "Principles" for adjudication of claims. These were approved by the Legislative Council the same year and throw strong light on the Hawaiian land system shortly before the annexation of Palmyra.[8] This Commission dealt not only with lands included in the Great Mahele but also with

[4] Revised Laws of Hawaii, 1905, p. 1197 *et seq.*

[5] *Thurston* v. *Bishop,* 7 Haw. 421, dissent, n. at 454.

[6] The domain covered by the term seems to be not only the lands declared to be the private lands of the King by the Act of June 7, 1848, but also other unassigned lands later declared by legislative authority to be Crown Lands. Rev. Laws, Hawaii, 1905, p. 1227; Act of November 14, 1890, Laws, Hawaii, 1890, c. 75; Rev. Laws, Hawaii, 1905, p. 1229.

[7] Hawaii, Statute Laws, 1845–46, vol. I, p. 107.

[8] Hawaii, Statute Laws, 1847, vol. II, pp. 81–94; Revised Laws, Hawaii, 1905, p. 1164 *et seq.*

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lands that were not mentioned in that act and established titles for such lands. It apparently continued until March 31, 1855.[9] After the end of the Commission's work, the Minister of the Interior and the King in Cabinet Council were charged May 17, 1859, with responsibility for government lands and the maintenance of records for all royal conveyances.[10] This summary of the Hawaiian land laws at the time of the annexation of Palmyra brings before us the pattern of land ownership and the system of recordation of titles, both those stemming from royal grants of government lands and from private transactions. The claim of respondents to Palmyra must be adjudicated with this situation in mind. We are not dealing with an explorer's claim of title to lands of a savage tribe or that of a discoverer of a hitherto unknown islet.

Whether we distinguish between Crown and Government lands, however, seems immaterial. No record appears of any conveyance from King or Minister to any land on Palmyra. We assume the law required a public record for any such conveyance from either from the time possession was taken for Hawaii. It is clear that both the King and the Minister of the Interior with the authority of

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[9] *Thurston* v. *Bishop*, 7 Haw. 421, 429, 437.

"The Commission was authorized to consider possession of land acquired by oral gift of Kamehameha I., or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reserved. The land in dispute in this case is not one of those specifically reserved by the King, Kamehameha III., to himself and his successors, and not being in the lists of lands specially set apart as Government or Fort lands, must be one of those over which the Land Commission had jurisdiction to award to the claimant." P. 429.

[10] Haw. Civil Code, 1859, p. 14 *et seq.*

the King in the Cabinet Council had power to convey the lands to private citizens. Civil Code, 1859, §§ 39–48; Act of January 3, 1865, Rev. Laws, Hawaii, 1905, p. 1226, § 3. We assume further that the formal claim to Palmyra for the Hawaiian Kingdom made by Bent, pursuant to his commission, gave Hawaii not only sovereignty over Palmyra but also the power to grant the lands of the newly annexed islets as part of its public lands to private owners.

In the circumstances heretofore described, were the district and circuit courts justified in quieting title to Palmyra in respondents on the theory of a lost grant? We take judicial notice of the laws of Hawaii prior to its annexation as a part of our domestic laws.[11] The rules under which the Hawaiian people lived under the monarchy or republic define, for the sovereign of today, the rights acquired during those periods. While in matters of local law the federal courts defer to the decisions of the territorial courts,[12] we are dealing here with a problem of federal law—the United States seeks to quiet its title to land now claimed by virtue of Hawaiian cession. The federal rights are partly dependent upon the Hawaiian law prior to annexation. Therefore while the Hawaiian law, as it existed before the annexation of the Territory, is controlling on rights in land that are claimed to have had their beginnings then the federal courts construe that law for themselves. The federal courts cannot be foreclosed by determinations of the Hawaiian law by the Hawaiian courts. They will lean heavily upon the Hawaiian decisions as to the Hawaiian law but they are not bound to follow those decisions where a claimed title to public

[11] *United States* v. *Perot,* 98 U. S. 428, 430; *United States* v. *Chaves,* 159 U. S. 452, 459.

[12] *De Castro* v. *Board of Comm'rs,* 322 U. S. 451, 459; *Christy* v. *Pridgeon,* 4 Wall. 196.

lands of the United States is involved.[13] The roots of respondents' claim spring from Hawaiian law. As their claim to Palmyra continued after the United States acquired in 1898 whatever rights Hawaii then had, the validity of respondents' claim must be judged, also, in the light of the public land law of the United States.

The presumption of a lost grant to land has received recognition as an appropriate means to quiet long possession. It recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title, even though the lost grant may not have been in fact executed.[14] The doctrine first appeared in the field of incorporeal hereditaments but has been extended to realty.[15] The rule applies to claims to land held adversely to the sovereign.[16] The case from this Court most often cited is

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[13] *Appleby* v. *City of New York*, 271 U. S. 364, 380; compare *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366; *United States* v. *Allegheny County*, 322 U. S. 174, 183; *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 564.

[14] *Fletcher* v. *Fuller*, 120 U. S. 534, 545, 547; *United States* v. *Chavez*, 175 U. S. 509, 520.

[15] *Ricard* v. *Williams*, 7 Wheat. 59, 109. See Holdsworth, A History of English Law, vol. VII, p. 343, *et seq.*; 1 Greenleaf, Evidence (12th Ed.), § 17.

[16] 1 Greenleaf, Evidence (16th Ed.), § 45a:

"Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, 'nullum tempus occurrit regi;' yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceable enjoyment, accompanied by the usual acts of ownership. So, after less than forty years' possession of a tract of land, and proof of a prior order of council for the survey of the lot, and of an actual survey thereof accordingly, it was held that the jury were properly instructed to presume that a patent had been duly issued. In regard, however, to crown or public grants, a longer lapse of time has generally

United States v. *Chaves,* 159 U. S. 452. In that case, there was evidence of the prior existence of the lost grant. The title of the claimants was upheld but this Court then stated, at p. 464, conformably to *Fletcher* v. *Fuller, supra:*

> "Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure,* wherever, by possibility, a right may be acquired in any manner known to the law."

See *United States* v. *Pendell,* 185 U. S. 189, 200–201.

A few years later, in *United States* v. *Chavez,* 175 U. S. 509, the problem of the lost grant again arose. In this case, as to one tract, case No. 38 at 516, the existence of the grant to Joaquin Sedillo was not shown except by a statement of January 11, 1734, that the tract conveyed "was acquired by his [affiant's] father in part by grant in the name of His Majesty [The King of Spain] . . ." P. 514. In referring to the recognition of title in the private owners, this Court said, at 520:

> "Succeeding to the power and obligations of those Governments, must the United States do so? This is insisted by their counsel, and yet they have felt and expressed the equities which arise from the circumstances of the case. Whence arise those equities? That which establishes them may establish title. Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment,

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been deemed necessary, in order to justify this presumption, than is considered sufficient to authorize the like presumption in the case of grants from private persons."

> in the absence of rebutting circumstances, as formal instruments, or records, or articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, do such presumptions arise in this case and do they solve its questions?"

Thereafter the Court, 524, referred to the long possession and sustained the claimants in their title.

Cariño v. *Insular Government,* 212 U. S. 449, was decided on a writ of error to the Supreme Court of the Philippine Islands. An Igorot chieftain sought to register his land in Benguet Province, long held by his family. Under claim of succession to the Spanish rights by the Treaty of Paris and an exception in the Act of July 1, 1902, providing for temporary administration of civil government in the Philippines,[17] the land had been taken for public purposes by the United States and the Philippine Government. Objection was made by the two governments and sustained by the Supreme Court of the Philippines on the ground that the applicant did not show a grant from any sovereign. This Court thought it unjust, in the circumstances, to require a native to have a paper title.

> "It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land." 212 U. S. at 460.

The Philippine judgment was reversed.

The law of the Territory of Hawaii recognizes and has applied the doctrine of the lost grant in controversies between a claimant to Government land and the Territory.

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[17] 32 Stat. 691, § 12.

In re Title of Kioloku (1920), 25 Haw. 357. The tract involved in that litigation had been held in "actual, open, continuous and uninterrupted possession" since 1870. No record or evidence of a grant by any governmental authority was produced. After a discussion of several of the cases just referred to and others, it was held that the doctrine of the lost grant, in claims to land against the state, was the "law of the land" in Hawaii. On appeal the holding was affirmed by the Circuit Court of Appeals for the Ninth Circuit. That court said:

> "Under the rule of law applicable to the case, as we find it, it was not necessary that the appellee should prove the probability that a grant did in fact issue to one of its predecessors in interest. It was enough to show, as we think it was shown, that there was a legal possibility of a grant." *Territory of Hawaii* v. *Hutchinson Sugar Plantation Co.*, 272 F. 856, 860.

We are therefore of the opinion that where, as here, there was power in the King or the officials of the Kingdom of Hawaii to convey a title to Palmyra [18] during the years immediately following its annexation to the Kingdom of Hawaii and prior to many of the private conveyances hereinafter referred to, the doctrine of a lost grant may be applied, in suitable circumstances, and its existence presumed in favor of the predecessors in title of these respondents. In order for the doctrine of a lost grant to be applicable, the possession must be under a claim of right, actual, open and exclusive.[19] A chain of conveyances is important. So is the payment of taxes.[20] A claim for government lands stands upon no different principle in

[18] 1 Greenleaf, Evidence (16th Ed.), § 45a.

[19] *Fletcher* v. *Fuller*, *supra*, 551; *United States* v. *Chaves*, *supra*, 464; *United States* v. *Chavez*, *supra*, 520.

[20] *Fletcher* v. *Fuller*, *supra*, 552; *Whitney* v. *United States*, 167 U. S. 529, 546; *Jover* v. *Insular Government*, *supra*, 633.

theory so long as authority exists in government officials to execute the patent, grant or conveyance. As a practical matter it requires a higher degree of proof because of the difficulty for a state to protect its lands from use by those without right. We turn then to the circumstances relied upon by the lower courts as sustaining respondents' contentions in respect to their claim to and occupation of Palmyra.

In the earlier part of this opinion, we have set out in detail the existing governmental record of the proceedings leading up to the annexation of Palmyra by the Kingdom of Hawaii in 1862. No positive evidence was produced as to any grant of Palmyra by Hawaii prior to the latter's annexation by the United States in 1898. Nor does the record show the exercise of any direct governmental authority over Palmyra. In 1905, upon a request of the Governor for an opinion concerning the jurisdiction of Hawaii over islands to the northwest of Kauai, the Attorney General answered that Hawaii had power to lease them. It will be noted from the short opinion in the margin that Palmyra, though over 1000 miles to the southeast of Kauai, was included. Nothing appears as to any former or subsequent exercise by Hawaii of a power to lease Palmyra.[21] No taxes were collected from those who

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[21] "OPINION BOOK

Attorney General's Department

Pages 598–600

Opinion No. 18

Honolulu, T. H., Feb. 11, 1905

To His Excellency Geo. R. Carter,
Governor of the Territory of Hawaii,
Honolulu, T. H.

SIR:

In answer to your request of December 15th, 1904, for an opinion as to the jurisdiction of the Territory of Hawaii over the various small guano islands to the north-west of Kauai, I would reply as follows:

After a careful investigation of the records in the office of the Secretary of the Territory, formerly the Foreign Office, and from other

claimed to be owners prior to 1885 when the Pacific Navigation Company paid taxes to Hawaii on Palmyra for three years. Assessments have been made annually since 1911 and taxes have been paid regularly since then by the claimants to the property. At the time of annexation by

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sources of information, I find that the authority of the Territory of Hawaii over these islands is as follows:

It appears in the report of J. A. King, Minister of the Interior, dated the 2nd day of June, 1894, to Sanford B. Dole, President of the Republic of Hawaii, that formal possession was taken of Necker Island by the said J. A. King, representing the Republic of Hawaii, on May 22, 1894; it also appears by that report that the government of the Hawaiian Islands had sent Captain John Paty to take possession of said island about 1857; it also appears that he did take such possession at that time.

Palmyra Island, seems to have been acquired during the reign of Kamehameha IV, by a proclamation signed by him, dated the 15th day of June, 1862.

Lisiansky Island was taken by the government of the Hawaiian Islands through Capt. John Paty on the 10th day of May, 1857.

Morell Island and Patrocinio or Byer Island were both taken for the Republic of Hawaii in 1898, by G. N. Wilcox, a Commissioner for that purpose appointed.

While I was unable to find any official records of the acquisition of the other islands, the government has, for many years, assumed jurisdiction over them. The following leases have been made, from time to time, and have been undisputed:

Lease of Necker Island, dated the 2nd day of June, 1904, to A. H. C. Lovekin, at $25.00 per annum, term twenty-five years.

Lease of J. A. King, Minister of the Interior, to the North Pacific Phosphate & Fertilizer Co. of Morell, Ocean, Pearl and Hermes reef, Midway and French Frigate Shoals, twenty-five years from the 15th day of February, 1894.

Laysan and Lisiansky Islands to G. D. Freeth, April 17th, 1893.

While it is to be regretted that the records of our foreign office are not more complete, possibly a more exhaustive search might find other documents which, in the present state of the old foreign office, it was impossible for me to find. I believe that from these records the government's right to lease the islands, or any privileges thereon, is clear; also to lease the same, as suggested in your letter. The fact of making such leases, and the lessees taking possession thereunder, recognizing the Territory of Hawaii as the landlord would be prima

the United States, provision was made for commissioners to recommend to Congress legislation concerning the Hawaiian Islands. 30 Stat. 750. A full report was made which was transmitted to Congress by the Pesident on December 6, 1898. U. S. Senate Document No. 16, 55th Cong., 3d Sess. It dealt with the Public Domain and shows that the Crown Lands had been taken over by the Hawaiian Government in 1894, p. 4 *et seq.* In 1894, the Crown Lands were in area 971,463 acres. There were no Crown Lands shown on the smaller islands. P. 102. An appendix shows the Government lands as of September 30, 1897, and lists in acres and values those of the principal islands of the group. Pp. 47–51. They amounted, in acres, to 1,744,713. In the recapitulation, though not included in the lists of public lands, there is an item that may include Palmyra. It reads, "Laysan, etc., islands, Acres ——, Value $40,000." At another point, p. 4, under "Area and Population" appears the only reference to Palmyra. The reference in its setting appears in the margin.[22]

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facie evidence in international law of our right to the same and would be the best evidence the government could make of its claim to the various islands in question.

Yours truly,

(Sgd) LORRIN ANDREWS

Attorney General."

[22] S. Doc. No. 16, 55th Cong., 3d Sess., p. 4:

"The Hawaiian group numbers seven inhabited islands and eleven or twelve small rocky or sandy shoals or reefs, with a total area of 6,740 square miles. They are described as follows:

	Population, 1896.
Hawaii, area 4,210 square miles	33,285
Maui, 760 square miles	17,726
Oahu, 600 square miles	40,205
Kauai, 590 square miles (rich farming and grazing lands)	15,228
Molokai, 270 square miles (agricultural and grazing)	2,307
Lanai, 150 square miles (devoted to sheep raising)	105
Niihau, 97 square miles (leased to sheep raisers)	164

Respondents' claim of title exists in a consistent series of transactions beginning in 1862 with a deed to Wilkinson from Bent. The deed was recorded in the Registry of Conveyances of Hawaii in 1885. It conveyed all Bent's "right, title and interest in and to all the property of whatever description now lying or situated on Palmyra Island in the Pacific Ocean which Island by a proclamation of His Majesty Kamehameha IV at present belongs to the Hawaiian Kingdom. And also all my right, title and interest in and to any partnership property that I may have an interest in as co-partner with the said Johnson Wilkinson." The language, we think, is consistent with an intention to convey a claimed interest in the realty "lying or situated on Palmyra Island" as well as any partnership personal property. Thereafter Wilkinson died in New Zealand in 1866 and left a will devising to his wife, Kalama:

> "And also all my landed freehold and leasehold Estates in the Province of Auckland aforesaid, at Hono-

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Kahoolawe, 63 square miles.
Molokini, small size.
Lehua, small size.
Nihoa, 500 acres (about), precipitous rock, 400 feet high (244 miles northwest from Honolulu).
Laysan, 2,000 acres (about), guano island, low and sandy, 30 feet high (800 miles northwest from Honolulu).
Gardeners Island, two inaccessible rocks, 200 feet high, about 1,000 feet long (607 miles northwest of Honolulu).
Liscansky Island, 500 acres (about), low and sandy, 25 to 50 feet high (920 miles northwest from Honolulu).
Ocean Island, 500 acres (about), low and sandy (1,800 miles northwest from Honolulu).
Necker Island, 400 acres (about), a precipitous rock, 300 feet high (400 miles northwest from Honolulu).
Palmyra Island, a cluster of low islets, about 10 miles in circumference, with lagoon in center; has a few cocoanut trees (1,100 miles southwest of Honolulu).
Kaula, small, rocky island, a few miles southwest of Niihau.
French Frigate Shoal, scattered shoals or reefs."

> lulu in the Sandwich Islands in the Island of Palmyra in the South Sea Islands and wheresoever the same may be situated and whether in the said Colony of New Zealand or elsewhere To hold suach real and personal estate unto the said Kalama absolutely and forever."

The will was proven and registered in New Zealand and was later admitted to probate in Hawaii in 1898. In 1885, after the death of Kalama, two of her heirs transferred all their "right, title and interest as heirs at law of the said Kalama or otherwise, in and to the Island of Palmyra" to one Wilcox, who conveyed to the Pacific Navigation Company. By a series of some four mesne conveyances between 1888 and 1911 the interest of Pacific Navigation Company in the island was eventually transferred to one Henry Cooper. A third heir of Kalama's transferred his rights in the island to one Ringer, whose children transferred their rights in the Island to Henry Cooper in 1912. Ringer's widow in 1912 sold all her right, title, and interest in the island to Maui and Clarke.

In 1912 Cooper petitioned the Land Court of Hawaii to confirm title in him. Maui and Clarke contested the petition, claiming to own a dower interest in an "undivided one-third of the Island." Through its Attorney General, the Territory of Hawaii answered the petition and disclaimed "any interest in, to or concerning" Palmyra. The court decreed that Cooper was the owner in fee simple of the island subject to the dower interest of Annie Ringer held by Maui and Clarke.[23] In 1920,

[23] The United States questions the effect on any title of the United States to Palmyra of the disclaimer of interest in Palmyra by Hawaii. The United States asserts that all public lands of Hawaii passed to the United States by the Joint Resolution of July 7, 1898, and the Resolution of the Senate of Hawaii of September 9, 1897. Rev. Laws, Hawaii, 1905, pp. 36, 40. Thereafter, in 1900, it is said that Con-

Cooper leased the Island to Meng and White who assigned the lease to the Palmyra Copra Company. In 1922 Cooper sold for $15,000.00 all but two of the islets to Mr. and Mrs. Fullard-Leo, respondents here, who had taken over the lease. From the foregoing, it will be apparent that from 1862 to the breakdown of negotiations a paper title existed in respondents and their predecessors in title, except for the grant from the Kingdom, and that there has been a record of the conveyances in Hawaii since 1885. There was, during these years, a claim of right to exclusive possession.

That claim of right was manifested not only by transfers of paper title but also by actual user of the property. The sufficiency of actual and open possession of property is to be judged in the light of its character and location.[24]

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gress made provision for the disposition of such lands. Hawaiian Organic Act, 31 Stat. 141; § 73 of the Organic Act, as amended in 1910, § 5, 36 Stat. 444; § 2432, Rev. Laws, Haw., 1905. The position of the United States is that there was no power in Hawaii to disclaim any interest that the United States might have in Palmyra in 1912. We need not resolve this issue. The Land Court record is referred to as another instance of the claims of respondent to Palmyra adverse to the claim of ownership of the United States and its predecessors in title to the public lands of Hawaii.

[24] A statement of this Court in *United States* v. *Pendell,* 185 U. S. at 197, is pertinent:

"There are no adverse claimants to the land in question, and the proof of possession, exclusive in its nature, has been satisfactory to the court below. What constitutes such possession of a large tract of land depends to some extent upon circumstances, the fact varying with different conditions, such as the general state of the surrounding country, whether similar land is customarily devoted to pasturage or to the raising of crops; to the growth of timber or to mining, or other purposes. That which might show substantial possession, exclusive in its character, where the land was devoted to the grazing of numerous cattle, might be insufficient to show the same kind of possession where the land was situated in the midst of a large population and the country devoted, for instance, to manufacturing pur-

It is hard to conceive of a more isolated piece of land than Palmyra, one of which possession need be less continuous to form the basis of a claim. This tiny atoll in the Pacific, however, far removed from any other lands and claimed by no sovereignty until 1862 was not wholly valueless, commercially, prior to the establishment of airways over the ocean.

From time to time, men thought there might be something gained from its exploitation. Bent's "representation" in 1862 for annexation was preceded by an acquaintance with the locality for a number of years. When he went to take possession he planted vegetables and melons, built a house and sought sea products. The Pacific Navigation Company had men on the island during 1885 and 1886. Cooper visited the island in 1913 and 1914. He was then the owner of record. In 1912, at Cooper's suggestion, the then Governor of Hawaii requested the Secretary of the Interior of the United States to send an American vessel to Palmyra to confirm American sovereignty. The Governor stated that Mr. Cooper was then the owner and that the private title to Palmyra had been in citizens of Hawaii since 1862. In 1920 and 1921 the Palmyra Copra Company was actively engaged on the island under a lease from Cooper. The Fullard-Leos, who acquired title to all but two of the islands from Cooper, visited the island in 1924 and again in 1935. On many occasions during the interim, they gave permission to various persons to visit the island.

From these evidences of claim of title and possession were the District Court and the Circuit Court of Appeals

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poses. Personal familiarity with the general character of the country and of its lands, and also knowledge of the nature and manner of the use to which most of the lands in the same vicinity are put, have given the judges of the court below unusual readiness for correctly judging and appreciating the weight and value to be accorded evidence upon the subject of possession of such lands as are here involved."

justified in entering a decree that the fee simple title to Palmyra is vested in respondents? The dissent in the Circuit Court of Appeals points out that our cases applying the lost grant doctrine required "uninterrupted and long continuing possession of a kind indicating the ownership of the fee." This is the rule. But, as we have indicated above, uninterrupted and long-continued possession does not require a constant, actual occupancy where the character of the property does not lend itself to such use.[25] No other private owner claims any rights in Palmyra. From the evidence of title and possession shown in this record, we cannot say that the decrees below are incorrect.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE MURPHY concur, dissenting.

I agree with the dissenting judges in the Circuit Court of Appeals that the possession shown on behalf of respondents is not sufficient to establish the presumption of a lost grant, even if title can be acquired from the Government in that manner. According to my understanding, the possession, to have that effect, must be actual, open, notorious, adverse and continuous from the time when the grant is presumed to have taken place.[1] Here for long

[25] See *Fletcher* v. *Fuller,* 120 U. S. 534, 543.

[1] "And hence, as a general rule, it is only where the possession has been *actual,* open and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked." (Emphasis added.) *Fletcher* v. *Fuller,* 120 U. S. 534, 551. "The possession must be adverse, exclusive, and *uninterrupted,* and inconsistent with the existence of title in another." (Emphasis added.) *Peabody* v. *United States,* 175 U. S. 546, 550. The statement in the authorities that the possession must be uninterrupted has been qualified only to the

periods the possession was constructive at the most, not actual. By the same token it was not continuous.[2] I do not think this Court should expand the established basis

extent that "This presumption may . . . , in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been *occasionally interrupted* during the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership." (Emphasis added.) *Fletcher* v. *Fuller, supra,* at 552. And the presumption of continuing possession which exists "in the absence of evidence to the contrary," *Lazarus* v. *Phelps,* 156 U. S. 202, 204, even if competent to furnish the basis for the further presumption of a lost grant, is here rebutted by the evidence which has been introduced. See note 2.

[2] The following summary of the island's history was given, with supporting record references, in note 3 of the dissenting opinion, 156 F. 2d 756, 760, filed by Denman, C. J., with whom Bone, C. J., agreed, in the Circuit Court of Appeals:

"Zenas Bent visited the island in April, 1862, and left five men there. In June annexation was formally proclaimed. It does not appear how long the five men remained on the island but in December of the same year Bent transferred all his interest to Wilkinson. Wilkinson died in 1866 and his will was probated in New Zealand giving his rights in Palmyra to his wife, Kalama. Nothing further occurred until 1885 when the supposed title was transferred to the Pacific Navigation Company, a conveyance being executed by two of Kalama's heirs and Bent's deed being acknowledged, 23 years after its execution. Thus, except for the five men left on the island by Bent in order to make the annexation effective, there is no indication that there was any possession or even visits to the island for the 23 years following annexation. On the contrary, the fact that Bent's deed was not acknowledged until 1885, after conveyance by Kalama's heirs, clearly indicates that, in the meantime, no claim of title or possession was asserted by anyone.

"Employees of the Pacific Navigation Company occupied the island for approximately a year in 1885 and 1886 and the company paid taxes in 1885, 1886 and 1887, not to the United States but to the Territory. (The claimant placed the lands on the tax rolls and in many cases taxes were paid on public lands.) This company's project apparently failed and there followed another long period when the island was

for acquiring title to government lands so as to include acquisition by adverse possession, as in effect the Court's opinion does. Accordingly, I dissent.

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vacant. Some time between 1889 and 1897 a British vessel visited the island and finding it uninhabited, claimed it for that country. In 1912 at the instigation of Henry Cooper who had just acquired the supposed title and whose Land Court proceeding to register it was pending, a vessel of the United States Navy visited the island in order to confirm this country's claim to it. No occupants were found on the island. In 1913 and 1914 Cooper made short visits of two or three weeks to the island and built a house thereon. However, the island was not permanently occupied and in 1914 evidence was found that since the 1913 visit Japanese bird poachers had been there.

"In 1920 another attempt was made to commercially develop the island. It was leased by Cooper; a corporation, The Island of Palmyra Copra Company, was organized; and a 'settlement group' was sent to the island. This project was not successful and its activities terminated after about a year. The Fullard-Leos bought Cooper's rights in 1922 but only visited the island twice, once in 1924 for twelve days and again in 1935 for one day. Between 1922 and the time this suit was commenced, no one lived on the island. It was most frequently visited by United States Navy or Coast Guard vessels which were in the neighborhood. In fact, Fullard-Leo went on the Coast Guard vessel 'Itasca' when he visited the island in 1935. Occasionally, vacationists or scientists made short visits to the island. During this period an unnamed man lived there for two or three months. On another occasion (1936) a party from Tahiti went there in an attempt to find a cargo of button shells which were rumored to have been jettisoned by an unseaworthy boat. By 1938, the house which Cooper built in 1913 had collapsed and all the various visitors testified they did not see any evidence of occupation in recent times."

From these facts the dissenting judges concluded: "In the 77 years from the royal proclamation of taking in 1862 to the filing of the instant case in 1939, the occupancy of the island has been less than two and one-half years. Of this a year was in the years 1885–86 and a year in 1920. In the interim, from 1862 to 1939, there was no one residing there under a claim of possession—the occasional visitors' brief stays being for other purposes." 156 F. 2d 756, 765; and see *id.* at note 3.

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NEW YORK ET AL. *v.* UNITED STATES ET AL.

NO. 343. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.*

Argued March 3, 4, 5, 1947.—Decided May 12, 1947.

1. After finding that the existing class-freight-rate structure discriminates in favor of the northeastern portion of the United States and against the southern and western portions contrary to § 3 (1) of the Interstate Commerce Act, the Interstate Commerce Commission issued an interim order under § 15 (1) increasing class rates within the northeastern area by 10 per cent and reducing those elsewhere east of the Rocky Mountains by 10 per cent, pending the formulation of a national uniform classification of freight and effectuation of greater national uniformity in the class-freight-rate structure. *Held:* The order did not exceed the Commission's authority. Pp. 296–300, 340–349.

   (a) Whatever doubt may have existed as to applicability of the prohibitions of § 3 (1) of the Interstate Commerce Act to regional discriminations in rates was removed by the 1940 amendment. P. 300.

   (b) The addition of the words "region, district, territory" to § 3 (1) did not require national uniformity in rates regardless of differing costs of the service; but made plain the duty of the Commission, in determining whether discrimination exists, to consider the interests of regions, districts and territories, and to eliminate territorial rate differences which are not justified by differences in territorial conditions. Pp. 300, 305, 350.

2. The basic finding of the Commission—that class rates within Southern, Southwestern, and Western Trunk-Line Territories, and from those Territories to Official (northeastern) Territory, are generally much higher, article for article, than the rates within Official Territory—is abundantly supported by the evidence. Pp. 301–305.

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*Together with No. 344, *Hildreth, Governor of the State of Maine, et al.* v. *United States et al.*, and No. 345, *Atchison, Topeka & Santa Fe R. Co. et al.* v. *United States et al.*, also on appeals from the same Court.

3. An unlawful discrimination in class rates against regions or territories is not dependent on a showing of actual discrimination against shippers located in such regions or territories or negatived by the fact that only a minor portion of freight moves by class rates. Pp. 306–309.
4. The Commission's finding—based upon a broad inquiry into the effect of class rates on the economic development of Southern, Southwestern and Western Trunk-Line Territories—that prejudice to these territories had been established, is supported by substantial evidence. Pp. 310–315.
5. The Commission's finding that conditions peculiar to the respective territories did not justify the difference in the territorial class-rate structure is supported by the evidence. Pp. 315–332.

   (a) The Commission's judgment that the differences in consists between the territories do not justify the present differences in interterritorial class rates is an expert judgment entitled to great weight; and this Court could not disturb its findings on the facts of this record without invading the province reserved for the expert administrative body. P. 326.

   (b) The earning power of the carriers, their freight operating ratios, their rates of return, the estimate of the volume of traffic in the future, and the nature and amount of traffic presently involved in the class-rate movements are all relevant to the finding of unlawful discrimination; and this Court cannot say that these considerations do not counterbalance or outweigh the higher operating costs in the West, since the appraisal of these numerous factors is for transportation experts and the error of judgment on their part, if any, is not of the egregious type which is within the reach of this Court on judicial review. P. 331.

   (c) An assumption that a reduction in the western rate structure, which, as compared with the eastern, is not warranted by territorial conditions and which prejudices the growth and development of the West, would have no effect in increasing the traffic of the western carriers would fly in the face of history, is contrary to the Commission's expert judgment and would protect a discriminatory rate structure from the power of revision granted the Commission under § 3 (1). P. 332.
6. Notwithstanding the Commission's finding that less-than-carload traffic as a whole is carried at a deficit in all territories, except possibly in the South, this Court will not set aside the order temporarily reducing the class rates on that traffic—especially in

view of the Commission's findings that such traffic constitutes less than 2 per cent of the total railroad freight tonnage, that much of it moves on exception rates and commodity rates instead of class rates, and that, if less-than-carload rates were left unchanged while class rates were reduced, the competitive relations between shippers of less-than-carload quantities and those shipping in carloads would be materially affected. Pp. 332–340.

(a) In eliminating unjust discrimination against entire regions and establishing the uniformity required by law in a complete rate structure, the Commission was warranted in making minor collateral readjustments so as to avoid creating new discriminations. P. 334.

(b) This Court would not be justified in setting aside the Commission's order on the ground that the new less-than-carload rates are confiscatory—especially in view of the facts that the order is of an interim nature, this reduction has since been offset by a nationwide increase in all freight rates, the Commission invited the carriers to apply promptly for adjustments to insure that the rates on such traffic are on a compensatory level, and it has not been clearly shown that the result of the order will be confiscatory. Pp. 334–340.

(c) If additional evidence was necessary to pass on an issue of confiscation raised in a petition for rehearing before the Commission but not supported by the introduction of additional evidence there, the district court should have remanded the cause to the Commission for a further preliminary expert appraisal of the facts which bear on that question, instead of receiving the evidence itself as though it were conducting a trial *de novo*. Pp. 335–336.

(d) The district court amply protected appellants when it overruled their claim that the interim rates are confiscatory without prejudice to another suit to challenge the legality of those rates if, after a fair test, they prove to be below the lowest reaches of a reasonable minimum or if the permanent rates do not meet that standard. P. 340.

7. Where the Commission finds that an existing rate results in unlawful discrimination contrary to § 3 (1), it may, under § 15 (1), prescribe a new rate which will be just and reasonable. Pp. 340–343, 345.

(a) It is not prevented from doing so by the fact that all rates involved in the rate relationship are not controlled by the same carriers. Pp. 342–343.

(b) It may take one step at a time and is not required to eliminate all evils in the rate structure or none. P. 343.

8. In prescribing a 10 per cent increase in class rates in the Northeast, as part of a general adjustment of the rate structure for all of the United States east of the Rocky Mountains in order to eliminate unjust territorial discriminations prohibited by § 3 (1), the Commission did not exceed its authority, even though the existing class rates in the Northeast were within the zone of reasonableness. Pp. 343–349.

(a) The Commission having given due consideration, as required by § 15a (2), to the effect of the rates on the movement of traffic, the need of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and the need of revenues sufficient to enable the carriers to provide such service, the weight to be given those factors, and especially the weight to be given the rate of return in current years as opposed to that in the preceding decade, is for the Commission to determine; and this Court would usurp the administrative function of the Commission if it overruled the Commission's judgment and substituted its own appraisal of these factors. Pp. 347–349.

9. The fact that the Commission subsequently granted a nationwide increase in all freight rates does not render the interim orders involved in this case obsolete and unenforceable; since the order granting the rate increase emphasizes the distinction between revenue and rate-relationship cases and in no way impairs the finding in the present case that the existing class-rate structure that has prevailed in the several territories violates § 3 (1). Pp. 349–350.

65 F. Supp. 856, affirmed.

Finding that the existing class-freight-rate structure discriminates in favor of the northeastern portion of the United States and against the southern and western portions, contrary to § 3 (1) of the Interstate Commerce Act, the Interstate Commerce Commission issued interim orders under § 15 (1) increasing class rates in the Northeast by 10 per cent and reducing those elsewhere east of the Rocky Mountains by 10 per cent, pending formulation of a national uniform classification and effectuation of

greater national uniformity in the class-freight-rate structure. In suits by or on behalf of northern and New England States and western railroads to set aside these orders, the District Court sustained the orders. 65 F. Supp. 856. *Affirmed,* p. 351.

Parker McCollester argued the cause for appellants in No. 343. With him on the brief were *Kenneth L. Sater* for the appellant States, *Nathaniel L. Goldstein,* Attorney General, and *Frank J. Clark* for the State of New York, *Clair John Killoran,* Attorney General, for the State of Delaware, *James A. Emmert,* Attorney General, and *Karl J. Stipher,* Deputy Attorney General, for the State of Indiana, *Hall Hammond,* Attorney General, for the State of Maryland, *Foss O. Eldere,* Attorney General, and *James W. Williams,* Assistant Attorney General, for the State of Michigan, *Walter D. Van Riper,* Attorney General, and *Robert Peacock,* Deputy Attorney General, for the State of New Jersey, *Hugh S. Jenkins,* Attorney General, for the State of Ohio, *John E. Martin,* Attorney General, and *Herbert T. Ferguson,* Assistant Attorney General, for the State of Wisconsin, and *James H. Duff,* Attorney General, and *E. A. DeLaney,* Deputy Attorney General, for the Commonwealth of Pennsylvania.

Henry F. Foley argued the cause and filed a brief for appellants in No. 344.

Douglas F. Smith argued the cause for appellants in No. 345. With him on the brief were *H. C. Barron, C. W. Fiddes, H. E. Boe, P. F. Gault, G. H. Muckley, Elmer B. Collins, Carson L. Taylor, Robert Thompson* and *D. Robert Thomas.*

Edward H. Miller argued the cause for the United States and *Daniel W. Knowlton* argued the cause for the Interstate Commerce Commission, appellees. With

them on the brief were *Acting Solicitor General Washington* and *Assistant Attorney General Berge.*

J. V. Norman argued the cause for the Southern States and Southern Governors' Conference, appellees.

Byron M. Gray argued the cause for the State of Arkansas et al., appellees. With him on the brief were *J. C. Murray* for the State of Arkansas, *Walter R. Johnson,* Attorney General, and *H. Emerson Kokjer,* Deputy Attorney General, for the State of Nebraska, *Nels G. Johnson,* Attorney General, *Neal E. Williams* and *James Hanley* for the State of North Dakota, *C. B. Bee* for the State of Oklahoma, *William Williamson,* Assistant Attorney General, for the State of South Dakota, and *Price Daniel,* Attorney General, *James D. Smullen* and *Charles D. Methews,* Assistant Attorneys General, for the State of Texas.

J. A. A. Burnquist, Attorney General, and *George T. Simpson* filed a brief for the State of Minnesota, appellee.

Eldon S. Dummit, Attorney General, *M. B. Holifield,* Assistant Atorney General, *J. E. Marks* and *L. F. Orr* filed a brief on behalf of the State of Kentucky, as *amicus curiae,* urging affirmance.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BURTON.

The orders of the Interstate Commerce Commission, which appellants seek to have set aside, resulted from two separate investigations instituted by the Commission on its own motion in 1939 to inquire into the lawfulness or unlawfulness of most of the then existing rate-making standards for interstate railroad class freight rates in the United States. One investigation related to classifica-

tions [1] under which commodities move by rail freight. The other related to class rates.[2] The two investigations were consolidated and were covered by one report, as the problems of classification and of class rates [3] are closely interrelated. The findings of the Commission as to classifications are not directly involved here. For the orders of the Commission under attack are interim orders which affect only class rates, increasing them in some areas and decreasing them in others. But a review and summary of the Commission's findings both on classifications and

[1] Commodities are grouped into classes, those commodities in each class paying the same freight rate per 100 pounds. Frequently a commodity is in several classes depending upon whether carload or less-than-carload lots are involved, and upon the method of packaging. One class is called first-class or class 100 and each other class has been fixed as a percentage, or multiple, of first-class. Thus the freight *classifications* involved in these cases consist of lists containing descriptions of every commodity moving by freight and the class or classes to which it is assigned, *i. e.*, its *classification rating* or *ratings*. See 262 I. C. C. pp. 465–472.

[2] The *class rates* are in the form of a schedule which shows the price per 100 pounds for moving first-class freight every possible distance it may be moved. The cost of shipment for a given commodity is determined by ascertaining its classification rating, the first-class rate per 100 pounds for the haul involved, and the percentage of the first-class rate to which the classification rating in question is subject. See 262 I. C. C. pp. 515–519.

[3] There are three other kinds of rates:

Exception rates are rates resulting from the transfer of a commodity out of its regularly assigned class in the classification and into another class.

Commodity rates are special rates established for particular commodities. For purposes of these rates a commodity is not given a classification rating; the result is that the commodity rates have no fixed percentage relationships to first-class rates.

Column rates are fixed as definite percentages of first-class rates but like commodity rates they apply only to particular commodities and are assigned no regular class.

See 262 I. C. C. p. 562.

on class rates are essential for an understanding of the problem.

While there are three major classification territories, there are five major rate territories.[4] Official Territory, roughly speaking, lies east of the Mississippi and north of the Ohio and Potomac Rivers; it also includes most of Virginia. Southern Territory lies south of Official Territory and east of the Mississippi. Western Trunk-Line Territory is located approximately between Official Territory and the Rocky Mountains. Southwestern Territory lies south of Western Trunk-Line Territory and west of the Mississippi and includes Arkansas, Texas, Oklahoma, and part of Louisiana. Mountain-Pacific Territory includes Montana and New Mexico and all territory west of the Rockies. Only Mountain-Pacific Territory is not involved in these cases.

The three major classifications are Official, Southern and Western.[5] But there is great lack of uniformity in the classifications. The problem is one with which the Commission has long wrestled.[6] But prior to the present

[4] Some rate territories have subdivisions in which rate differentials are applicable which vary the class rates within the territory in question.

[5] The Official Classification applies within Official Territory and from Western Trunk-Line Territory to Official. The Southern Classification applies within Southern Territory, between Official and Southern, and from Western Trunk-Line to Southern. Western Classification includes Western Trunk-Line, Southwestern and Mountain Pacific rate territories. It applies within those three territories, between Southwestern and Official, between Southwestern and Southern, from Official to Western Trunk-Line, between Mountain Pacific and Official, from Southern to Western Trunk-Line, and between Mountain-Pacific and Southern.

[6] *Western Classification,* 25 I. C. C. 442; *Consolidated Classification,* 54 I. C. C. 1; *Southern Class Rate Investigation,* 100 I. C. C. 513; *Consolidated Southwestern Cases,* 123 I. C. C. 203; *Western Trunk-Line Class Rates,* 164 I. C. C. 1; *Eastern Class-Rate Investigation,* 164 I. C. C. 314.

investigation its chief accomplishment in this field had been to establish classification uniformity within the separate territories. National classification uniformity was still in the main lacking. Many differences between classifications on a particular rating are matters of substance; others are matters of nomenclature. Moreover, there has been a tendency among carriers to work against the evolution of uniform classifications by making exceptions which remove commodities from the classifications for rate-making purposes.

Section 1 (4) of the Interstate Commerce Act as amended, 24 Stat. 379, 54 Stat. 899, 900, 49 U. S. C. § 1 (4) provides that it shall be the duty of common carriers to establish just and reasonable classifications applicable to through freight rates and charges. Section 1 (6) prohibits every unjust and unreasonable classification. Section 3 (1) prohibits discrimination. And § 15 (1) empowers the Commission to prescribe just, fair, and reasonable classifications, after a finding that existing classifications are unlawful. The Commission found that the existing classifications are unlawful and will continue to be unlawful until there is national uniformity of classification. It found that differences in the applicable classifications affect the levels of the class rates as much as or more, in some instances, than the differences in the levels of the class rate scales themselves. It found that shippers in one territory pay more than shippers in another territory on the same article because of classification differences; that territorial boundaries separating classification territories are artificial and cause serious complications; that where geographic conditions produce divergent costs, revenue requirements, or other conditions requiring rate adjustments, the adjustments should be made not in the basic classification itself but in the rate levels or by the creation of legitimate exceptions to the classification; that amongst the classifications there was no real uniformity

of classification ratings although the same classification principles are applicable throughout the nation. It concluded that without such uniformity it is impossible to maintain just and reasonable relationships between class rates for competing commodities; that it is feasible for the carriers to establish a uniform classification. The Commission gave the railroads the opportunity to take the initiative in preparing the new uniform classification—an invitation which, we are advised, has been accepted.

Prior to this proceeding the Commission made four major class rate investigations—one for each of the rate territories except Mountain-Pacific.[7] These established class rate structures on a regional basis, *i. e.* they established some degree of uniformity in class rates within each territory or subdivision of a territory. But they did not deal with interterritorial class rates by harmonizing regional rate adjustments one with the other. As a result there are separate interterritorial rate structures applicable to freight traffic moving from one territory into another.

These territorial class rate structures are exceedingly complicated. There is no basic uniformity amongst them and they are computed by varying formulae.

The Commission found that class rates within Southern, Southwestern and Western Trunk-Line territories, and from those territories to Official Territory, were generally much higher, article for article, than the rates within Official Territory. It found that higher class rates have impeded the development and movement of class rate

[7] *Eastern Class-Rate Investigation,* 164 I. C. C. 314, 171 I. C. C. 481, 177 I. C. C. 156, 203 I. C. C. 357; *Southern Class Rate Investigation,* 100 I. C. C. 513, 109 I. C. C. 300, 113 I. C. C. 200, 128 I. C. C. 567; *Western Trunk-Line Class Rates,* 164 I. C. C. 1, 173 I. C. C. 637, 178 I. C. C. 619, 181 I. C. C. 301, 196 I. C. C. 494, 197 I. C. C. 57, 204 I. C. C. 595, 210 I. C. C. 312, 246 I. C. C. 119; *Consolidated Southwestern Cases,* 123 I. C. C. 203, 205 I. C. C. 601. See the discussion in 262 I. C. C. pp. 526 *et seq.*

freight within Southern, Southwestern and Western Trunk-Line territories and from those territories to Official Territory. It concluded that neither the comparative costs of transportation service nor variations in the consists [8] and volume of traffic within the territories justified those differences in the class rates. The Commission also determined that equalization of class rates is not dependent on equalization of non-class rates and that interterritorial rate problems can be solved only by establishing substantial uniformity in class ratings and rates.

Section 1 (4) and (5) (a) of the Act require rates and charges to be just and reasonable. The Commission found that the intraterritorial class rates applicable to the territories in question and the interterritorial class rates between the territories violate those provisions.

Section 3 (1) of the Act outlaws undue or unreasonable preferences or advantages to any region, district, or territory. The Commission found that the relation between the interterritorial class rates to Official Territory from the other territories in question and the intraterritorial class rates within Official Territory results in an unreasonable preference to Official Territory as a whole, and to shippers and receivers of freight located there, in violation of § 3 (1). The Commission, acting pursuant to its authority under § 15 (1) of the Act, prescribed reasonable and nondiscriminatory class rates to cure the preference found to exist, the new rates to become applicable simultaneously with the new revised classification which, as we have noted, the Commission ordered to be established.

But time will be required to formulate a uniform classification. And the Commission concluded that pending completion of that undertaking certain interim readjustments in the existing basis of class rates, based on existing

[8] The consist of freight in a given territory is the totality of commodities carried in that territory.

classifications, could be made—readjustments which would be just and reasonable, and which would reduce to a minimum the preferences and prejudices which the Commission found to be unlawful in the existing system. It determined that the several intraterritorial freight-rate structures should be brought closer to the same level and be constructed on the same pattern or scheme. It concluded that as many differences as possible between the interterritorial rates and the intraterritorial rates should be eliminated. It accordingly ordered that existing interstate class rates[9] applicable to freight traffic moving at the classification ratings within Southern, Southwestern, and Western Trunk-Line territories, interterritorially between those territories, and interterritorially between each of those territories and Official Territory, be reduced 10 per cent subject to qualifications not important here. It also ordered that interstate class rates for freight traffic moving at classification ratings within Official Territory be increased 10 per cent, subject to qualifications not relevant to our problem. It found the new interim class rates just and reasonable. 262 I. C. C. 447, supplemental report, 264 I. C. C. 41.

The new interim rates were ordered to become effective January 1, 1946. Prior to that date, New York and other northern States, appellants in No. 343, filed their petition in the District Court to set aside the orders of the Commission. A statutory three judge court was convened and a temporary injunction was issued preventing the orders from going into effect. 38 Stat. 208, 220, 28 U. S. C. § 47. The Governors of the six New England States (three of whose successors in office have been substituted as appellants in No. 344) intervened on the side of the plaintiffs, as did most of the appellants in

[9] No change in intrastate class rates was made. Nor was any change made in existing exception, column or commodity rates. See note 3, *supra*.

No. 345. The Commission and others [10] intervened on the side of the United States. Appellants in No. 345, including most of the western railroads, also filed their petition in the District Court seeking substantially the same relief as appellants in No. 343. The cases were consolidated and tried together, the District Court receiving additional evidence offered by the western railroads. The court sustained the orders of the Commission in all respects, 65 F. Supp. 856, but continued the injunction pending appeal to this Court.[11] Judicial Code § 210, 28 U. S. C. § 47a.

First. The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations. *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 749–750. Until 1935, § 3 (1) of the Act prohibited discrimination only against a "person, company, firm, corporation, or locality, or any particular description of traffic . . . ." 24 Stat. 379, 380. The question arose whether "locality" included a port insofar as the port was not a point of origin or destination but a gateway through which shipments were made. The Court held by a closely divided vote, and contrary to the ruling of the Commission, that it did not. *Texas & Pacific R. Co.* v. *United States,* 289 U. S. 627. Thereafter Congress amended § 3 (1) so as to extend the prohibition against discrimination to include a "port, port district, gateway, transit point." 49 Stat. 607. And see *Albany Port Dis-*

[10] Alabama, Arkansas, Florida, Georgia, Kansas, Louisiana, Mississippi, Minnesota, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, the State Commissions of a number of these States, the Southern Governors' Conference, and the Southeastern Association of Railroad and Utilities Commissioners.

[11] We denied the motion of the United States to dissolve the injunction. 328 U. S. 824. See Fed. R. Civ. P. 62 (g).

trict Commission v. *Ahnapee & W. R. Co.*, 219 I. C. C. 151. That was in 1935. In 1940 Congress went further. By § 5 (b) of the Transportation Act of 1940, 54 Stat. 899, 902, known as the Ramspeck Resolution, it authorized and directed the Commission to institute an investigation into rates on commodities between points in one classification territory and points in another territory and into like rates within territories for the purpose of determining whether those rates were "unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist . . . ." [12] Congress also extended the prohibition against discriminations by adding to § 3 (1) the words "region, district, territory." [13]

It is now asserted that the Commission has misunderstood its duties under these 1940 amendments. It is said that the Commission has construed this mandate of Congress to mean that identical rates, mile for mile, should be

[12] The Commission advised Congress that its investigations instituted in 1939 (the basis of the orders challenged in the present cases) would be carried out pursuant to this mandate. See 262 I. C. C. p. 689.

[13] Section 3 (1) now reads:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

established everywhere in the country, in face of a long-standing practice of rate-making (which the legislative history of the 1940 amendments shows was not intended to be changed) that allowed differences in rates which were based on differences in the length of haul, character of the terrain, density of traffic, and other elements of the cost of service. Thus it is argued that the Commission runs afoul of *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, which involved the construction of a joint resolution of Congress directing the Commission to make an investigation to determine whether existing rates and charges were unjust, unreasonable, or unjustly discriminatory so as to give undue advantage "as between the various localities and parts of the country . . . ." 43 Stat. 801, 802. The Commission, relying on that mandate, condemned certain existing rates between California and eastern points. The Court set aside the order of the Commission, holding that the joint resolution did not purport to change the existing law but left the validity of rates to be determined by that law.

But the Commission in the present cases did not proceed on the assumption that the Ramspeck Resolution changed the substantive law. As we read its report, the Commission took the resolution only as a directive to investigate and correct violations of substantive law as it deemed that law broadened by the amendment to § 3 (1). It said:

> "By the amendment to the substantive antidiscrimination provisions of section 3 (1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions men-

tioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate making applied in the light of the amended law are unlawful and should be corrected." 262 I. C. C. p. 692.

From this statement it is apparent that the Commission concluded that the 1940 amendment to § 3 (1) enlarged the scope of the section. The Commission, indeed, stated that "it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country." *Id.* p. 692. And see *id.* pp. 688–691. But it is suggested that discriminations based on geographic factors were outlawed prior to the 1940 amendment to § 3 (1), as evidenced by its long-standing condemnation of "undue or unreasonable prejudice or disadvantage" to any "locality" and, since 1935, to any "port, port district, gateway, transit point." [14] It is, moreover, suggested that even the prohibition of discriminations against shippers was broad enough all along to ban discriminations based on the geographic location of the shippers. The contention is that without a change in the law the present orders were unwarranted; it is pointed out that the class rates now condemned had been found by the Commission itself to be just and reasonable in recent years. And it is asserted

[14] It is pointed out in this connection that *Texas & Pacific R. Co.* v. *United States, supra,* while holding that a port was not a "locality" when it was only a gateway through which shipments were made, recognized that a port was a "locality" when it was a point of origin or destination. 289 U. S. p. 638.

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that the Commission did not take its present action on a showing of changed circumstances since those times. The conclusion, therefore, is that the present orders are not warranted by § 3 (1).

We need not determine whether, prior to the 1940 amendment, § 3 (1), by its ban on unlawful discriminations against a "locality," would have permitted the Commission to eradicate regional discriminations in class rates. For whatever doubt may have existed in the law was removed by the 1940 amendment which made abundantly clear that Congress thought that the problem of regional discriminations had been neglected and that, if any such discriminations were found to be present, they should be eradicated.[15] But, as the Commission concedes, the addition of "region, district, territory" to § 3 (1) did not change the law respecting discrimination by authorizing uniform freight rates, mile for mile, without regard to differing costs of the service. Congress, by adding those words, made plain the duty of the Commission, in determining whether discriminatory practices exist, to consider the interests of regions, districts, and territories, and to eliminate territorial rate differences which are not justified by differences in territorial conditions. In other words Congress did not introduce a new standard of discrimination by its amendment to § 3 (1); it merely made clear its purpose that regions, districts, and territories should be the beneficiaries of the law against discrimination.

[15] Senator Wheeler who had charge of the bill on the floor of the Senate stated concerning the amendment to § 3 (1): "The previous provision with regard to 'discrimination' simply referred to discrimination as to 'locality, port, port district, gateway, transit point' without specifying the region, district, or territory. So we felt that by broadening the language we would at least take away that excuse, and we would provide expressly that the Commission should not discriminate in its rate structures." 84 Cong. Rec., p. 5889.

Second. It is argued, however, that the findings of the Commission concerning regional discriminations in class rates are not supported by substantial evidence.

The great differences betwen territorial class rate levels are shown by the following table. It gives a comparison (in cents per 100 pounds) between the first-class rate scale within Official Territory and that within each of the other territories:

Distance	Eastern scale rate	Southern scale		Western trunk-line scale					
				Zone I		Zone II		Zone III	
		Rate	Percentage of Eastern	Rate	Percentage of Eastern	Rate	Percentage of Eastern	Rate	Percentage of Eastern
50 miles	47	57		53		61		65	
100 miles	62	79		73		83		90	
150 miles	73	96		86		98		107	
200 miles	80	112		97		111		123	
300 miles	96	134		117		134		147	
400 miles	109	156		136		156		172	
500 miles	122	173		156		178		196	
600 miles	135	189		176		200		220	
700 miles	149	206		196		222		244	
800 miles	160	222		210		239		263	
900 miles	171	235		226		256		282	
1,000 miles	182	249		240		273		300	
Average			137.7		129.6		144.4		159.4

These first-class intraterritorial rates are used as bases in formulating rates on other classes of freight in the respective territories.[16]

The following tables compiled by Government counsel show the first-class rates for interterritorial movements to Official Territory from each of the other territories as compared with intraterritorial movements for approximately equal distances within Official Territory:

[16] See note 2, *supra.*

Southern v. Official		Miles	First class rates	Disadvantage of Southern Territory shipper compared with Official Territory shipper	
From—	To—			In cents	In per cent
Nashville, Tenn	Indianapolis, Ind	297	135		
Indianapolis, Ind	Kent, Ohio	296	96	39	41
Knoxville, Tenn	Columbus, Ohio	395	155		
Baltimore, Md	Warren, Ohio	392	103	52	50
Birmingham, Ala	Muncie, Ind	536	179		
Pittsburgh, Pa	Rockford, Ill	538	128	51	40
Chattanooga, Tenn	Chicago, Ill	594	187		
Philadelphia, Pa	Toledo, Ohio	595	135	52	39
Atlanta, Ga	Chicago, Ill	731	210		
Danville, Ill	Washington, D. C	733	151	59	39
Macon, Ga	Chicago, Ill	819	223		
Trenton, N. J	Danville, Ill	819	163	60	37

Southwestern v. Official		Miles	First class rates	Disadvantage of Southwestern Territory shipper compared with Official territory shipper	
From—	To—			In cents	In per cent
Little Rock, Ark	Detroit, Mich	785	222		
Official Territory Point	Detroit, Mich	785	160	62	39
Oklahoma City, Okla	Cincinnati, Ohio	882	244		
Official Territory Point	Cincinnati, Ohio	882	171	73	43
Shreveport, La	Cleveland, Ohio	1,013	264		
Official Territory Point	Cleveland, Ohio	1,013	185	79	43
Dallas, Tex	Pittsburgh, Pa	1,224	304		
Official Territory Point	Pittsburgh, Pa	1,224	207	97	47

Western Trunk-Line v. Official		Miles	First class rates	Disadvantage of Western Trunk-Line Territory shipper compared with Official Territory shipper	
From—	To—			In cents	In per cent
Des Moines, Iowa	Toledo, Ohio	558	142		
Official Territory Point	Toledo, Ohio	558	118	24	20
St. Paul, Minn	South Bend, Ind	491	138		
Official Territory Point	South Bend, Ind	491	111	27	24
Lincoln, Nebr	Evansville, Ind	612	169		
Official Territory Point	Evansville, Ind	612	125	44	35
Denver, Colo	Cleveland, Ohio	1,329	289		
Official Territory Point	Cleveland, Ohio	1,329	200	89	45

The disadvantage to the Southern or Western shipper who attempts to market his product in Official Territory is obvious. Thus the first of these tables shows that a Nashville shipper pays 39 cents more on each 100 pounds of freight moving to Indianapolis, Indiana than one who ships from Indianapolis to a point of substantially equal distance away (Kent, Ohio) in Official Territory. Similar disadvantages suffered by Southern and Western shippers are revealed in the other comparable interterritorial freight movements set forth in the tables.

That disadvantage is emphasized if the effects of classification differences on rates for identical commodities are considered. A comparison of rates in cents per 100 pounds for 200 miles shows that, even though shippers in the South and West have the same or lower classification ratings for identical commodities, they nevertheless *on the whole* pay higher charges than the shippers in Official Territory for equivalent service. Thus there are in class 100 (first class) for less-than-carload lots 2092 items

common to the three classifications. In Official Classification all of these move at a rate of 80 cents per 100 pounds for a haul of 200 miles. In Southern, 2075 of these items are classified 100 and move at a rate of $1.12. Of the remaining 17 items 5 are classified in Southern in class 85 with a rate of 95, 2 in class 70 with a rate of 78, 7 in class 55 with a rate of 62, 2 in class 45, with a rate of 50, 1 in class 40 with a rate of 45. In Western Trunk-Line Zone I, 2076 of the 2092 items are classified 100 with a rate of 97, 4 in 85 with a rate of 82, 10 in 70 with a rate of 68, 2 in 55 with a rate of 53.

In class 100 for carload lots there are 213 common items. In Official Classification all of these move at a rate of 80 cents for a haul of 200 miles. In Southern, 199 of these items are classified 100 and move at a rate of $1.12 for 200 miles. Of the remaining 14, 7 are classified in Southern in class 85 with a rate of 95, 2 in 75 with a rate of 84, 5 in 70 with a rate of 78. In Western Trunk-Line Zone I, 202 of the 213 items are classified 100 with a rate of 97, 7 in 85 with a rate of 82, 3 in 70 with a rate of 68, 1 in 55 with a rate of 53. Additional illustrations are too numerous and detailed to include in this opinion. But the ones given are representative of the rest and show how disparities in the rate levels are aggravated when the effects of classification differences on rates are considered.

There is rather voluminous evidence in the record tendered to show the effect in concrete competitive situations of these class rate inequalities. The instances were in the main reviewed by the Commission. They are attacked here on various grounds—that some of them involved rates other than class rates, that others were testified to by shippers who made no complaint of class rates, that others showed shippers paying higher rates yet maintaining their competitive positions and prospering. We do not stop to

analyze them or discuss them beyond saying that some of the specific instances support what is plainly to be inferred from the figures we have summarized—that class rates within Southern, Southwestern and Western territories, and from those territories to Official Territory, are generally much higher, article for article, than the rates within Official Territory. That was the basic finding of the Commission; and it is abundantly supported by the evidence.

Thus discrimination in class rates in favor of Official Territory and against the Southern, Southwestern and Western Trunk Line territories is established. But that is not the end of the matter. For "mere discrimination does not render a rate illegal under § 3." *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 521. Section 3 condemns "any undue or unreasonable preference or advantage" and "any undue or unreasonable prejudice or disadvantage" to any territory. And, as we have said, the 1940 amendment to § 3, by its addition of "region, district, territory," did not change the prevailing rules respecting unlawful discrimination; it merely enlarged the reach of § 3. Hence we must determine from the pre-existing law whether a discrimination against a territory is obnoxious to § 3. The rule is stated in *United States* v. *Illinois Central R. Co., supra,* p. 524, as follows:

> "To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

It is on this principle that the findings of the Commission under § 3 are both defended and attacked.

Third. The Commission's findings under § 3 (1) are first challenged on the ground that there is no finding that the corresponding class rates are actually charged to or demanded of competing shippers in the several territories. That is to say, no unlawful discrimination in favor of a shipper in Official Territory and against a shipper in Southern Territory can be said to exist unless it is shown that the southern competitor is actually required to pay the higher interterritorial class rates. It is contended that the record negatives the existence of facts which could support such a finding and that no such finding was made. Reliance is placed on two circumstances. In the first place, reference is made to the effect of classification ratings on class rates which we briefly summarized above. It is noted, for example, that the southern shipper in some instances actually pays less for the shipment of the same commodity than the shipper in Official Territory, *e. g.*, where the Southern Classification carries the commodity in a lower class, which in turn exacts a rate less than that required of the higher classification granted by Official. It is apparent from the illustrations we have given that such is true in some cases. But that is not the dominant pattern. In the vast majority of the instances the classification ratings, like the class rate structure, work to the benefit of Official Territory and against the others. But the greater reliance is placed on the second circumstance—that only a minor portion of freight moves by class rates and of that a greater percentage moves in Official Territory than in the others. This point requires a more extended answer.

The Commission, indeed, found that by reason of nonuse the class rates have become obsolete and no longer serve the purposes for which they were designed. They move a relatively small amount of freight. The following table indicates the percentages of carload traffic carried at class rates within and between territories in 1942:

From	To			
	Official	Southern	South-western	Western trunk-line
Official	5.8	12.6	22.5	12.3
Southern	.9	1.8	6.1	1.5
Southwestern	1.5	1.2	2.4	2.0
Western trunk-line	3.1	6.1	13.0	.6

In September, 1940, for example, less-than-carload ratings on about 3,000 commodities were removed from the Southern Classification by classification exceptions. The great bulk of the freight moves on exception rates and commodity rates.[17] This trend, according to the Commission, has been the result of competitive forces. The creation of the exceptions has "shorn the ratings in the classifications of much of their usefulness and proper function." 262 I. C. C. p. 504. The record is replete with evidence supporting this finding of the Commission. And appellants seize on it as supporting their claim that since class rates have largely become paper rates, they are not the source of injury to shippers from the South and the West; that if the latter are prejudiced by the rate structure, the injury must flow from the exception rates and commodity rates not involved in this proceeding; and that in any event the case of unlawful discriminations in favor of Official Territory and against the other territories has not been founded on the actual use of disadvantageous class rates by shippers in the Southern, Southwestern, and Western Trunk-Line territories.

But that takes too narrow a view of the problem confronting the Commission. We start of course with some showing of actual discrimination against shippers by reason of their use of class rates. But the main case of discrimination made out by the record is one against

[17] See note 3, *supra*.

regions and territories. We assume that a case of unlawful discrimination against shippers by reason of their geographic location would be an unlawful discrimination against the regions where the shipments originate. But an unlawful discrimination against regions or territories is not dependent on such a showing. As we stated in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 450, "Discriminatory rates are but one form of trade barriers." Their effect is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a State or region, to make it difficult for an agricultural economy to evolve into an industrial one. Non-discriminatory class rates remove that barrier by offering that equality which the law was designed to afford. They insure prospective shippers not only that the rates are just and reasonable *per se* but that they are properly related to those of their competitors. Shippers are then not dependent on their ability to get exception rates or commodity rates after their industries are established and their shipments are ready to move. They have a basis for planning ahead by relying on a coherent rate structure reflecting competitive factors.

If a showing of discrimination against a territory or region were dependent on a showing of actual discrimination against shippers located in these sections, the case could never be made out where discriminatory rates had proved to be such effective trade barriers as to prevent the establishment of industries in those outlying regions. If that were the test, then the 1940 amendment to § 3 (1) would not have achieved its purpose. We cannot attribute such futility to the effort made by Congress to make regions, districts and territories, as well as shippers, the beneficiaries of its anti-discrimination policy expressed in § 3 (1).

So far as the remedy is concerned, the present cases might, of course, be different if the Commission had no power to prescribe classifications. But § 15 (1) of the Act grants it full power, on finding that a classification is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," to determine and prescribe what classification will be "just, fair, and reasonable." The Commission's over-all conclusion was that the classifications in force and the class rates computed from them harbor inequities which result in unlawful discriminations in favor of Official Territory and against the other territories. The fact that relatively small amounts of freight move by class rates proves not that the regional and territorial discrimination is slight, but that the rate structure as constituted holds no promise of affording the various regions or territories that parity of treatment which territorial conditions warrant. The Commission in substance concluded that that result could not be achieved unless traffic was, in the main, moved on class rates. We will discuss later the appropriateness of the relief granted by the interim orders here challenged. It is sufficient here to note that the case of unlawful discrimination against these territories was chiefly founded on the absence of non-discriminatory class rates and uniform classifications which would remove the features of existing rate structures prejudicial to Southern, Southwestern, and Western Trunk-Line territories.

We are thus not primarily concerned with the adequacies of the Commission's findings showing discrimination against actual shippers located in a territory (cf. *Florida* v. *United States,* 282 U. S. 194; *North Carolina* v. *United States,* 325 U. S. 507; *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567), but with prejudice to a territory as a whole.

Fourth. The inquiry of the Commission into the effect of class rates on the economic development of Southern, Southwestern, and Western Trunk-Line territories took a wide range. It concluded that prejudice to the territories in question had been established. We think that finding is supported by substantial evidence.

It is, of course, obvious that the causal connection between rate discrimination and territorial injury is not always susceptible of conclusive proof. The extent of that causal relation cannot in any case be shown with mathematical exactness. It is a matter of inference from relevant data. The Commission recognized, for example, that the fact that the South has fewer industries than the East results from a complex of causes—that the "industrial development of the East is due to many factors other than transportation services and costs, such as climate, soil, natural resources, available water power, supplies of natural gas and coal, and early settlements of population which antedated the building of railroads." 262 I. C. C. p. 619. It noted that in 1939 freight revenues on commodities in the manufactures and miscellaneous group were but 5.3 per cent of the destination value of manufactured goods and that differences in freight charges resulting from differences in class rate levels were only a small fraction of that figure. But it nevertheless concluded that "Nearness to markets and ability to ship to markets, on a basis fairly and reasonably related to the rates of competitors, are nevertheless potent factors in the location of a manufacturing plant. In fact, rate relations are more important to the manufacturer and shipper than the levels of the rates." 262 I. C. C. 619–620.

The great advance in industrialization of Official Territory over the other territories need not be labored, for it is obvious. Some manifestations of that development may be illustrated by the following tables:

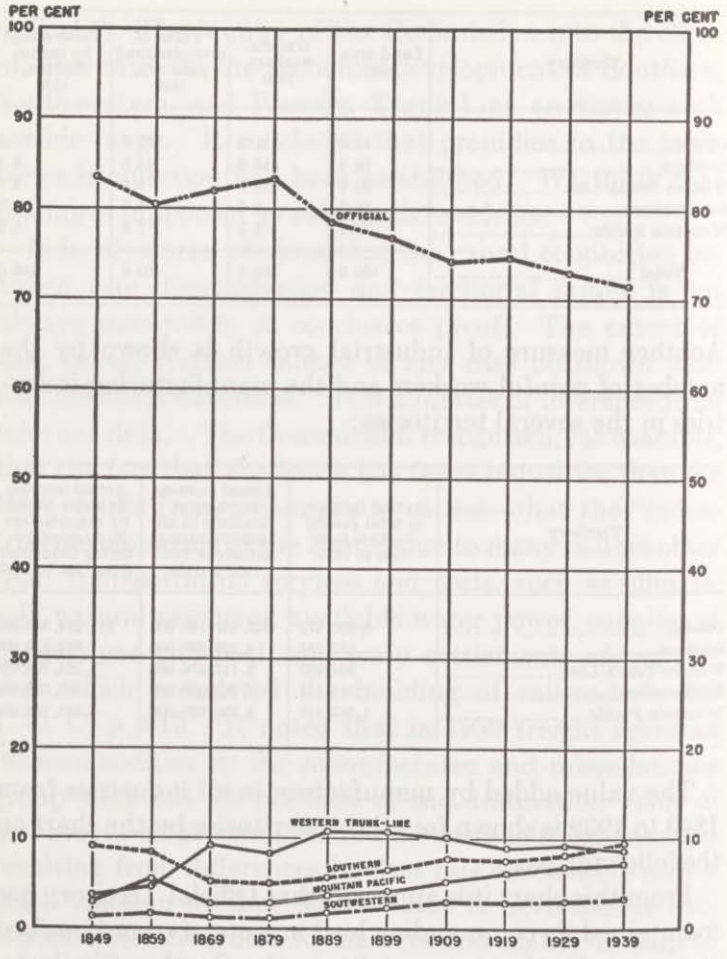
Territory	Land area, 1940	Gainful workers, 1930	Value of manufactured products, 1939	Value added by manufacture, 1939
Official	13.5	51.1	67.8	71.4
Southern	13.3	16.8	10.0	9.4
Western Trunk Line	20.9	13.5	9.9	8.7
Southwestern	14.2	9.3	4.5	3.3
Mountain Pacific	38.1	9.3	7.8	7.2
Total	100.0	100.0	100.0	100.0

Another measure of industrial growth is shown by the number of gainful workers and the manufacturing industries in the several territories:

Territory	Actual increase in total gainful workers from 1910 to 1930	Actual increase in value of products in all manufacturing industries from 1909 to 1939	Actual increase in value added by manufacture in all manufacturing industries from 1909 to 1939
Official	6,230,273	$23,561,190,000	$11,284,350,000
Southern	652,755	4,229,396,000	1,662,336,000
Western Trunk-Line	904,986	3,117,079,000	1,284,798,000
Southwestern	1,011,151	1,942,378,000	580,388,000
Mountain Pacific	1,863,419	3,320,930,000	1,341,785,000

The value added by manufacture in all industries from 1849 to 1939 is shown for all the territories by the chart on the following page.

From this chart it is apparent that Official Territory has maintained its commanding lead in spite of recent marked increases elsewhere, especially in the South. Similarly, for the period 1929 to 1939 the number of wage earners in manufacturing industries in the entire country decreased 11 per cent; in Official Territory, 12 per cent; while in the South there was an increase of 5 per cent. For the same period, values of manufactured products increased 1 per cent in the South, while they decreased 21 per cent for the entire country and 25 per cent in Official Territory. From 1930 to 1940, the number of gain-



fully occupied workers in manufacturing in Official Territory decreased from 70.5 per cent to 69.4 per cent of the nation's total, while in the South there was an increase from 10 per cent to 11.9 per cent. A number of manufacturing activities have increased more rapidly in the South than in Official Territory, though the reverse has been true in other industries. But in spite of the growth in industrial activities in the South and West (which ap-

pellants stress heavily), the percentage comparisons are not particularly revealing because of the great disparity between the bases on which they are computed.

The fact remains that economic development in the South and West has lagged and still lags behind Official Territory. In 1940 the average annual dollar income per person employed in Official Territory was $1,988; in Southern, $940; in Southwestern, $1,177; in Western Trunk-Line, $1,411. Official has 69 per cent of all workers engaged in manufacturing in the United States and 29 per cent of all workers in extractive industries. It has, for example, a high concentration in the manufacture of steel and copper products, though less than 4 per cent of the iron ore reserves, and no reserves of metallic copper. The South and West furnish raw materials to Official and buy finished products back. They are also dependent to a great extent on the markets for their products in Official, which has over 48 per cent of the population of the country, 76 per cent of the national market for industrial machinery and raw materials, 64 per cent for all goods and sources, 62 per cent for consumer luxuries, and 53 per cent for consumer necessities. Yet the South and West suffer rate handicaps when they seek to reach those markets.[18] One of the many illustrations will suffice. Cottonseed oil is a basic agricultural commodity. Class rates on it are

[18] The Commission stated, 262 I. C. C. pp. 695–696:

"Although manufacturing has grown in the South and Southwest and to a lesser extent in western trunk-line territory in the last decade, it is still vastly less in diversification and amount than in official territory. The increases in manufacturing in these territories has created a demand for rates which will at once permit the free movement of the manufactured articles, but because of the level of the intraterritorial and interterritorial class rates, such free movement has been impeded insofar as such commodities move at class rates. In most instances it has been necessary either to reduce the class-rate levels or to establish exception or commodity rates in order that the manufactured products may move freely, and this action has frequently been

7 per cent higher from Southern to Official Territory than they are within Official Territory. If the cottonseed oil is manufactured into oleomargarine, the rates from Southern to Official Territory are 35 per cent higher than the rates within Official Territory.

It is said in reply, however, that the disparities which we have mentioned reflect only natural advantages which justify differences in rates. The great concentration of population in the East is said to show that its more favorable rates are justified by the fact that it has many more people to support the roads. The unfavorable income comparisons with the East are thought to establish one of the handicaps under which the roads in the South and West operate. It is pointed out that the heavy preponderance of the nation's total natural resource of energy supply is located in Official Territory—40 to 45 per cent of the total bituminous and semi-bituminous coal supply, practically all of the anthracite resources; 60 per cent of all electric energy originates there. It is said that Official Territory is the logical location for industries which use metals from other territories, since it has the natural supplies of coal. It is also pointed out that the gross income from crops and livestock in Official Territory is the highest

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subject to long delays because of the failure of individual carriers or groups of carriers to agree upon a basis.

"Official territory is the greatest consuming territory in the country, and is the market that nearly all manufacturers desire to reach, particularly where they have a surplus of their products to sell. In shipping to official territory, manufacturers in the other territories not only have the disadvantage of location, but are subjected to an additional burden in those instances where they must pay class rates on a much higher level than their competitors in official territory. This situation reacts to the disadvantage of manufacturers in the other territories, and to the advantage of those in official territory, tends to restrict the growth and expansion of the manufacturers in the other territories, and, to some extent, to prevent the establishment of new manufacturing plants in those territories."

in the country, amounting to 31 per cent of the total. From these and comparable data it is argued that the lower rates in Official Territory reflect only inherent advantages which the other territories do not enjoy. It is, therefore, argued that what the Commission has sought to do is to equalize economic advantages, to enter the field of economic planning, and to arrange a rate structure designed to relocate industries, cause a redistribution of population, and in other ways to offset the natural advantages which one territory has over another. It is asserted that such a program is unlawful under *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46, where the Court held that the Act, in its condemnation of discrimination, "does not attempt to equalize fortune, opportunities or abilities." And see *United States* v. *Illinois Central R. Co., supra,* p. 524; *Texas & Pacific R. Co.* v. *United States, supra,* pp. 637–638.

We will revert to this matter when we come to consider whether territorial conditions justify the differences in rates. It is sufficient at this point to say that the record makes out a strong case for the inference that natural disadvantages alone are not responsible for the retarded development of the South and the West, that the discriminatory rate structure has also played a part. How much a part cannot be determined, for every effect is the result of many factors. But the inference of prejudice from the discriminatory rate structure is irresistible. If this discriminatory rate structure is not justified by territorial conditions, then its continued maintenance preserves not the natural advantages of one region but man-made trade barriers which have been imposed upon the country. Such a result cannot be reconciled with the great purposes of § 3 (1) as amended in 1940.

Fifth. The Commission found that conditions peculiar to the respective territories did not justify the differences in the territorial class-rate structures. In reaching that

conclusion it first inquired whether the differences in the costs of furnishing the railroad service in the several rate territories justified the existing differences in the levels and patterns of the class rate scales.[19] The basis of its inquiry was a cost study submitted by its staff. For cost analysis purposes the United States is divided into areas roughly but not exactly approximating the classification territories. Thus there are three districts: Eastern, Southern and Western. Southern district is further divided into Pocahontas region and Southern region. Eastern district plus Pocahontas region is substantially the equivalent of Official territory.[20] In the cost study, railroads were assigned to geographical areas; expenses for individual roads were divided into groups, each group being associated with appropriate service units which included revenue car-miles, revenue gross ton-miles, and cars originated and terminated; unit costs were then obtained by dividing the aggregate of the territorial expenses in each group by the applicable territorial units; the costs of particular services were then built up from the unit costs. Costs were put into two classes—(1) out-of-pocket or variable expenses which vary directly with the kind of traffic handled; (2) constant or fixed costs not capable of assignment to particular kinds of traffic costs[21] which

[19] In *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 597, the Court stated, "The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account."

[20] For description of exact boundaries, see 262 I. C. C. 605. For some cost purposes the United States is also divided into 11 cost territories, various combinations of which are equivalent to the rate territories. For definitions of these cost territories, and a collection of a substantial portion of the Commission's cost data, see S. Doc. No. 63, 78th Cong., 1st Sess.

[21] The sum of the out-of-pocket costs plus a pro rata distribution of the constant or fixed costs is referred to as fully distributed cost.

normally must be borne by the various types of traffic in proportion to the ability of each to pay. The details of the cost study are too intricate and voluminous to relate here. They have been summarized by the Commission. 262 I. C. C. pp. 571–592. It should be noted, however, that allowances for return—computed at both 4 per cent and 5¾ per cent—were included among costs. The allowances for return were based on recommended rate-making values furnished by the Bureau of Valuation. The territorial cost comparisons were principally based on the 4 per cent return figure, the Commission noting that the figure was relatively close to the return earned by the carriers in the year covered by the study, *viz.*, 1939.

To summarize very briefly, the expenses of the carriers were first broken down and translated into territorial average unit costs of performing each of the kinds of services involved in moving a specific shipment or in furnishing a given amount of transportation service in each territory. These unit costs were then multiplied by the number of units of each of the services found to be employed in moving the specific shipment or furnishing the given amount of service in the territory. The process was repeated for a series of different shipments or services sufficient to make the result representative of territorial conditions. Once the average costs for each rate territory were computed, territorial average costs were compared. The principal comparisons were based on the year 1939, although supplementary studies were also made for the periods 1930–1939, inclusive, 1937–1941, inclusive, and 1941. The territorial cost comparisons showed, for example, the costs of hauling given weight loads in a certain type of car for given distances in each territory. They also showed the relative costs of handling the entire traffic consist of each territory. This was designed to eliminate the effects of any differences in consists of traffic between territories compared, by determining first the cost in the territory

in which it actually moved and then the cost in each of the other territories. The cost study gave consideration to freight moving for various distances in all kinds of equipment—box, hopper, gondola, tank, stock, flat, and refrigerator cars. Costs were compared for identical loads hauled in the principal types of equipment. Standard loads were then taken. The average weight loads experienced in each territory for various types of equipment were also taken. The aim was to make adjustment for the different types of equipment used and the different average loads between territories. Likewise, comparisons were made of the cost of hauling the entire consist of the traffic of one territory, at the average loads and unit costs applicable in that territory, with the cost of hauling the identical traffic at the average loads and unit costs applicable to the other territories. Comparisons were also made (for the distances the traffic actually moved, by classes of equipment, and at actual average loads) of the relative cost of hauling the consist of traffic of the entire United States, and the costs of carrying the Eastern, Southern and Western consists respectively in each of the several territories.

When it came to the Eastern district, computations were made which both excluded and included the Pocahontas region. That region, for purposes of the study, represented the operation of three railroads—Chesapeake & Ohio, Norfolk & Western, and the Virginian—about 84 per cent of whose freight traffic is coal. For purposes of such a comparative study as this, the exclusion of Pocahontas is considered desirable, since its costs are low because of the very heavy coal tonnage.[22]

[22] 262 I. C. C. p. 578. Similar conditions call for the exclusion of Kentucky in considering figures for the Southern region. And see *General Commodity Rate Increases*, 223 I. C. C. 657.

The Commission attached principal weight to the haul of 300 miles per shipment originated, as that distance most closely approximated the length of haul in each territory in 1939. Relative territorial [23] costs (fully distributed) for traffic moving that distance in box cars and gondola cars were as follows:

[U. S. average=100]

	Box cars		Gondola and hopper cars	
	Assumed 25 ton load	Actual average load	Assumed 50 ton load	Actual average load
Eastern (excl. Pocahontas)	102	103	100	100
Southern	96	97	99	102
Western	108	108	109	115

The Commission computed that on the foregoing analysis for 100, 300 and 500 miles, the fully distributed costs for the South are generally a little lower than for the East, Pocahontas excluded, while the fully distributed costs in the West exceed those of the East by from 6 to 15 per cent. Similar cost comparisons were made for the several territories for stock-car, refrigerator-car, tank-car, and flat-car traffic. Based on the actual average loads experienced for each class of equipment, the Commission found the costs for the South lower than those for the East (Pocahontas excluded) for traffic moving in all those classes of equipment. The costs for the West are also lower than those for the East as to stock-car, refrigerator-car, and flat-car traffic, but higher for tank-car traffic.

[23] Not including Pocahontas in Eastern Territory figures. Relative costs were not shown separately for Western Trunk-Line, Southwestern, and Mountain Pacific territories, the Commission noting that differences between costs for the total West and for each of those three rate territories were relatively small. 262 I. C. C. p. 578.

A territorial comparison of fully distributed costs for carload traffic moving 300 miles in all classes of equipment shows the following: [24]

[U. S. average=100]

	Identical loads	Actual average loads
Eastern (excl. Pocahontas)	102	102
Pocahontas	67	67
Eastern including Pocahontas	95	95
Southern	98	101
Western	108	110

The fully distributed costs on identical loads in the South are 4 per cent below those for the East, excluding Pocahontas. The same comparison shows the costs for the West 6 per cent higher than those in the East, excluding Pocahontas. Costs in the South, based on the actual average loads are 1 per cent below those for the East, excluding Pocahontas. In the West they are 8 per cent higher than the latter.

Territorial comparisons based on average net ton-mile carload costs (1930–1939) adjusted for differences in the length of haul and the consist of the traffic were made. They showed that the costs for the South are approximately 1 or 2 per cent below those for the East, excluding Pocahontas. On the other hand, those costs for the West exceeded those of the East, excluding Pocahontas by from 5 to 7 per cent.

Territorial comparisons of the less-than-carload costs were also prepared. They showed that those costs are lower in the South than in the East whether assumed identical loads or actual average loads are taken, and even if

[24] Weighting given to the costs for each class of equipment was based on the volume of traffic handled in each type of equipment in the United States. Terminal costs for each class of equipment were weighted for the total United States traffic handled in each class of equipment as measured by tons originated plus tons terminated. Line-haul costs by classes of equipment were weighted for the ton-miles of traffic handled in each class of equipment.

Pocahontas is included in the East. They are higher in the West than in the East. If Pocahontas is excluded from the East the following table shows the comparison for a 300 mile haul:

[U. S. average=100]

	Assumed identical load		Actual average load	
	Out of pocket	Out of pocket plus constant [1]	Out of pocket	Out of pocket plus constant [1]
Eastern (excl. Pocahontas)	105	101	94	93
Southern	89	87	88	86
Western	104	109	120	121

[1] Constant costs common to all traffic are not included.

In all territories less-than-carload traffic (1939) was carried at a deficit, Southern making the best showing, Western the worst. That is revealed in the following table:

	Revenues	Costs [1]	Deficit
Eastern (excl. Pocahontas)	$107,155,756	$133,308,907	$26,153,151
Southern	46,635,725	47,451,184	815,459
Western	88,797,938	123,146,215	34,348,277

[1] Out-of-pocket cost plus total solely related expenses plus collection and delivery.

The Commission found that the difference in fully distributed costs for all traffic between the East and the West is largely in the constant or fixed expenses and the passenger and less-than-carload deficits. Out-of-pocket expenses in the South and West are frequently as low as, or even lower than, the out-of-pocket costs in the East. The Commission further found that the increase in freight traffic volume received by the carriers subsequent to 1939 served to reduce the unit costs of transportation in the South and West in a proportionately greater degree than in the East. A somewhat larger percentage of out-of-pocket expenses in the East is variable with added traffic than is true of the South and West, due apparently to the fact that the East, with its higher traffic density, is closer

to its maximum capacity than is true of the others. Thus the influence of added traffic in reducing average costs is greater in the West. On the other hand constant costs (proportionately larger in the South and West) do not increase with added traffic. As illustrative of those circumstances the Commission noted the effect of increases in 1941 of the ton-miles of revenue freight. They increased in 1941, as compared with 1939, 43 per cent in the East, 27 per cent in Pocahontas, 44 per cent in Southern and 46 per cent in Western Territory. The cost per revenue ton-mile decreased by only about 5 per cent in the East and in Pocahontas, as compared with decreases in excess of 10 per cent in the South and West.

The Commission summarized the results of the territorial cost comparisons as follows: There is little significant difference in the cost of furnishing transportation in the South as compared with the East, Pocahontas excluded. It is principally the low terminal costs in the South that account for its relatively low total costs. Based on the year 1939 and the period 1930–1939, the costs in the South are equal to or a little lower than those in the East. Based on the period 1937–1941, the costs in the South are substantially lower than those in the East.[25] Based on the year 1939 and the period 1930–1939, the cost of rendering transportation service in the West is between 5 and 10 per cent higher than in the East, excluding Pocahontas. Based on 1941, that difference is reduced to 5 per cent or less.[26]

The Commission recognized, of course, that carriers must obtain their revenue from the traffic which moves in

[25] If Pocahontas is included in the East, the costs for the South, based on the year 1939, are between 3 and 6 per cent above those for the East; for the years 1930–1939, between 6 and 8 per cent higher; for the years 1937–1941, about the same.

[26] If Pocahontas is included in the East for 1930–1939, the cost in the West is 18 per cent higher; based on 1939, approximately 15 per cent higher; based on 1941, about 10 per cent higher.

their respective territories. Hence the revenue-producing or rate-bearing characteristics of the different commodities which compose the traffic of the several territories, *i. e.*, the consists and volumes of traffic, are also important in determining whether territorial conditions justify differences in territorial rates.

The percentage distribution of total tons carried and revenue by commodity groups for 1939 is shown in the following table:

	Eastern district		Eastern (including Pocahontas)		Southern region		Western district	
	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue	Percent of tonnage	Percent of revenue
Group I: Products of agriculture	6.57	8.73	6.07	8.03	10.80	17.73	18.88	23.70
Group II: Animals and products	1.64	4.72	1.47	4.23	1.45	3.51	3.00	6.30
Group III: Products of mines	58.06	34.85	61.53	40.24	46.39	23.65	36.64	13.98
Group IV: Products of forests	2.43	2.74	2.43	2.69	11.40	9.45	10.59	9.31
Group V: Manufactures and miscellaneous	29.57	41.41	26.89	37.75	27.21	34.66	29.38	39.94
Total all carload traffic	98.27	92.45	98.39	92.94	97.25	89.00	98.49	93.23
All less-than-carload traffic	1.73	7.55	1.61	7.06	2.75	11.00	1.51	6.77

The Commission also considered the distribution of carload traffic based on revenue ton-miles for 1939 which it summarized as follows:

Item	Eastern district	Pocahontas region	Southern region	Western district
Products of agriculture	10.7	2.7	15.8	26.8
Animals and other products	3.8	.5	2.2	4.5
Products of mines	49.3	87.4	40.8	20.1
Products of forests	3.1	1.6	11.6	13.6
Manufactures and miscellaneous	33.1	7.8	29.6	35.0
Grand total, carload	100.0	100.0	100.0	100.0

And the contribution which the major classes of commodities (carload lots) make in excess of out-of-pocket costs (1939) appears as follows:

Item	Eastern district	Pocahontas region	Southern region	Western district	United States
Products of Agriculture	4.2	3.1	15.8	18.0	10.8
Animals and products	1.5	1.1	3.4	4.3	2.7
Products of mines	38.0	73.4	21.2	13.9	29.7
Products of forests	2.8	2.8	9.4	8.1	5.7
Manufactures and miscellaneous	53.5	19.6	50.2	55.7	51.1
Grand total, carload	100.0	100.0	100.0	100.0	100.0

A large volume of all traffic moves across territorial boundaries and therefore becomes common to two or more territories. And as respects the balance, the Commission found striking similarity in the consists of the traffic so far as its revenue-producing characteristics are concerned. The manufactures and miscellaneous commodity group embraces traffic which moves at relatively high rates, *i. e.*, rates which, ton-mile for ton-mile, make a substantially greater than average contribution to the constant costs. The percentages of the total tons carried in that group and the corresponding percentages for revenue produced by them are quite close to each other—particularly the East and the West.

The Commission stated that the revenue-producing qualities, or rate-bearing characteristics, of the commodities which compose the traffic in those several territories constituted "the governing factor" so far as the problem of the consists and volume of traffic was concerned. 262 I. C. C. p. 694. It appraised the evidence we have related as meaning that "the differences that exist in the consists of traffic in these respective territories are not so substan-

tial or of such character as to warrant the present differences in class rates." *Id.*, p. 695.

The findings of the Commission both as to the consists of the freight and the costs of rendering the service in the respective territories are vigorously challenged, especially by the western roads.

As to the consists, it is said that the eastern roads have a much heavier percentage of freight of a kind that produces excess revenue to carry the general expenses. Findings of the Commission are relied upon as showing that the eastern roads' preponderance of high-grade traffic affords a greater source of revenue than does the high percentage of low-rate products carried by the western roads.[27] These undisputed facts are said to disprove

[27] It is pointed out, as the Commission found, that livestock is a commodity which cannot do more than pay its own way; that products of the forest are subject to freight rates below the higher brackets; that agricultural products carry a low rate. The western district roads originated 36.91 per cent of the total tons of carload traffic originated in the United States (excluding Pocahontas) in 1941, while the eastern roads originated 47.40 per cent. To that disparity is added the fact that of the total agricultural products originated in the country in 1941 the western district roads originated 68.82 per cent as contrasted to 20.88 per cent by the eastern carriers excluding Pocahontas. For manufactures and miscellaneous tonnage the percentages were 28.06 per cent and 60.66 per cent, respectively. It is pointed out that while the difference between the percentage of agricultural products originated by the western carriers (68.82 per cent) and the percentage of manufactures and miscellaneous originated by the eastern carriers (60.66 per cent) is only 8 per cent, the eastern roads' tonnage of the latter group of commodities (which are high-grade traffic) is almost three times the tonnage of products of agriculture originated by the western carriers. Like comparisons are made between other groups of commodities carried by the eastern and western carriers respectively. Of the total tons of animals and products originated in the country in 1941 (excluding Pocahontas), the western roads originated 63.03 per

the Commission's finding that the consists of traffic in the respective territories do not warrant the present differences in class rates.

These facts, however, relate to density of traffic,[28] the effect of which is merged in the final cost figures. But the relation of the consist problem to the problem of rate structures is somewhat different. It is relevant in order to determine whether the consists of traffic are so different in the several territories that separate rate structures with different distributions of the transportation burden amongst commodities and classes of freight are necessary. It is apparent from the statistics which we have reviewed that, while there is a diversity in traffic moved in the several territories, the diversity largely disappears when commodity groups are considered. Then, also, the percentages of the total traffic in each territory which fall under the several commodity groups are not only very similar in the East, South, and West, but each group yields about the same percentage of the total revenues in each of the territories. The choice of groupings is plainly a specialized problem in transportation economics upon which the Commission is peculiarly competent to pass. Its judgment that the differences in consists between the territories do not justify the present differences in interterritorial class rates is, indeed, an expert judgment entitled to great weight. We could not disturb its findings on the facts of this record without invading the province reserved for the expert administrative body.

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cent, the eastern, 28.51 per cent. Of the total tons of products of forests originated in 1941, the respective percentages were 58.73 per cent and 7.52 per cent. And for products of mines the percentages were 33.31 per cent and 49.85 per cent, respectively.

[28] The 1941 revenue ton miles per mile of line were as follows:

Eastern District (excluding Pocahontas)	3,392,964
Pocahontas Region	7,519,840
Western District	1,358,041

As to the cost study little need be said concerning the South. Once the integrity of the cost study is assumed,[29] the finding of the Commission that there is little significant difference in the cost of furnishing transportation in the South as compared with the East has support in the facts. Moreover, the data on rates of return and freight operating ratios, to which we will shortly refer, corroborate the conclusion reached from the cost study that the differences in class rates between the East and the South are not justified by territorial conditions. The finding that the discrimination against the South is unlawful under § 3 (1) is thus amply supported—a conclusion that the southern carriers do not challenge here.

The question is a closer one when we turn to the West. For, as we have seen, the costs in the West on the average run higher than those in the East. Based on the year 1939 and the period 1930–1939, the cost of rendering transportation service in the West is between 5 and 10 per cent higher than in the East, excluding Pocahontas. Based on 1941, that difference is reduced to 5 per cent or less.

[29] Costs developed in the cost scales and the carriers' total known expenses by cost territories were reconciled within a very close margin as appears from the following table:

Territory	Aggregate expenses, increased for a 4-percent return computed by applying costs to traffic handled (1939)	Actual expenses as reported by carriers increased for a 4-percent return (1939)	Ratio (percent) of computed expenses to actual expenses
Eastern	$1,426,950,260	$1,451,484,949	98.3
Pocahontas	183,076,590	185,387,990	98.8
Southern	450,448,155	449,001,663	100.3
Western	1,382,549,982	1,395,188,845	99.1
United States	3,443,024,987	3,481,063,447	98.9

The Commission stated, "Judging from the above table, whatever errors may exist in the . . . studies, they have not had the effect of overstating or understating the carriers' costs in the aggregate to any appreciable degree." 262 I. C. C. p. 587.

As we have seen, the class rate structure is discriminatory as between the East and the West. The level of class rates in the West is from 30 to 59 per cent higher than that in the East. The problem of the Commission, therefore, was to determine whether that disparity is justified by territorial conditions. The Commission found that it was not so justified. The problem for us is whether the Commission had a basis for its conclusion.

While the western roads vigorously challenge the Commission's finding, their argument is in the main directed to the point that some disparity in rates between East and West is justified by differing territorial costs. No particular effort is made to prove that those costs are a fair measure of the existing rate differences.

We start, of course, from the premise that on a subject of transportation economics, such as this one, the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

The Commission has concluded that while cost studies are highly relevant to these rate problems they are not conclusive. It said in this case:

> "Discretion and flexibility of judgment within reasonable limits have always attended the use of costs in the making of rates. Costs alone do not determine the maximum limits of rates. Neither do they control the contours of rate scales or fix the relations between rates or between rate scales. Other factors along with costs must be considered and given due weight in these aspects of rate making." 262 I. C. C. p. 693.

In appraising the cost figures relevant here the Commission proceeded on the assumption that the 1941 traffic

level is most likely to prevail in the postwar period. It therefore started with the assumption that the margin of difference between the costs in the West and those in the East was slight and not accurately measured by 1939 figures, and that if, as has been the fact,[30] the freight carried in the West increased above that level the unit costs of transportation in the West would be reduced to a greater degree than those in the East, for reasons which we have already stated.

The Commission also had before it certain data relative to the financial condition of the various roads, data which we have not yet discussed. Thus comparative analyses of the rates of return of the roads in the several territories showed that while the western roads have had many lean years, the recent period has put them ahead of the roads in the East. The following table shows the rates of return in percentages based on the net railway operating income and the book investment, increased for cash, materials and supplies:

	1936	1937	1938	1939	1940	1941	1942	1943
Eastern district	2.67	2.27	1.26	2.34	2.66	3.62	4.9	4.32
Southern region	2.52	2.35	1.9	2.5	2.57	4.24	6.51	5.73
Pocahontas region	7.58	6.61	4.54	5.89	6.21	6.67	5.29	5.22
Western district	1.88	1.71	1.09	1.65	2.06	3.36	5.8	5.22

The Commission also considered the territorial freight operating ratios—the per cent of operating revenues from freight absorbed by operating expenses attributed to the freight.[31] They are shown in the following table:

[30] In the twelve months ended October 31, 1946, the revenue tons carried in the West were 26 per cent higher than for the year 1941, and the revenue ton miles were 43 per cent higher than in 1941.

[31] See White, Analysis of Railroad Operations (1946) pp. 14–15, pp. 69, *et seq.*; Locklin, Economics of Transportation (1938) p. 581; Miller, Inland Transportation (1933) pp. 500–502.

	1936	1937	1938	1939	1940	1941	1942	1943
Eastern district	64.95	67.86	68.98	64.88	63.92	63.04	61.93	66.23
Southern region	65.38	67.77	66.73	64.99	65.34	61.07	56.84	59.41
Pocahontas region	47.04	50.63	53.59	50.71	49.77	48.12	49.62	52.86
Western district	65.07	66.93	67.13	65.01	63.63	60.98	55.79	59.47

In light of such data the Commission said:

> "Making due allowance for a substantial decline in traffic from the war peak and for the fact that in the decade preceding 1940 the earnings of the western rail respondents were relatively low, nevertheless, insofar as the prospects of traffic and revenues in the immediate future can be foreseen, there is no reason to conclude that the interim adjustment will have any serious effect upon those respondents." 264 I. C. C. 63–64.

The Commission went on to note that intrastate class rates generally in most of the western States and many of the interstate class rates in western territory were already lower than those prescribed in the interim orders. It accordingly concluded that the western roads "cannot consistently maintain these sub-normal class rates and continue to maintain the relatively high basis of interstate class rates . . . ." 264 I. C. C. p. 64.

Moreover, as we have already noted, class rates have to a great extent fallen into disuse. This fact is relevant here in two respects. In the first place, the orders of the Commission affect class rates and class rates alone, the Commission not dealing with exception and commodity rates by the interim action which it has taken. So far as present freight movement is concerned, the orders affect a much smaller fraction of the traffic in the West than in the East. The Commission said:

> "The record does not support the contentions that the revenue needs of the western rail respondents with

> respect to their class-rate traffic are greater than those of the eastern rail respondents. From the carriers' reports to us for the years 1942, 1943, as shown in our original report, and 1944, it clearly appears that there is a greater need for revenue by rail carriers in the eastern district as compared with rail carriers in the western district or in the southern region. The report shows also that a much larger percentage of the total traffic in the eastern district moves on class rates than in the western district or in the southern region." 264 I. C. C. pp. 64–65.

In the second place, the existing rate structure singles out the class rate traffic in the West for the payment of unusually high rates. The class rate traffic is largely that of small shippers, who do not have the ability to obtain the benefit of the lower exception or commodity rates.

We cannot, therefore, treat this case as if it were one where the Commission, in spite of a showing of some increased cost in the West, reduced all freight rates to a level of equality with the East. It is a case of determining whether the discrimination against one small class of traffic is warranted by the showing of some increased cost in the West. The earning power of the carriers, their freight operating ratios, their rates of return, the estimate of the volume of traffic in the future, the nature and amount of traffic presently involved in the class rate movements are all relevant to the finding of unlawful discrimination. We cannot say that these considerations do not counterbalance or outweigh the disparity in costs between East and West. The appraisal of these numerous factors is for transportation experts. They may err. But the error, if any, is not of the egregious type which is within our reach on judicial review.

As we have noted, *Interstate Commerce Commission* v. *Diffenbaugh, supra,* p. 46, held that the Act, in its

condemnation of discrimination, "does not attempt to equalize fortune, opportunities or abilities." But the Commission made no such effort here. It eliminated inequalities in the class rates because it concluded that the differences in them were not warranted by territorial conditions. We think that the findings supporting that conclusion are based on adequate evidence.

It is argued that the comparison of rates of return and freight operating ratios overlooks the fact that both reflect the higher freight revenue level that prevails in the West. And it is urged that without the rate advantage which the western carriers now enjoy, any comparison which now appears to favor the western carriers would disappear. That argument assumes a constancy in freight traffic and on that assumption could be mathematically demonstrated. But we are dealing here with a problem of discrimination—a western rate structure which, as compared with the eastern, is not warranted by territorial conditions and which prejudices the growth and development of the West. It would be a large order to say that the removal of that trade barrier will have no effect in increasing traffic. The assumption on which the finding of prejudice is made is, indeed, to the contrary. Moreover, that argument would protect a discriminatory rate structure from the power of revision granted the Commission under § 3 (1) by the easy assumption that without discrimination the carriers would not thrive. But that flies in the face of history and is contrary to the Commission's expert judgment on these facts.

Sixth. An extended argument is made by the western roads, challenging the class rate reduction on less-than-carload lots. The argument is twofold—first, that the case of unlawful discrimination has not been made out for this type of class rate traffic; second, that the new less-than-carload class rates are confiscatory.

We have referred to some of the cost figures on less-than-carload lots. We have seen that those cost figures run higher in the West than in the East; that even when no constant costs common to all traffic are allocated to less-than-carload traffic, the deficit in the West is substantially higher than that in the East. The Commission noted that less-than-carload traffic as a whole is carried at a deficit in all territories, except possibly in the South. It also noted that in all territories it was not bearing its proper share of the costs of transportation; that, apart from wartime loading, it was not yielding, on the average, its out-of-pocket costs plus constant expenses solely related to less-than-carload traffic [32] plus the cost of collection and delivery, in any territory except possibly the Southern. 262 I. C. C. p. 697.

Little need be said concerning the argument that a case of unlawful discrimination has not been established in the case of less-than-carload traffic. The Commission concluded that if less-than-carload class rates were left unchanged while carload class rates in Southern, Southwestern and Western Trunk-Line territories were reduced 10 per cent, "the competitive relations between shippers shipping in less-than-carload quantities and those shipping in carloads" would be materially affected. 264 I. C. C. p. 66. Less-than-carload traffic is less than 2 per cent of total railroad freight tonnage, and much of that moves, not on class rates, but on exception rates and commodity rates. In Western Trunk-Line and Southwestern territories many intrastate and interstate class rates are now voluntarily maintained on less-than-carload traffic which are lower than the corresponding reduced interstate class rates required by the interim orders. There are other

[32] Constant costs solely related to less-than-carload traffic are those costs which do not vary with the volume of the traffic, but which could be eliminated if no less-than-carload traffic were handled.

circumstances, to which we will shortly advert, which reinforce the action of the Commission in reducing class rates on less-than-carload traffic. But the ones we have mentioned are adequate to support the Commission on the discrimination phase of the problem. The Commission was dealing not with discrimination against a particular commodity but with discrimination against entire regions. It was a complete rate structure that was subject to inquiry and revision. Once the Commission concluded that unlawful discrimination existed in the main features of that rate structure, it was justified in removing it. In eliminating the discrimination and establishing the uniformity required by the law, it was warranted in making minor collateral readjustments so that the Commission itself would not in turn create new discriminations. The adjustment of the less-than-carload class rates was permissible on that ground alone. The traffic affected was only a fraction of 2 per cent of the total traffic. Without that readjustment that class of traffic would be prejudiced. With that readjustment the prejudice would be removed and the entire rate structure—intrastate and interstate—would be more nearly rationalized.

That does not, of course, answer the argument on confiscation. The latter requires more extended treatment.

The western roads in their petition for rehearing before the Commission raised the confiscation point. But in doing so they rested on the record before the Commission and tendered no additional evidence. In the District Court, however, they presented further evidence which was received over objection and considered by that court.

This, therefore, is not a case like *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 363, 371–372, where the Commission refused to receive evidence proffered on the point of confiscation. Here, as we have said, the Commission received all evidence that was offered; and

when its order was announced and made known and the petition for rehearing was filed, the opportunity to tender additional evidence to bolster the confiscation point was not accepted. As stated in *Manufacturers R. Co.* v. *United States,* 246 U. S. 457, 489–490, and in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53–54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo.* The reason is plain enough. These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated.[33] Moreover, the impact of a particular order on revenues and the ability of the enterprise to thrive under it are matters for judgment on the part of those who know the conditions which create the revenues and the flexibility of managerial controls. For such reasons, we stated in *Board of Trade* v. *United States,* 314 U. S. 534, 546:

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the

[33] See Hamilton, Cost as a Standard for Price, 4 Law & Contemp. Prob., 321, 329:

"Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than carload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation."

> resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question. But we do not take that course here for reasons which will shortly appear.

The Commission explained its finding that less-than-carload traffic was being carried at large deficits and was not bearing its proper share of transportation costs. That finding was based on the operation of the roads in 1939 when the average load per car of less-than-carload shipments amounted to only 4.3 tons in the West. Since 1939 there has been a substantial increase in the average loading of such shipments, which was brought about under wartime conditions and which has materially decreased the unit costs attributable to less-than-carload traffic. In the judgment of the Commission it was not shown that loadings in the immediate postwar period were likely to decline to 1939 levels. Moreover, the cost data on less-than-carload traffic related to such traffic as a whole and not solely to that moving on class rates. As we have noted, much of this traffic moves not on class rates but on exception rates and commodity rates. The class-rate traffic bears the highest rates. The past failure of this traffic, as a whole, to carry its proper share of the costs may well have been due in large measure to the maintenance of exception and commodity rates.

The western roads present elaborate analysis (based both on the Commission's cost figures and on costs as adjusted by the evidence introduced in the District Court)

which shows less-than-carload traffic largely carried at deficits irrespective of the class rate paid under the interim orders. They contend that the loading figure of 4.3 tons is the only reliable one to use in projecting the costs and revenues into the postwar period, since it was in fact the average loading prior to the war, and will be once more, as soon as the order of the Office of Defense Transportation which requires ten-ton loading is revoked. And computations are presented based on that figure which show deficits in less-than-carload traffic, deficits which are increased when the Commission's cost figures are adjusted to reflect cost increases to January 1, 1946. All of those computations include as constant costs only those which related to this traffic. And it is pointed out that if all constant costs were included, the computed deficits would substantially increase.

On the other hand the Commission shows that on the basis of the new interim rates this traffic in the West would produce revenues in excess of out-of-pocket expenses plus 4 per cent return plus collection and delivery expenses plus loss and damage payments. That computation is based on a ten-ton loading figure. And on the basis of those types of costs, there is an excess of revenue even though the costs are increased to the January 1, 1946 level. The 1939 less-than-carload costs [34] in the West were 30 per cent greater than revenues from all such traffic. If the class-rate portion of less-than-carload traffic is taken, the costs are 81 per cent of the revenues, provided certain adjustments are made: (1) increased revenues from the increase in the minimum charge per shipment from 55 to 75 cents which the Commission authorized in this proceeding; (2) the elimination of less-than-carload traffic moving on exception, commodity, and intrastate rates; (3) a 10-ton load; and (4) a 2.47 per cent rate of return, which was the actual rate of return of 1939.

[34] Out-of-pocket costs plus solely related constant costs.

We do not stop to analyze the various computations in order to ascertain the exact relation between revenues and costs of less-than-carload traffic. That, indeed, would not be feasible on this record. For even the Commission made no attempt to determine what share of *all* costs should fairly be allocated to less-than-carload traffic. Hence, if the Commission had spoken its final word, and if it were believed necessary as a matter of constitutional law, see *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585; cf. *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602, to fix a less-than-carload class rate which produced a fair return on that particular traffic, the case would have to be remanded to the Commission for appropriate findings on this phase. The difficulty of treating the issue on the present record is illustrated in another way. Less-than-carload traffic, more than carload traffic, carries costs which to a degree are dependent on the carrier. Heavy or light loadings, speed of service, ratio of empty return cars, methods of loading freight so as to reduce damage claims, substitution of auxiliary truck service and the like turn on competitive conditions. Certainly rates need not compensate carriers for the most expensive way of handling less-than-carload service. Yet the present findings do not illuminate that problem nor provide the standard in terms of service for measuring the compensatory character of the less-than-carload class rates. And on such a problem the Commission's highest expert judgment would be called into play.

But the Commission has not finished with this problem. In the first place, as we point out hereafter, the Commission, subsequent to the issuance of these interim orders, granted a nationwide increase in freight rates, including an increase on less-than-carload rates. The temporary injunction has prevented the interim orders reducing class rates in the West by 10 per cent from going into effect.

When, therefore, the interim orders do go into effect, the actual rates chargeable presumably will be increased from the level fixed by the interim orders to the level prescribed by the recent order increasing all freight rates. Thus no loss has been suffered by the 10 per cent reduction on less-than-carload class rates; and any loss which would have been suffered by that rate reduction has probably been at least lessened, if not eliminated, by the general rate increase. Though it is argued that such is not the case, the showing is too speculative on this record for us to decide what the precise effect of the revised class rates on less-than-carload traffic will be. In the second place, as we have noted, the Commission made the present interim adjustment of class rates on less-than-carload traffic as a consequence of its reduction in carload class rates so that less-than-carload shippers would not suffer a disadvantage from the removal of the major discrimination in the class rate structure. The interim or temporary nature of the adjustment was recognized by the Commission when it admonished the carriers "to give careful consideration to the rates maintained by them on less-than-carload traffic with a view to making readjustments in ratings or rates, as promptly as possible, which will insure that the rates on such traffic are on a compensatory level." 264 I. C. C. 66–67. And it recognized but left untouched the problem of determining what would be the proper share of transportation costs to be borne by less-than-carload traffic.

The justification the Commission had for leaving the problem in that condition at this stage of the proceedings is apparent. The carriers are now preparing the new uniform classification. They have it within their power to follow the lead suggested by the Commission and to propose classification differences between carload and less-than-carload traffic which will obviate any issue of confiscation respecting less-than-carload rates. And it

has likewise left open the question of readjustment of the class rates on less-than-carload traffic when the total program, of which these interim orders are but a part, is put into effect.

Where the result of a rate order is not clearly shown to be confiscatory but its precise effect must await operations under it, the Court has refused to set it aside despite grave doubts as to its consequences. See *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 17–18. And see *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54–55; *Darnell* v. *Edwards*, 244 U. S. 564, 570; *Brush Electric Co.* v. *Galveston*, 262 U. S. 443, 446; *St. Joseph Stock Yards Co.* v. *United States*, *supra*, p. 69. The reasons for following a like course are equally impelling here. The Commission has not placed the western roads in a strait jacket. It has made an interim reduction on less-than-carload class rates as an incident to its removal of discriminations in carload class rates. It has indicated the course to be followed by the carriers, as a part of the overall classification and class rate problem, to make certain that these rates are compensatory. We are thus dealing with a problem which is in flux, an interim order made necessary as a result of a comprehensive revision of entire rate structures. Moreover, the conclusion to be drawn from the recent general increase in freight rates is too uncertain and speculative on this record for us to pass on the confiscation issue. See *Brush Electric Co.* v. *Galveston*, *supra*. The District Court amply protected appellants when it overruled their claim that the interim rates are confiscatory without prejudice to another suit to challenge the legality of those rates if, after a fair test, they prove to be below the lowest reaches of a reasonable minimum or if the permanent rates do not meet that standard. See *Darnell* v. *Edwards*, *supra*, p. 570.

Seventh. It was held in *Texas & Pacific R. Co.* v. *United States*, *supra*, p. 650, that where the Commission makes

an order under § 3 to remove an unlawful discrimination, the carriers must be afforded the opportunity to "abate the discrimination by raising one rate, lowering the other, or altering both." But that ruling was qualified by the statement that the Commission need not follow that course in case it acts under § 15 (1). *Id.*, p. 650, note 39. Section 1 (5) (a) of the Act provides that all charges for the transportation of property "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." And see § 1 (4). Section 15 (1) provides that when the Commission finds that "any individual or joint rate, fare, or charge" of a common carrier is "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," the Commission may determine and prescribe "what will be the just and reasonable" rate. And see § 15 (3). The words "unjustly discriminatory or unduly preferential or prejudicial" plainly refer to practices condemned by § 3 (1). A proper finding of unlawful discrimination under § 3 (1) thus enables the Commission not only to direct the carriers to eliminate the practice but also, pursuant to § 15, to prescribe the alternative. See *Youngstown Sheet & Tube Co.* v. *United States,* 295 U. S. 476. Thus the Commission in this type of situation, as in the case where intrastate commerce is involved, *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, may remove unlawful discriminations and prescribe new rates.

In *Texas & Pacific R. Co.* v. *United States, supra,* p. 650, it was also stated that, "A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for the correction of the disparity is to run against it or them." And it was held in *Central R. Co.* v. *United States,* 257 U. S. 247, 259, that mere participation in joint rates does not make connecting carriers partners in discrimination;

that they can be held responsible for unjust discrimination only if each carrier has participated in some way in the practice which causes the discrimination, "as where a lower joint rate is given to one locality than to another similarly situated." It is argued that the same rule applies in this case since, for example, the western carriers have no control of or participation in the lower Official intraterritorial rates, although they do participate in the joint or through interterritorial rates.

In reply it is said that carriers in Official Territory control rates within that area and also control, jointly with the carriers in each of the other territories, the rates from each of them into Official. That common source of discrimination is said to be sufficient to sustain the Commission's action. See *St. Louis Southwestern R. Co.* v. *United States,* 245 U. S. 136; *Chicago, I. & L. R. Co.* v. *United States,* 270 U. S. 287. But we do not need to decide the question. For the principle announced in *Central R. Co.* v. *United States* and *Texas & Pacific R. Co.* v. *United States, supra,* is applicable only where the Commission is directing the carriers to remove the discrimination. Those cases hold that the Commission may not require carriers to do what they are powerless to perform. But the Court recognized in *Central R. Co.* v. *United States, supra,* p. 257, that where the Commission acts pursuant to § 1 to require carriers to establish, in connection with through routes and joint rates, reasonable rules and regulations, that problem is not involved. For then the Commission corrects the unlawful discriminatory practice in the case of each carrier by prescribing the just and reasonable rate or practice. The same is true where, as here, the Commission in order to eliminate territorial discriminations proceeds under § 15 (1) to fix new reasonable rates. If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are con-

trolled by the same carriers, then the 1940 amendment to § 3 (1) fell far short of its goal. We do not believe Congress left the Commission so impotent.

It may not be said in this case, as it was held in *Texas & Pacific R. Co.* v. *United States, supra,* p. 633, that there was no evidence of the unreasonableness of the rates, or that that question was not in issue. The Commission here found that the rates were unjust and unreasonable under § 1 and it proceeded to fix new rates under § 15 (1). The facts which establish that the differences in rates as between the several territories are not warranted by territorial conditions plainly sustain its findings under § 1.

As we have said, this proceeding pertains only to class rates, which move but a small percentage of the traffic. It is, therefore, argued that the Commission should not have made adjustments in those rates without bringing about some equalization of exception and commodity rates under which the bulk of the traffic is moved. But there is no reason in law why the Commission need tackle all evils in the rate structure or none. It may take one step at a time. Cf. *United States* v. *Wabash R. Co.,* 321 U. S. 403. The 10 per cent interim rate order did not attempt to bring about complete elimination of the discriminatory features of the class rate structure. It was only an approximation of that result, the complete step awaiting the new uniform classification. But the reasons justifying that partial measure likewise support the action of the Commission in commencing with class rates when it tackled the problem of territorial discriminations.

Eighth. A different problem is presented when we turn to the 10 per cent increase in class rates which the Commission prescribed for Official Territory. Appellants strenuously urge that this action of the Commission was unauthorized under the Act, even if the other portions of its orders were justified.

The finding of the Commission on this phase of the case was that the present class rates in Official Territory were below a just and reasonable level and should be increased 10 per cent as a part of the adjustment of the rate structure in order to remove the unlawfulness both as respects their unreasonable low level and their unduly preferential character. 262 I. C. C. 700–701, 704–705; 264 I. C. C. 62. That finding is said to be without support in the record and to lack the preliminary findings necessary to support it.

It is argued that rates are not unreasonably low in violation of § 1 unless they are either noncompensatory or otherwise threaten harmful effects upon the revenues and transportation efficiency of the carriers in question, or of their competitors. It is said, as is the fact, that no such findings were made by the Commission and that on this record there are no facts which could support such a finding.

If this were a case of determining whether existing rates passed below the lowest or above the highest reaches of reasonableness, the point might be well taken.[35] See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506. But we do not have here such a revenue problem. This case presents problems in rate relationships, that is to say, problems of a discriminatory rate structure condemned by § 3 (1). The Commission may remove a discrimination effected by rates, even when they are within the zone of reasonableness, if the discrimination is forbidden by § 3 (1). As Mr. Justice Brandeis stated in *United States* v. *Illinois Central R. Co., supra,* p. 524, the

[35] The point might also be well taken if this were a proceeding under § 13 (4) to determine whether intrastate traffic was producing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the property devoted to interstate and intrastate transportation. *Florida* v. *United States, supra; United States* v. *Louisiana,* 290 U. S. 70; *North Carolina* v. *United States, supra.*

mere fact that one rate is "inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice." The Commission has the power to adjust the rates upwards and downwards, within that zone, in order to eradicate the discrimination. That power is not unlimited; there are standards which control its exercise. But as we shall see, the Commission acted within permissible limits here.

Once the Commission has found rates to be "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial," it is empowered to prescribe rates which are "just and reasonable" or "the maximum or minimum, or maximum and minimum, to be charged . . . ." § 15 (1). In *Youngstown Sheet & Tube Co.* v. *United States, supra,* the Commission, acting under § 15 (1), increased rail rates by prescribing what it found to be reasonable minimum rates. There was no finding that the existing, lower rates were not compensatory. The finding of reasonableness was premised on the grounds that "lower rates would create undue discrimination against shippers in origin districts who cannot use the water-rail route, and would tend to disrupt the rate structure, and to destroy the proper differentials between various producing districts on shipments to Ohio destinations." P. 479. The Commission relied not only on evidence bearing upon the character of the service and cost but also on a comparison of other rates in the same or adjacent territory. The Court sustained the order saying, "The existing rate structure furnished support for the finding of reasonableness." P. 480. In *Scandrett* v. *United States,* 32 F. Supp. 995, 996, aff'd 312 U. S. 661, the Commission had found that proposed reduced rates were "compensatory, considering all costs" but that they were below a minimum

reasonable level and therefore unlawful. It took that action to prevent destructive competition between rail, water, and motor carriers. The court sustained the order. And see *Jefferson Island Salt Min. Co.* v. *United States,* 6 F. 2d 315.

These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920. See H. R. Rep. No. 456, 66th Cong., 1st Sess., p. 19. Cf. *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282. But the elimination of discrimination occupies an equally high place in the statutory scheme. And, as we have said, the power granted the Commission under § 15 (1) includes the power to prescribe rates which will substitute lawful for discriminatory rate structures. If the Commission were powerless to increase rates to a reasonable minimum in order to eliminate an unlawful discrimination, unless existing rates were shown to be non-compensatory or unless ruinous competition would result, it would in some cases be powerless to prescribe the remedy for unlawful practices. The present case is a good illustration. A 10 per cent reduction of rates in the South and West would remove only part of the discrimination. On this record it is most doubtful that a full reduction of those rates to the level of Official Territory would be warranted. Yet if the rates in Official Territory may not be increased unless the present ones are shown to be non-compensatory, discrimination against the South and West and in favor of Official Territory would continue to thrive. For shippers in Official Territory would still have a preferred rate, as compared with shippers from the South and West, in reaching the great markets of the East—a preference not

shown to be warranted by territorial conditions. The raising of rates to a reasonable minimum was, therefore, as relevant here as it was in *Youngstown Sheet & Tube Co.* v. *United States, supra,* to the Commission's task of providing a rational rate structure.

The authority of the Commission to increase rates in order to remove discrimination, even though existing rates may be compensatory, is not unlimited. Section 15a (2) of the Act provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The balancing and weighing of these interests is a delicate task. "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304. And see *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352–353; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6–7. We may assume, however, that if the rates of return of the eastern carriers were substantially above that for the South and the West, an increase of the rates for the former would not be permissible, even in order to remove a discrimination. But, as we have seen, the rate of return in recent

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years [36] has favored the southern and western carriers, as have the freight operating ratios. The Commission took those factors, as well as the others we have reviewed, into consideration in determining that an increase in rates in Official Territory was warranted. 264 I. C. C. 61–62.

Revenue needs, like costs of rendering the transportation service, are germane to the question whether differences in territorial rate structures are justified by territorial conditions. They are amongst the standards written into § 15a; they reflect the totality of conditions under which the carriers in the respective territories operate. Should the Commission fail to consider them in determining whether the discrimination inherent in the rate struc-

[36] As we point out hereafter, after the present interim orders were issued, the Commission granted a general freight rate increase. See *Ex parte No. 162,* note 37, *infra.* In that case it reviewed the rates of return of the roads in the several territories based on the rates in effect at the time, which of course did not include the 10 per cent increase in class rates for Official Territory authorized in this proceeding but stayed by the District Court. What the Commission said in *Ex parte No. 162* corroborates its finding in the present case concerning the greater relative revenue needs of the roads in Official Territory:

"On the basis of the interim rates in effect since July 1, 1946, the rate of return for the eastern district will be considerably less for 1946 than in the Pocahontas region, the southern region, or the western district, even though an additional increase of 5 percent in certain rates in official territory was authorized and has been in effect since July 1, 1946. It also appears that even on the basis of the increases sought in Ex Parte No. 162 and the railroads' estimates of revenue, the rate of return in the eastern district for 1946 will be less than the rate of return in the Pocahontas region, the southern region, or the western district." 266 I. C. C. 548.

The latter estimates of the rate of return in per cent are as follows:

Eastern District	2.06
Pocahontas Region	6.26
Southern Region	4.01
Western District	3.31

tures was unwarranted, it would have not completed its task. There may be differences of opinion concerning the weight to be given those factors, especially the weight to be given the rate of return in the current years as opposed to that in the preceding decade. But their significance is for the Commission to determine; and, though we had doubts, we would usurp the administrative function of the Commission if we overruled it and substituted our own appraisal of these factors.

Ninth. After the present interim orders were issued, the Commission granted a nationwide increase in all freight rates.[37] It is argued that this rate increase has rendered the interim orders with which we are here concerned obsolete and unenforcible. It is said that in making the general rate increase, the Commission found greatly different conditions affecting transportation rates from those it found in these proceedings; that the greater increases allowed in Official Territory [38] undo the uniformity policy on which the interim orders are framed; and that the enforcement of the interim orders in light of these changed conditions would produce results plainly not contemplated.

This is not a case where by reason of changed conditions the record is stale. The changed circumstances do not affect the issues here. Cf. *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 515; *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535. To repeat,

[37] *Ex parte No. 162,* interim report 264 I. C. C. 695, final report December 5, 1946, 266 I. C. C. 537. This increased most basic freight rates by 15 to 25 per cent. Rates on articles under the general commodity grouping of Manufactures and Miscellaneous, class rates and rates on less-than-carload and any-quantity traffic were increased 25 per cent in Official Territory, 20 per cent within and between other territories, and 22.5 per cent between Official Territory and points in other territories. Express rates were increased October 28, 1946. *Ex parte No. 163,* 266 I. C. C. 369.

[38] See note 37, *supra.*

this is a proceeding to eliminate territorial rate differences not justified by territorial conditions. The general rate increase recently granted by the Commission was a revenue proceeding. Revenue adjustments can be and are superimposed on such rate structures as exist. The fact that revenue adjustments may produce lack of uniformity in rates is not inconsistent with the decision in the present case. As we said earlier, § 3 (1) does not dictate a policy of national uniformity in rates; it only requires that the lack of uniformity in rates among and between territories be justified by territorial conditions. The finding of the Commission, if supported by evidence, that the revenue needs of carriers in one territory demand a lower or a higher rate in that territory is a justification for a difference in rates as between that territory and other territories. The order of the Commission granting the general rate increase is not before us and we intimate no opinion on it. It is sufficient for our present purposes to say that it emphasizes the distinction between revenue and rate-relationship cases and in no way impairs the finding in the present case that the existing class-rate structure that has prevailed in the several territories stands condemned under § 3 (1). Nor is there any inherent inconsistency between the interim orders reducing class rates and the recent order increasing all rates. The latter was based on conditions in a period subsequent to the discrimination proceedings. Whether the general rate increase will require adjustments in the new permanent uniform scale which awaits the new uniform classification is a question for the Commission when the new classification is ready.[39]

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[39] That the order granting the general freight rate increase did not affect the orders in the present proceeding is made clear by the following provision:

"That outstanding unexpired orders in other proceedings are hereby modified so as to permit the increases in freight rates and charges

Other issues raised by appellants need not be discussed. The injunction staying the orders of the Commission is vacated and the judgment of the District Court dismissing the petitions is

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

In a case involving issues much narrower than those now here, the Court, only the other day, struck down an order of the Interstate Commerce Commission for want of adequate findings. *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, at 583. Although in that case there were explicit findings, the Court deemed them inadequate because they were based on "unsifted averages." In a series of cases the Court has set aside orders of the Interstate Commerce Commission because of the failure of the Commission to ascertain and to formulate with clarity and definiteness the transportation and economic circumstances which alone could justify the order, and thereby afford this Court assured basis for concluding that the Commission had duly exercised its allowable judgment on the factors underlying the ultimate issues. See *Florida* v. *United States,* 282 U. S. 194; *United States* v. *Baltimore & Ohio R. Co.,* 293 U. S. 454; *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 295 U. S. 193; *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475; *City of Yonkers* v. *United States,* 320 U. S. 685; *Eastern-Central Motor Carriers Association* v. *United States,* 321 U. S. 194; *North Carolina* v. *United States,* 325 U. S. 507; *Alabama*

herein authorized to be established; *Provided,* however, that the provisions of this paragraph shall not be construed to suspend or supersede or modify or affect the findings and order entered in *Class Rate Investigation, 1939,* Docket No. 28300, the operation of which is stayed by court order . . . ."

See *Ex parte No. 162, supra,* note 37.

v. *United States,* 325 U. S. 535. Not one of these cases involved an order having a reach comparable to the reach of the order now before us. We are asked to sustain an order that readjusts the class rates of the whole country barring only the territory west of the Rockies—an order that changes not only the rates within the various rate territories in this vast region, but changes the relation of the rates inter-territorially. I am not unmindful of the complicated nature of the problem which confronted the Commission, of the empiric character of the process of rate-making, of the limited scope for judicial review in this process, of the respect to be accorded to the Commission's conclusions. *Board of Trade* v. *United States,* 314 U. S. 534. But when the outcome of legal issues is bound to cut deeply into economic relations on such a scale, it is not asking too much to ask the Commission to be explicit and definite in its findings on the elements that are indispensable to the validity of its order.

When inter-territorial discrimination is complained of, at least two basic issues confront the Commission: (1) Is there discrimination? (2) If there is, how is the discrimination to be abated? The Commission cannot eliminate discrimination—*i. e.,* harmonize the rate relations between territories—in disregard of the reasonableness of the readjusted rates within each territory. The Interstate Commerce Act must be applied in its entirety and the different sections which make an articulated whole cannot be treated disjointedly. Such is the teaching of our cases, especially of *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, and *Intermountain Rate Cases,* 234 U. S. 476—the two cases which beyond all others give the controlling considerations in construing the Interstate Commerce Act.

And so the Commission is not empowered to remove discrimination between two territories without at the same time considering whether the remedies proposed for such

removal fit the requirement of reasonableness of rates. It may not lower the rates in a territory beyond the level which gives the carriers an income sufficient to enable them to operate effectively as part of the nation's transportation system. And the Commission may not raise rates to a level which would exact freight charges from shippers beyond a rate structure that is reasonable. The small proportion of freight that moves on class rates is no measure of the importance of those rates to the total earnings of carriers. Unreasonable rates—whether unreasonably high or unreasonably low—even on a fraction of the freight, may make the difference between earnings to which carriers are entitled under the Interstate Commerce Act and those to which they are not entitled for discharging their duty as part of the national transportation system. We are without informing findings on these issues. But even if one were to consider questions of discrimination in isolation, inequality—the essence of discrimination—cannot be dealt with mechanically by taking a percentage off one territory and adding it to another. The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals. The findings do not reveal how it happened that putting 10% on and taking 10% off respectively will beget just the right adjustment. I am not suggesting that one might not dig out of the record inexplicit, argumentative support for the view that an increase of 10% in Official Classification Territory rates will still leave the level of rates within that Territory not unreasonable, and that a decrease of 10% in Western Territory will leave the carriers the required reasonableness of rates within that Territory. But it is not conducive to a fair administration of the Interstate Commerce Act, nor is it consonant with the proper discharge of this Court's task, to require us to dig out indications or evidence giving appropriate answer to these issues from a record consisting of nearly 13,000 pages spread over

21 volumes, which led to a report by the Commission of 320 pages.

The District Court acknowledged the absence of finding on such issues. Said the court: "it has been argued that there can be no increase in class rates in Official Territory unless there is first a so-called primary finding, supported by substantial evidence that the present rates are not compensatory. While that fact, if proved, would have been of much significance the failure to prove it and the consequent lack of a finding that present rates are confiscatory does not leave the Commission's finding that the rates are unlawful unsupported by substantial evidence." 65 F. Supp. 856, 873. But the fact that the rates in Official Territory may, as a matter of abstract comparison, be out of line with the rates in Western or Southern Territory is hardly proof that the rates in Official Territory should be increased by the same flat percentage as the rates in the other territories should be decreased. Such a flat increase in Official Territory may make the proposed new rates unlawful because unreasonable. While a 10% decrease in rates in Western Territory may eliminate unfairness to shippers in that territory, it does not follow that a corresponding 10% increase in Official Territory rates will not result in unfairness to shippers there.

One can hardly read the concurring and dissenting views to the Commission's Report without being left with uncertainty regarding the basis of the Commission's order.

> "The report does not show, except in nebulous fashion, that the cost figures represent apportionment of totals, based on estimates; that they involve many assumptions and acts of judgment; and are not computations from direct, original cost figures for particular movements. These, however, are the facts. It omits evidence showing that 59 out of 117 items of basic data used in the studies were estimated, and that 458 out of 500 sequences were wholly or partly estimated.

> It fails to disclose clearly that when making the studies it was assumed that the consist of the traffic is the same in the different territories, when the fact is, as I have pointed out, that the traffic consist differs widely in the respective territories. The result is that theoretical costs are produced, based upon assumptions which are not facts, and upon comparisons of unlike things." (Commissioner Porter, dissenting, 262 I. C. C. 447, 709, 717; and see dissenting views of Commissioner Barnard, *id.* at 725.)

According to two of the Commissioners the record is wholly inadequate to support a finding that class rates within Official Territory are unreasonable under § 1 of the Act. See 264 I. C. C. 69–70. Certainly the Commission did not make an explicit finding that they are unreasonable. If there is any such finding, it must be sought for as would a needle in a haystack. The Commission's order ought not to be allowed to rest on such dubious foundations.

Nor can such a mechanical or abstractly mathematical readjustment of rates inter-territorially be justified as a tentative adjustment. Of course, the Commission may generalize a sufficient number of typical instances and make a flat readjustment within a territory, leaving instances of unreasonableness to be taken out of such an order upon individual application. This is what the Commission did, and what this Court sustained, in the *New England Divisions Case,* 261 U. S. 184. The order in that case, directing a 15% increase in the share of the New England railroads in the joint through-freight rates, was based upon evidence "which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." 261 U. S. at 196–97. The Court found that the established practice in rate litigation, the nature of the hearing before the Commission, the evidence submitted, the findings made, the opportunities to

apply for modifications in typical situations, amply supported the Commission's findings. The present record, as reflected in the Commission's report, does not present a comparable situation. One gets the impression that the adjustment of a flat 10% decrease in the rates outside the Official Territory and a flat increase of 10% within that Territory is attributable, fundamentally, to a laudable desire on the part of the Commission to secure uniform classification throughout the country. The Commission was not prepared to make such a classification, but it made these rate changes in the hope that they would exert pressure on the carriers to agree upon a uniform classification. It is in relation to that hope that it is urged that the order is merely a conditional or tentative order—conditioned upon agreement by the carriers upon a uniform classification. But to condition the order on the realization of that hope is to condition it, if experience be any guide, on the Greek kalends.

What this Court said in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 510–11, involving a rate adjustment within a very limited territory, with no such far-reaching consequences as the order now under review, has enhanced applicability to the present order of the Commission. "We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction [initiated by a carrier] as something more than a disruptive tendency . . . . The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; *Florida* v.

United States, 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Administrative experts no doubt have antennae not possessed by courts charged with reviewing their action. And so it may well be that to the expert feel the justifiable correction of an imbalance between Official Territory rates and the rates of other territories is a shift of 10% in the respective rates—Official Territory rates increased 10% and rates elsewhere decreased 10%. But courts, charged as they are with the review of the action of the Commission, ought not to be asked to sustain such a mathematical coincidence as a matter of unillumined faith in the conclusion of the experts.

I would reverse the decree and order the proceedings returned to the Interstate Commerce Commission.

MR. JUSTICE JACKSON, dissenting.

I find it impossible to agree with this extraordinary decision. I will discuss but one of its phases—that which is treated in subdivision Eighth of the Court's opinion. This holds that the Interstate Commerce Commission has, and rightfully has exercised, the power to add 10% to certain basic freight rates affecting the Northeastern part of the United States. This increase was not asked by the railroads, goes to the prosperous and the insolvent ones alike, and is not even claimed to be necessary to pay the cost of service and a fair return on the property used in rendering it. This additional assessment is in no sense compensation for handling the traffic which the railroads concede was adequately compensated before. It is really a surtax, see Brandeis, J., in *New England Divisions Case,* 261 U. S. 184, 196, added solely to increase shipping costs in the Northeastern part of the United States for the purpose of handicapping its economy and in order to make transportation cost as much there as it does in areas where there

is less traffic to divide the cost. The surcharge burdens the territory where fifty percent of the consuming population of the United States resides by adding an estimated $15,000,000 per year to its shipping bills. It adds that much to the revenues of the Northeastern railroads with no showing or finding that it is needed to meet costs of furnishing railroad service.

The most important reason advanced for sustaining this order is the claim that this surcharge is to cure a discrimination in favor of the Northeastern territory against the South and West. Briefly and generally, the discrimination is said to consist in this: Mile for mile, a higher average charge is made for transportation under the present classifications in the more sparsely settled areas of the South and West than is made in the denser traffic regions of the Northeast. Why, then, should not the alleged discrimination be removed by lowering the high rates of the South and West? The answer is that they cannot be reduced further than the ten percent already ordered in this proceeding, because the railroads of the South and West, in view of their costs, could not bear further decrease. So the only other way of equalizing the rates and making it as costly to move goods there as anywhere in the United States, is to make the shippers in the Northeastern territory pay the railroads this additional 10% which they have not asked and do not need.

The Court's approval of this order is based on an entirely new theory of "discrimination." It has never before been thought to be an unlawful discrimination to charge more for a service which it cost more to render. Discrimination heretofore has been found to exist only when an unequal charge was exacted for a like service, or vice versa. But now it is held to be an unlawful discrimination if railroads of the Northeast do not make the same charge as other railroads in the South or West, for a different transportation under different cost conditions.

The Government frankly advocates this new concept of discrimination as necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic and perhaps its political life more nearly to its heart's desire. It says in its brief to us:

> "There is no direct relation between the distribution of natural resources and the distribution of population in the United States. It happens that some of the areas richest in natural resources in the United States are sparsely populated. If the raw materials making up those natural resources are to be converted into finished products in that vicinity, allowing the area some economic benefit from their conversion, it will be necessary to transport considerable volumes of finished goods for long distances. Necessarily minerals are obtained where the deposits occur, and agricultural products must be produced in areas of suitable soil and climate. It is the task of the transportation system to carry commodities from points of production to consuming centers throughout the United States and to the ports for export. The more freely and cheaply the products are carried, the more competition there will be, the more production there will be, and the better will our transportation system serve our national economy.
>
> The maintenance of a sound national economy requires the proper use of natural resources to insure reasonable economic opportunity of a stable nature for the people in each of the regions of the country. As indicated, population distribution is not in accord with the distribution of natural resources, and it would require many years for people to move to where these resources are, assuming it possible to induce such millions to migrate, or that it would be wise policy to do so even if possible. There are also areas of one-crop agriculture in which the people face read-

justments to restore and protect the land and to obtain additional sources of livelihood.

In view of all this, one of the basic principles in making freight rates should be the elimination of rate barriers against regional development, not to change our economy, but to remove discriminatory conditions which unfairly and unlawfully prevent the possibility of change."

The Court's entire discussion of the discrimination feature of this case is an acceptance of the Government's position without which the last support for this order would fail.

No authority can be found in any Act of Congress for the imposition of this surcharge on the Northeast solely to penalize it for being able to transport goods cheaper due to its density of population and volume of traffic. The policy of Congress remains as it long has stood: "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service . . . ." Interstate Commerce Act, § 15a (2), 48 Stat. 220, 54 Stat. 912, 49 U. S. C. § 15a (2). Congress has never intimated, much less declared, a purpose to deprive the territory in which fifty percent of the nation's consumers reside of the benefit of this policy. The Ramspeck resolution did no more than to direct the Commission's attention to earnest complaints that the South and West were being mistreated in the matter of rail rates, and very properly to direct that they determine such complaints on their merits. True, in 1940 the provision prohibiting undue prejudice and preference was amended by the addition of "region, district, territory," to the list of persons or things not to be unduly prejudiced or preferred. Transportation Act, 1940, § 5 (a), 54 Stat. 902, 49 U. S. C. § 3 (1). But the Act already prohibited undue prejudice or preference to any "locality" and it is conceded that

the 1940 Act made no change in the substantive law of discrimination. Senator Wheeler, Chairman of the Interstate Commerce Committee of the Senate, showed clearly that while it would "make toward the equalization of rates," 84 Cong. Rec. 6072, it was not intended to accomplish what is here attempted. The following colloquy occurred:

"MR. FRAZIER. Is it the expectation of the committee that by the amendment in section 52 [now section 5 (b) of the Act] the rates in the various classification territories will be equalized or made the same in different territories?

"MR. WHEELER. I do not think that is possible.

"MR. FRAZIER. I do not see how it is possible. I was wondering what the intention was.

"MR. WHEELER. It is not possible for a number of reasons. For example, it costs more to carry freight over the mountains in two trains than to carry it on the plains in one train. Likewise, we must recognize the fact that railroad transportation service and rates depend somewhat on the intensity of the traffic. In long stretches of territory with no traffic, shippers must pay more for railroad service than do shippers in a densely settled part of the country where traffic is plentiful and where there is much competition from busses, trucks, and things of that kind. However, it seems to me from my study of the question that apparent inequalities ought to be corrected. . . .

"MR. FRAZIER. In North Dakota we have a large volume of wheat to transport in the fall of the year, and because we have that large volume, and because our territory is practically level, we have a rather beneficial rate on wheat as compared with some other territories. Our railroad commission and traffic experts are afraid that the provision to which reference

has been made will take that special rate away from us.

"MR. WHEELER. I believe this provision will help the people of the Senator's State rather than harm them in many respects.

"MR. FRAZIER. We have a much lower rate than prevails in many other sections of the country. If rates are to be equalized, it will mean raising our rates.

"MR. WHEELER. The bill does not mean that rates are to be equalized. . . . The people of the Senator's State might just as well disabuse their minds of the fear that as a result of the bill they will lose any benefit which they now have. . . ." (84 Cong. Rec. 5890.)

The Court never before has confided to any regulatory body the reshaping of our national economy. In *Texas & Pacific R. Co.* v. *United States,* 289 U. S. 627, the following statement of the law was made: "A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel." 289 U. S. at 637. See also *Southern Pacific Co.* v. *I. C. C.,* 219 U. S. 433; *I. C. C.* v. *Diffenbaugh,* 222 U. S. 42, 46; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 524.

The Interstate Commerce Commission also accepted this as the law. In *Stoves, Ranges, Boilers, etc.,* 182 I. C. C. 59, the majority said, "It is not within our power to equalize natural disadvantages of locations," 182 I. C. C. at 68, and Commissioner Eastman was even more explicit, saying, 182 I. C. C. at 74:

"However, it is undeniable, I think, that in the past both southern manufacturers and southern car-

riers have shown a tendency to demand that the rates to the North be equalized in level with those within the North, on the ground that such equalization is commercially essential to the southern industries. It is a sufficient answer to say that it is not our province to equalize commercial conditions. However, the evidence in this case has served a useful purpose in making it quite clear that the southern manufacturers have certain advantages over their northern rivals, so far as operating and overhead costs are concerned, which would have to be taken into consideration if it were our duty to equalize commercial conditions through an adjustment of freight rates."

The Court shrouds this simple legal issue as to whether there is power to levy this surtax on the Northeast, in elaborate discussions of the evils of existing freight classifications and affirmations of the Commission's power to correct them. Neither of these propositions have ever been in doubt. But what importance can the Commission's power over classifications have in testing validity of this order? To correct classification was the asserted object of this proceeding, but that power has not been exercised at all. Not one classification is changed. Instead, a flat boost is made against traffic in the Northeast and a flat reduction for traffic in the South and West is ordered, leaving every inequality, discrimination, injustice or illegality in classifications just where the Commission found them. If there is proof of specific discrimination, injustice and illegalities in this case, why are they not now ordered corrected? If there is not sufficient proof of any specific discrimination, how can we hold that there is a general discrimination so extensive as to warrant this levy on the Northeast to correct them?

Perhaps the most incomprehensible of the Court's grounds for sustaining this order is that we do not have

here a "revenue problem." It is admitted that the Northeastern rates before increase are not proved nor found by the Commission to be noncompensatory to the railroads, or otherwise to threaten harmful effects upon the revenues and transportation efficiency of the carriers who get the increase. It also is admitted that the absence of such proof and findings might be fatal to this increased rate, for "If this were a case of determining whether existing rates passed below the lowest or above the highest reaches of reasonableness, the point might be well taken." Can the label affixed to a proceeding make legal what under another label would be invalid? Because the proceeding professes to correct classifications, a purpose now long and indefinitely deferred, may it be used incidentally to raise the rates of the whole Northeastern territory without any showing of need therefor? Whether we call the case a "revenue case" or something else, and whether we decline to denominate the problem a "revenue problem" and style it something else, the *order* under review is a *revenue order* and nothing else. It adds 10% to the revenues of the Northeastern roads from traffic moving under the rates in question; it knocks 10% off from the Southern and Western traffic under them. It exacts for the railroads added revenues; it lays on shippers the burden of providing those added revenues. This order admittedly might be invalid if the increased revenue were given to the railroads because they had made a claim to need it, and had only the present evidence and findings to support an allowance of their claim. So the conclusion is that the order is valid only because the railroads have no revenue problem and have not made a case entitling them to increased revenue. That is all I can get from the answer that it is a valid order only because "we do not have here such a revenue problem."

I long have heard the complaint that freight rates discriminated against the South. I have been inclined to suspect it to be true and have hoped to see an impartial and exhaustive study and decision on the subject. But this case does not meet that description. The student of economics will be puzzled at the Court's citation of the fact that the average employed person in the South earns only half as much as those in the Northeast as being in some way attributable to these freight rates. And the student of the judicial process will find instruction in the contrast between today's decision and that of *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, in its regard for inherent advantages, in its attitude to "unsifted" averages as a basis for raising rates and in its deference to the administrative expertise of the Interstate Commerce Commission.

I am not unaware of the difficult position in which the Interstate Commerce Commission finds itself in cases of this character. Commissioner Eastman gave voice to it in dissent in *State of Alabama* v. *New York Central R. Co.,* 235 I. C. C. 255, 333, as follows:

> "The Commission is called upon to decide this case, on the record, after it has in effect been decided, in advance and without regard to the record, by many men in public life, of high and low degree, who have freely proclaimed their views on what they conceive to be the basic issues. Their thesis has been that the section of our country generally known as the South is our 'Economic Problem No. 1', because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South. It has become a political issue. While, however, the South gave birth to

the issue, public representatives of the West now cry out against like supposed oppression, and public representatives of the North or East, as it is variously called, have risen in defense of their section.

"Under such conditions, it is not easy to decide the case without being influenced by emotional reactions, one way or the other, which should play no part in the decision."

But by administrative succession and judicial fiat the regulatory power of the Federal Government over commerce is now used to force a surtax on transportation of one section of the country admittedly not needed to compensate the railroad for the carriage but to take away from its inhabitants one of the advantages inherent in its density of population, regardless of the disadvantages which density of population also causes.

The observation of Commissioner Mahaffie in this case seems to me appropriate and accurate:

". . . In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the extent equality is justified by transportation conditions. I think the effort to do so must necessarily fail. But I am afraid the process of finding out whether it can be done will be painful and costly. The prejudice findings on which the new adjustment is largely predicated are calculated, if carried to a logical conclusion, to lead to a rigid rate structure based on mileage. While this may seem on its face to be equitable its accomplishment would entail radical industrial and agricultural readjustments. I doubt if the country should be required to incur the expense of making them." (262 I. C. C. at 708.)

MR. JUSTICE FRANKFURTER joins in this opinion.

Syllabus.

CRAIG ET AL. *v.* HARNEY, SHERIFF.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 241. Argued January 9, 1947.—Decided May 19, 1947.

1. The publication in a newspaper of news articles, which unfairly reported events in a case pending in a state court, and an editorial, which vehemently attacked the trial judge (a layman elected for a short term) while a motion for a new trial was pending, did not, in the circumstances of this case, constitute a clear and present danger to the administration of justice; and the conviction of the newspapermen for contempt violated the freedom of the press guaranteed by the First and Fourteenth Amendments. Following *Bridges* v. *California,* 314 U. S. 252, and *Pennekamp* v. *Florida,* 328 U. S. 331. Pp. 368–370, 375–378.
2. The present case is one of the type in which this Court is required to make an independent examination of the facts to determine whether a State has deprived a person of a fundamental right secured by the Constitution. Pp. 373–374.
3. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor reports of occurrences in judicial proceedings. P. 374.
4. One reporting the news of a judicial trial may not be held for contempt because he missed the essential point in the trial or failed to summarize the issues to accord with the views of the trial judge. P. 375.
5. The vehemence of the language used in a publication concerning a pending case is not alone the measure of the power to punish for contempt; the threat to the administration of justice must be imminent. P. 376.
6. The law of contempt is not designed for the protection of judges who may be sensitive to the winds of public opinion. P. 376.
7. Although the nature of a case may be relevant in determining whether the clear and present danger test is satisfied, the rule of the *Bridges* and *Pennekamp* cases is fashioned to serve the needs of all litigation, not merely particular types of pending cases. P. 378.

149 Tex. Cr. —, 193 S. W. 2d 178, reversed.

Petitioners' application to a state court for a writ of *habeas corpus* to obtain their release from imprisonment for contempt was denied. 193 S. W. 2d 178. This Court granted certiorari. 329 U. S. 696. *Reversed,* p. 378.

Marcellus G. Eckhardt and *Ireland Graves* argued the cause for petitioners. With them on the brief was *Charles L. Black.*

Jerry D'Unger argued the cause for respondent. With him on the brief was *John S. McCampbell.*

Elisha Hanson and *Letitia Armistead* filed a brief for the American Newspaper Publishers Association, as *amicus curiae,* urging reversal.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE REED.

Petitioners were adjudged guilty of constructive criminal contempt by the County Court of Nueces County, Texas, and sentenced to jail for three days. They sought to challenge the legality of their confinement by applying to the Court of Criminal Appeals for a writ of *habeas corpus.*[1] That court by a divided vote denied the writ and remanded petitioners to the custody of the county sheriff. 149 Tex. Cr. —, 193 S. W. 2d 178. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem and because the ruling of the Texas court raised doubts whether it conformed to the principles announced in *Bridges* v. *California,* 314 U. S. 252, and *Pennekamp* v. *Florida,* 328 U. S. 331.

[1] That appears to be the appropriate remedy in Texas in this type of case. *Ex parte Miller,* 91 Texas Cr. Rep. 607, 240 S. W. 944. As to the Texas procedure where there is an adjudication of contempt for violating an order in a civil cause, see *Thomas* v. *Collins,* 323 U. S. 516.

Petitioners are a publisher, an editorial writer, and a news reporter of newspapers published in Corpus Christi, Texas. The County Court had before it a forcible detainer case, *Jackson* v. *Mayes,* whereby Jackson sought to regain possession from Mayes of a business building in Corpus Christi which Mayes (who was at the time in the armed services and whose affairs were being handled by an agent, one Burchard) claimed under a lease. That case turned on whether Mayes' lease was forfeited because of non-payment of rent. At the close of the testimony each side moved for an instructed verdict. The judge instructed the jury to return a verdict for Jackson. That was on May 26, 1945. The jury returned with a verdict for Mayes. The judge refused to accept it and again instructed the jury to return a verdict for Jackson. The jury returned a second time with a verdict for Mayes. Once more the judge refused to accept it and repeated his prior instruction. It being the evening of May 26th and the jury not having complied, the judge recessed the court until the morning of May 27th. Again the jury balked at returning the instructed verdict. But finally it complied, stating that it acted under coercion of the court and against its conscience.

On May 29th Mayes moved for a new trial. That motion was denied on June 6th. On June 4th an officer of the County Court filed with that court a complaint charging petitioners with contempt by publication. The publications referred to were an editorial and news stories published on May 26, 27, 28, 30, and 31 in the newspapers with which petitioners are connected. We have set forth the relevant parts of the publications in the appendix to this opinion. Browning, the judge, who is a layman and who holds an elective office, was criticised for taking the case from the jury. That ruling was called "arbitrary action" and a "travesty on justice." It was deplored that a layman, rather than a lawyer, sat as judge. Groups of

local citizens were reported as petitioning the judge to grant Mayes a new trial and it was said that one group had labeled the judge's ruling as a "gross miscarriage of justice." It was also said that the judge's behavior had properly brought down "the wrath of public opinion upon his head," that the people were aroused because a service man "seems to be getting a raw deal," and that there was "no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated." And the fact that there could be no appeal from the judge's ruling to a court "familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel" was deplored.

The trial judge concluded that the reports and editorial were designed falsely to represent to the public the nature of the proceedings and to prejudice and influence the court in its ruling on the motion for a new trial then pending. Petitioners contended at the hearing that all that was reported did no more than to create the same impression that would have been created upon the mind of an average intelligent layman who sat through the trial. They disclaimed any purpose to impute unworthy motives to the judge or to advise him how the case should be decided or to bring the court into disrepute. The purpose was to "quicken the conscience of the judge" and to "make him more careful in discharging his duty."

The Court of Criminal Appeals, in denying the writ of *habeas corpus,* stated that the "issue before us" is "whether the publications . . . were reasonably calculated to interfere with the due administration of justice" in the pending case. 193 S. W. 2d p. 186. It held that "there is no escape from the conclusion that it was the purpose and intent of the publishers . . . to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision

or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." *Id.*, pp. 188–189. The court went on to say that "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done." *Id.*, p. 189. The court distinguished the *Bridges* case, noting that there the published statements carried threats of future adverse criticism and action on the part of the publisher if the pending matter was not disposed of in accordance with the views of the publisher, that the views of the publisher in the matter were already well-known, and that the *Bridges* case was not private litigation but a suit in the outcome of which the public had an interest. *Id.*, p. 188. It concluded that the facts of this case satisfied the "clear and present danger" rule of the *Bridges* case. That test was, in the view of the court, satisfied "because the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." *Id.*, p. 189.

The court's statement of the issue before it and the reasons it gave for holding that the "clear and present danger" test was satisfied have a striking resemblance to the findings which the Court in *Toledo Newspaper Co.* v.

United States, 247 U. S. 402, held adequate to sustain an adjudication of contempt by publication.[2] That case held that comment on a pending case in a federal court was punishable by contempt if it had a "reasonable tendency" to obstruct the administration of justice. We revisited that case in *Nye* v. *United States,* 313 U. S. 33, 52, and disapproved it. And in *Bridges* v. *California, supra,* we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth (*Schneider* v. *Irvington,* 308 U. S. 147; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108) forbade the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a "clear and present danger" to the administration of justice. 314 U. S. pp. 260–264. We

[2] The findings which the Court in that case sustained were as follows:

"(a) Because . . . their manifest purpose was to create the impression on the mind of the court that it could not decide in the matter before it in any but the one way without giving rise to such a state of suspicion as to the integrity or fairness of its purpose and motives as might engender a shrinking from so doing. (b) Because the publications directly tended to incite to such a condition of the public mind as would leave no room for doubt that if the court, acting according to its convictions, awarded relief, it would be subject to such odium and hatred as to restrain it from doing so. (c) Because the publications also obviously were intended to produce the impression that any order which might be rendered by the court in the discharge of its duty, if not in accord with the conceptions which the publications were sustaining, would be disregarded and cause a shrinking from performing duty to avoid the turmoil and violence which the publications, it may be only by covert insinuation, but none the less assuredly, invited. And (d) because the publications were of a character, not merely because of their intemperance but because of their general tendency, to produce in the popular mind a condition which would give rise to a purpose in practice to refuse to respect any order which the court might render if it conflicted with the supposed rights of the city espoused by the publications."

247 U. S. pp. 414–415.

reaffirmed and reapplied that standard in *Pennekamp* v. *Florida, supra,* which also involved comment on matters pending before the court. We stated, p. 347:

> "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its courts. The problem presented is only a narrow, albeit important, phase of that problem—the power of a court promptly and without a jury trial to punish for comment on cases pending before it and awaiting disposition. The history of the power to punish for contempt (see *Nye* v. *United States, supra; Bridges* v. *California, supra*) and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice.

In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. See *Norris* v. *Alabama,* 294 U. S. 587, 590; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Chambers* v. *Florida,* 309 U. S. 227, 228–229; *Lisenba* v. *California,* 314 U. S. 219, 237–238;

Ashcraft v. *Tennessee,* 322 U. S. 143, 147–148. This is such a case.

We start with the news articles. A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

The articles of May 26, 27, and 28 were partial reports of what transpired at the trial. They did not reflect good reporting, for they failed to reveal the precise issue before the judge. They said that Mayes, the tenant, had tendered a rental check. They did not disclose that the rental check was post-dated and hence, in the opinion of the judge, not a valid tender. In that sense the news articles were by any standard an unfair report of what transpired.[3] But inaccuracies in reporting are

[3] The charge against petitioners also set forth other allegedly false statements: (1) that Mayes was not an ex-insurance man but in the insurance business at the time; (2) that terms of the contract on which Jackson sued were not disclosed; (3) that the arrangements under which the premises had been operated for some months before Mayes was inducted into the armed services were not disclosed; (4) that the articles failed to state the legal grounds on which Jackson's motion for an instructed verdict was argued and granted; (5) that much material evidence was omitted which would have enabled the public to form a fair estimate of the nature of the controversy; (6) that the principal plaintiffs who were highly respected business and professional men of Corpus Christi were not named.

These omissions, though reflecting on the quality of the reporting, do not seem to us to be of importance here.

commonplace. Certainly a reporter could not be laid by the heels for contempt because he missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case. Conceivably, a plan of reporting on a case could be so designed and executed as to poison the public mind, to cause a march on the court house, or otherwise so disturb the delicate balance in a highly wrought situation as to imperil the fair and orderly functioning of the judicial process. But it takes more imagination than we possess to find in this rather sketchy and one-sided report of a case any imminent or serious threat to a judge of reasonable fortitude. See *Pennekamp* v. *Florida, supra.*

The accounts of May 30 and 31 dealt with the news of what certain groups of citizens proposed to do about the judge's ruling in the case. So far as we are advised, it was a fact that they planned to take the proposed action. The episodes were community events of legitimate interest. Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.

The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides "high handed," a "travesty on justice," and the reason that public opinion was "outraged." It said that his ruling properly "brought down the wrath of public opinion upon his head" since a service man "seems to be getting a raw deal." The fact that there was no appeal from his decision to a "judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly" was a "tragedy." It deplored the fact that the judge was a "layman" and not a "competent attorney." It concluded that the "first rule of justice" was to give both

sides an opportunity to be heard and when that rule was "repudiated," there was "no way of knowing whether justice was done."

This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one "who ventures to publish anything that tends to make him unpopular or to belittle him . . . ." See *Craig* v. *Hecht*, 263 U. S. 255, 281, Mr. Justice Holmes dissenting. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

We agree with the court below that the editorial must be appraised in the setting of the news articles which both preceded and followed it. It must also be appraised in light of the community environment which prevailed at that time. The fact that the jury was recalcitrant and balked, the fact that it acted under coercion and contrary to its conscience and said so were some index of popular opinion. A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude.

The editorial's complaint was two-fold. One objection or criticism was that a layman rather than a lawyer sat on the bench. That is legitimate comment; and its relevancy

could hardly be denied at least where judges are elected. In the circumstances of the present case, it amounts at the very most to an intimation that come the next election the newspaper in question will not support the incumbent. But it contained no threat to oppose him in the campaign if the decision on the merits was not overruled, nor any implied reward if it was changed. Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary. The fact that the discussion at this particular point of time was not in good taste falls far short of meeting the clear and present danger test.

The other complaint of the editorial was directed at the court's procedure—its failure to hear both sides before the case was decided. There was no attempt to pass on the merits of the case. The editorial, indeed, stated that there was no way of knowing whether justice was done. That criticism of the court's procedure—that it decided the case without giving both sides a chance to be heard—reduces the salient point of the case to a narrow issue. If the point had been made in a petition for rehearing, and reduced to lawyer's language, it would be of trifling consequence. The fact that it was put in layman's language, colorfully phrased for popular consumption, and printed in a newspaper does not seem to us to elevate it to the criminal level. It might well have a tendency to lower the standing of the judge in the public eye. But it is hard to see on these facts how it could obstruct the course of justice in the case before the court. The only demand was for a hearing. There was no demand that the judge reverse his position—or else.

"Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges* v. *California, supra,* p. 271. But there was here no threat or menace to the integrity of the trial. The

editorial challenged the propriety of the court's procedure, not the merits of its ruling. Any such challenge, whether made prior or subsequent to the final disposition of a case, would likely reflect on the competence of the judge in handling cases. But as we have said, the power to punish for contempt depends on a more substantial showing. Giving the editorial all of the vehemence which the court below found in it we fail to see how it could in any realistic sense create an imminent and serious threat to the ability of the court to give fair consideration to the motion for rehearing.

There is a suggestion that the case is different from *Bridges* v. *California, supra,* in that we have here only private litigation, while in the *Bridges* case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the clear and present danger test is satisfied. But, the rule of the *Bridges* and *Pennekamp* cases is fashioned to serve the needs of all litigation, not merely select types of pending cases.

Reversed.

[For concurring opinion of MR. JUSTICE MURPHY, see *post,* p. 383. For dissenting opinions of MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, see *post,* pp. 384, 394.]

APPENDIX.

On May 26, 1945, a *news item* stated:

> "Burchard further claimed that although he had not known of the option clause, when he learned of it he had immediately proffered a check for $275 rental."

On May 27, 1945, there was a *news item* which stated:

"At 7 p. m. Browning, without listening to argument from counsel for either side on a plaintiff's motion presented by Dudley Tarlton for Jackson, and without giving the six-man jury opportunity to weigh the evidence, instructed the jury to find against Mayes.

"Walter M. Lewright, Mayes' attorney, protested that the court's arbitrary action had ruled that Tarlton's 'one-page motion' did not need supporting argument and citation of authorities."

On May 28, 1945, an *article* said:

"Browning accepted Tarlton's one-page motion, and without permitting argument or citation of authorities to support the motion, ruled that it be granted. The effect of this ruling was that Browning took the matter from the jury."

That article also included the following statement made by Mayes' attorney to the jury on May 27, 1945:

"However, I now advise you that under the law, Judge Browning has the right to compel you, even against the dictates of your conscience, to sign the verdict he has ordered.

"As a matter of fact, it is probable that he has the power to put you in jail until such time as you do sign it, and I rather imagine, from what has heretofore taken place in this trial, that unless you do sign the verdict, he will cause you to be put in jail.

"As I and my clients feel that you have done all in your power to register your protest and revulsion of feeling at the effect of this decision reached by Judge Browning; as you are helpless to do anything further; and as making you suffer by remaining locked up will not do us a bit of good, I suggest that you sign the verdict and return to your homes with a clear con-

science of having done all that you could to protect the rights of a man whom I feel, and evidently you feel, has been done a gross injustice.

"While we have no appeal from the court's decision in this case, we do have the right again to appeal to his conscience by presenting a motion for new trial in this action—and which motion we will file and argue strenuously with the hope that in the meantime he will see the error committed and will rectify the same.

"There cannot be any doubt but that the action of you men in registering your protest against this decision, as you have done, will affect him. At least, I can only hope that it will. I sincerely thank you."

On May 30, 1945, an *editorial* stated:

"Browning's behavior and attitude has brought down the wrath of public opinion upon his head, properly so. Emotions have been aggravated. American people simply don't like the idea of such goings on, especially when a man in the service of his country seems to be getting a raw deal . . . Then the plaintiff's counsel offered a motion for an instructed verdict for his client. It was granted immediately, without having him cite his authority or without giving the defendant's attorney a chance to argue against it.

"That was the travésty on justice, the judge's refusal to hear both sides. That's where a legal background would have served him in good stead. It is difficult to believe that any lawyer, even a hack, would have followed such high handed procedure in instructing a jury. It's no wonder that the jury balked and public opinion is outraged.

"The fact that a serviceman is involved lends drama to the event. But it could have happened to anyone, it can happen to anyone, with a layman sitting as

judge in a case where fine points of law are involved. True, the idea that only lawyers are qualified to occupy most public offices has been run into the ground, and in most instances a competent layman would be better qualified, but the county judge's office is an exception. He should be a competent attorney as well as a competent businessman.

"It's the tragedy in a case of this sort that the court where the controversial decision was handed down is the court of last resort. It's too bad that appeal can't be made to a district court and heard by a judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly . . . There is no way of knowing whether justice was done, because the first rule of justice, giving both sides an opportunity to be heard, was repudiated."

On May 30, 1945, there appeared a *report* of a resolution passed by the Sailor's and Soldier's Advisory Council of Corpus Christi "labeling County Judge Joe D. Browning's order for a directed verdict against Mayes a 'gross miscarriage of justice.' " That *article* further stated:

"The council's resolution called on Browning to grant Mayes a new trial on the grounds that he had committed an error in instructing the jury to find for the plaintiff. The petition asked that Browning, upon granting the new trial, should disqualify himself to further sit as judge in the trial, and should permit the trial to be retried before another judge and jury . . . The trial reached a climax Saturday night when Browning, on motion of Dudley Tarlton, Jackson's counsel, and without argument or citation of authority, instructed the six-man County Court jury to find for Jackson. The jury twice refused,

both times bringing in verdicts in favor of Mayes and against Jackson.

"Browning had the jury confined to the court house jury room all Saturday night. Sunday morning, when the court convened, the jury reported that it still had not signed the verdict in favor of Jackson.

"Browning announced that he would lock the jury up again until Monday morning. However, Walter M. Lewright advised the jurymen that they should not continue to 'suffer' any longer, and should sign the verdict, since Browning had the legal right to force them to do so. The jury signed the verdict, but appended a statement asserting that they did so under pressure."

On May 31, 1945, a *news story* said:

"Three local groups were reported last night to be preparing petitions requesting County Judge Joe D. Browning to grant Pvt. Joe L. Mayes a new trial in the Playboy Cafe ouster suit.

"One petition is reported being drawn by a parents and teachers' group, another by a service mothers' group, and the third is being drawn for independent circulation among parents of men in service.

"The new petitions are said to follow the general outline of a petition adopted by the Corpus Christi Soldier's and Sailor's Advisory Council Tuesday night. This petition called on Browning to grant a new trial and upon doing so to disqualify himself and permit the trial to go on under another judge and jury. Action on the petitions is expected shortly.

"The council's petition, drawn up by five veterans' organizations with a membership of more than 1,000, followed by a few hours the filing of a motion for a new trial by Walter M. Lewright and LeGrand Woods, Mayes' counsels . . . It came to a climax Sunday

> when Browning Saturday night accepted without argument or citation of authority a motion by Dudley Tarlton Jackson's lawyer, for an instructed verdict . . . The jury was kept Saturday night in the Court House. Sunday morning, following a threat by Browning to keep the jury together until they did sign, the jurymen signed the verdict, appending a statement that they did so against the dictates of their conscience."

MR. JUSTICE MURPHY, concurring.

While joining in the opinion of the Court, I believe that the importance of the problem raised by this case cannot be overemphasized. A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.

In my view, the Constitution forbids a judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice. Unscrupulous and vindictive criticism of the judiciary is regrettable. But judges must not retaliate by a summary suppression of such criticism for they are bound by the command of the First Amendment. Any summary suppression of unjust criticism carries with it an ominous threat of summary suppression of all criticism. It is to avoid that threat that the First Amendment, as I view it, outlaws the summary contempt method of suppression.

Silence and a steady devotion to duty are the best answers to irresponsible criticism; and those judges who feel the need for giving a more visible demonstration of

their feelings may take advantage of various laws passed for that purpose which do not impinge upon a free press. The liberties guaranteed by the First Amendment, however, are too highly prized to be subjected to the hazards of summary contempt procedure.

MR. JUSTICE FRANKFURTER, with whom THE CHIEF JUSTICE concurs, dissenting.

Today's decision, in effect though not in terms, holds unconstitutional a power the possession of which by the States this Court has heretofore deemed axiomatic.

It cannot be repeated too often that the freedom of the press so indispensable to our democratic society presupposes an independent judiciary which will, when occasion demands, protect that freedom. To help achieve such an independent judiciary and to protect its members in their independence, the States of the Union, from the very beginning and throughout our history, have provided for prompt suppression and punishment of interference with the impartial exercise of the judicial process in an active litigation. Interference was punished not by the ordinary criminal process of trial before a jury, but through a distinctive proceeding, summary in character in the sense that a judge without a jury might impose punishment. Such protective measures against publications seriously calculated to agitate the disinterested operation of the judicial process in a litigation awaiting disposition have been deemed part of the constitutional authority of the States to establish courts to do justice as between man and man and between man and society.

The opinion of the Court reviews the Texas Court as though we were merely reviewing the judgment of a court lower in the judiciary hierarchy. Formally, no doubt, we have before us the correctness of a decision of the Court of Criminal Appeals of Texas. But that decision is challenged as offending the Due Process Clause

of the Fourteenth Amendment. We are not, therefore, merely reviewing a decision of the Texas Court; we are passing upon the power of the State of Texas. "The question before us must be considered in the light of the total power the State possesses . . ." *Skiriotes* v. *Florida,* 313 U. S. 69, 79. To paraphrase what was said in *Rippey* v. *Texas,* 193 U. S. 504, 509, the question for us is this: if Texas had expressly provided in its Constitution that publications in the circumstances here found by the Texas Court shall constitute contempt of court, would this Court hold that such finding by the Texas Court and such a provision in the Texas Constitution collide with the Constitution of the United States?

Texas, speaking through its authoritative judicial voice, says: "When the several publications in the instant case are considered together and in their chronological order of appearance, there is no escape from the conclusion that it was the purpose and intent of the publishers thereof to force, compel, and coerce Judge Browning to grant Mayes a new trial. The only reason or motive for so doing was because the publishers did not agree with Judge Browning's decision or conduct of the case. According to their viewpoint, Judge Browning was wrong and they took it upon themselves to make him change his decision." 149 Tex. Cr. —, 193 S. W. 2d 178, 188–89.

After a painstaking examination of the series of publications in the setting of the circumstances of the case, and an extended hearing, all of which comprises a record here of more than four hundred pages, the Court below reached this conclusion: "It is hard to conceive how the public press could have been more forcibly or substantially used or applied to make, force, and compel a judge to change a ruling or decision in a case pending before him than was here done. The publications were not only reasonably calculated to accomplish that purpose but there was also a 'clear and present danger' that they would and the like-

lihood that such result would follow was 'extremely serious' and the degree of 'imminence extremely high.'" 149 Tex. Cr. —, 193 S. W. 2d at 189. It must be emphasized that the publications in question were made after it was notorious that a motion for a new trial had already been made and would shortly be heard. In the light of this crucial fact—that the trial judge would shortly be called upon to reconsider his instruction to the jury to find for the plaintiff—the court below found that

> "the publications and their purpose were to impress upon Judge Browning (a) that unless he granted the motion for a new trial he would be subjected to suspicion as to his integrity and fairness and to odium and hatred in the public mind; (b) that the safe and secure course to avoid the criticism of the press and public opinion would be to grant the motion and disqualify himself from again presiding at the trial of the case; and (c) that if he overruled the motion for a new trial, there would be produced in the public mind such a disregard for the court over which he presided as to give rise to a purpose in practice to refuse to respect and obey any order, judgment, or decree which he might render in conflict with the views of the public press." 149 Tex. Cr. —, 193 S. W. 2d at 189.

The Court minimizes these findings by pointing to a likeness between them and those that were made in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, and found inadequate by Mr. Justice Holmes' dissent, an inadequacy subsequently supported by our decision in *Nye* v. *United States,* 313 U. S. 33. The Court also draws on *Craig* v. *Hecht,* 263 U. S. 255, as though what was said there applies here. But those three cases involved only the construction of the federal statute. Congress decided to allow the power to punish for contempt theretofore vested in the lower federal courts, when invoked against misbe-

havior not in the presence of the court, only when such misbehavior was "so near" the presence of the court "as to obstruct the administration of justice." Act of March 2, 1831, 4 Stat. 487; § 268 of the Judicial Code, 28 U. S. C. § 385; *Nye* v. *United States, supra.* Texas, however, has seen fit not to restrict the power of its courts to punish for contempt as does the federal statute. The power to punish for contempt which the Texas legislature granted to its courts more than a hundred years ago is not restricted as Congress restricted the contempt power of the lower federal courts. See Acts 1846, p. 200; Vernon's Texas Statutes, Art. 1955. It is an inadmissible jump from finding that conduct is not contempt within the federal Act, to finding that an exertion of State power offended the Fourteenth Amendment. Yet the Court now finds that Texas has transgressed the implications of the Due Process Clause by punishing conduct which this Court in the *Toledo* case thought was within the scope even of the federal Act—a construction which it occurred to no member of the Court to question on constitutional grounds.

The difference between the issue before us and that raised by the *Toledo* and *Craig* cases is basic. In those cases the Court had before it, and Mr. Justice Holmes was concerned only with, the proper application of a federal statute setting a narrowly confined scope to the power to punish for contempt. The Court was not concerned with the Constitutional power of the States to enforce a broader contempt policy. Such a power, in fact, had been assumed to be beyond doubt. "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." So wrote Mr. Justice Holmes for this Court. *Patterson* v. *Colorado,* 205 U. S. 454, 463. To be sure, he wrote this forty years

ago, and on several occasions thereafter, as part of the formulation of his profound tolerance for freedom of expression, he spoke out against misuse of the power to punish for contempt. But nothing that that great judge ever wrote qualified in the slightest his conviction that the theory of our system of justice is "that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado, supra,* at 462. Mr. Justice Holmes had no tolerance whatever for any special claim by judges to immunity from criticism. He was against anything that smacked of summary proceeding for what was known as "scandalizing the court," that is, speaking ill of a court as an institution and thereby argumentatively bringing it into disrepute. He would allow summary punishment of conduct calculated to affect a judge in the discharge of his duty only as to matters "pending" before him in the active sense of that term. "It is not enough that somebody may hereafter move to have something done." So he wrote, dissenting, in *Craig* v. *Hecht, supra,* at 281. And in his misapplied dissent in the *Toledo* case he expressed his impatience with federal judges who take notice of newspaper comments to which a judge should be indifferent. But his opinion in that case conveys not a doubt as to the power of States to enforce a policy for the punishment of contempt in relation to a pending case, though the State policy be not limited as Congress limited the power of the federal courts to punish for contempt. There is not a breath of a suggestion in the opinion in the *Nye* case that the restricted geographic meaning which the Court gave to the Act of Congress designed to limit the power of the lower federal courts was required by constitutional considerations. The opinions of Mr. Justice Holmes contain not the remotest hint that

the Due Process Clause withdrew from the States the power to base a finding of contempt on publication aimed at a particular outcome of a matter awaiting adjudication. And it is worthy of note that in the very opinion in which the phrase "clear and present danger" was first used by Mr. Justice Holmes, he referred to his opinion in the *Patterson* case, and not with disapproval. See *Schenck* v. *United States*, 249 U. S. 47, 51–52.

We are not dealing here with criticisms, whether temperate or unbridled, of action in a case after a judge is through with it, or of his judicial qualifications, or of his conduct in general. Comment on what a judge has done—criticism of the judicial process in a particular case after it has exhausted itself—no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth.

The publications now in question did not constitute merely a narrative of a judge's conduct in a particular case nor a general commentary upon his competence or his philosophy. Nor were they a plea for reform of the Texas legal system to the end that county court judges should be learned in the law and that a judgment in a suit of forcible detainer may be appealable. The thrust of the articles was directed to what the judge should do on a matter immediately before him, namely to grant a motion for a new trial. So the Texas Court found. And it found this not in the abstract but on the particular stage of the happenings and in the circumstances disclosed by the record. The Texas Court made its findings with reference to the locality where the events took place and in circumstances which may easily impart significance to the Texas Court but may elude full appreciation here.

Corpus Christi, the locale of the drama, had a population of less than 60,000 at the last census, and Nueces County about 92,000. The three papers which published the articles complained of are under common control and are the only papers of general circulation in the area. It can hardly be a compelling presumption that such papers so controlled had no influence, at a time when patriotic fervor was running high, in stirring up sentiment of powerful groups in a small community in favor of a veteran to whom, it was charged, a great wrong had been done. It would seem a natural inference, as the court below in effect found, that these newspapers whipped up public opinion against the judge to secure reversal of his action and then professed merely to report public opinion. We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another. Only if we can say that the Texas Court had no basis in reason to find what it did find, can we deny that the purpose of the articles in their setting was to induce the judge to grant a new trial. Surely a jury could reach such a conclusion on these facts. We ought not to allow less leeway to the Texas Court in drawing inferences than we would to a jury. Because it is a question of degree, the field in which a court, like a jury, may "exercise its judgment is, necessarily, a wide one." Mr. Justice Brandeis in *Schaefer* v. *United States,* 251 U. S. 466, 483. Of course, the findings by a State court of what are usually deemed facts cannot foreclose our scrutiny of them if a constitutional right depends on a fair appraisal of those facts. But it would be novel doctrine indeed to say that we may consider the record as it comes before us from

a State court as though it were our duty or right to ascertain the facts in the first instance. A State cannot by torturing facts preclude us from considering whether it has thereby denied a constitutional right. Neither can this Court find a violation of a constitutional right by denying to a State its right to a fair appraisal of facts and circumstances peculiarly its concern. Otherwise, in every case coming here from a State court this Court might make independent examination of the facts, because every right claimed under the Constitution is a fundamental right. The "most respectful attention" which we have been told is due to a State would then be merely an empty profession. See *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

If under all the circumstances the Texas Court here was not justified in finding that these publications created "a clear and present danger" of the substantive evil that Texas had a right to prevent, namely the purposeful exertion of extraneous influence in having the motion for a new trial granted, "clear and present danger" becomes merely a phrase for covering up a novel, iron constitutional doctrine. Hereafter the States cannot deal with direct attempts to influence the disposition of a pending controversy by a summary proceeding, except when the misbehavior physically prevents proceedings from going on in court, or occurs in its immediate proximity. Only the pungent pen of Mr. Justice Holmes could adequately comment on such a perversion of the purpose of his phrase.

Changes are rung on the remark of Mr. Justice Holmes in the *Toledo* case that "a judge of the United States is expected to be a man of ordinary firmness of character . . . ." 247 U. S. at 424. But it is pertinent to observe that that was said by an Olympian who was so remote from the common currents of life that he did not

read newspapers. Even a conscientious judge not a layman, and not merely one serving under a short judicial tenure, may find himself in a dilemma when subjected to a barrage pressing a particular result in a case immediately before him. He may not unnaturally be moved to do what is urged, or he may be impelled to display his independence and not give to the arguments on behalf of the motion for a new trial that serene and undisturbed consideration which often leads judges to grant such a motion. It has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation. Thus, one or another of the litigants before the Court may have been denied that disinterested exercise of judgment which is of the essence of the judicial process. The demands found to have been made upon the judge by these papers may agitate even a conscientious judge. He may himself be unaware of the extent to which his powers of reason have not the sway they would otherwise have. Or a judge, proud of his independence, may unconsciously have his back stiffened, and thereby his mind, when hearing the motion for a new trial and passing on its validity. Judges are not merely the habitations of bloodless categories of the law which pursue their predestined ends.

The fact that it cannot be demonstrated how the delicate balance of an adjudication was tampered with, or whether it was, does not prove that it was not tampered with. To rely on the assumption that judges are men of fortitude and that no judge "worthy of the name" would be influenced in his decision by a publication directed toward a particular disposition of a pending litigation, is to say in effect that the Due Process Clause precludes a State from believing that there may be such a psychological danger, short of the fantastic situation where a judge confesses that he decided as he did because of newspaper

pressure, or avows that he came awfully close to being derelict in his judicial duty because of such pressure. In *Bridges* v. *California,* 314 U. S. 252, this Court did not profess to make a constitutional dogma of so questionable a psychological assumption. It did not condemn outright the power of a State summarily to punish for contempt a publication uttered outside of court but brought to bear upon a pending case. The opinion of the Texas Court gives every indication of scrupulous obedience to the requirements of the *Bridges* case. Nor did the dissenting judge find conflict with the *Bridges* case. If we accord "most respectful attention" to what the State court has decided, I am unable to find any ground for rejecting the application which the Texas Court made to the circumstances of this case of the principles which it drew from the *Bridges* case.

Is it conceivable that even the most doctrinaire libertarian would think it consonant with the impartiality which adjudication presupposes to publish a poll regarding the outcome desired by a community in a pending case? How can the insertion into the scales of justice of a newspaper's own notion of the desire of a community for a particular result in a pending case be more permissible than the report of public feeling as ascertained by a public poll? Again, suppose the newspaper articles here in controversy had been enclosed in a letter to the judge urging, on the basis of these articles, a new trial. Would the Constitution of the United States forbid a State to deal with such conduct through the corrective process of contempt? But a denial of this power to the States where newspapers carry the same articles directed to the same end can only be on the basis that private correspondence has less constitutional protection than have newspapers.

To agree with a principle in principle only to depart from it in practice has not been so fruitful of good in the

world of diplomacy as to suggest its importation into the judicial process. If it be deemed that the Due Process Clause put an end to the historic power of States to allow summary proceedings for contempt by interference with an actually pending controversy, or even if it be deemed offensive to due process for the judge whose conduct is called in question to sit in judgment upon the contemnor because self-interest is too great, see *Tumey* v. *Ohio,* 273 U. S. 510, and *Cooke* v. *United States,* 267 U. S. 517, 539, such a break with the past had best be completely candid. It may well be the deeper wisdom to treat with intelligent neglect paragraphs that are calculated and intended to influence the disposition of litigation. But the wisdom of such wisdom is not the measure of the constitutional power of the several States to deal with extraneous influence designed to affect the outcome of a particular case.

We think the judgment should be affirmed.

MR. JUSTICE JACKSON, dissenting.

This is one of those cases in which the reasons we give for our decision are more important to the development of the law than the decision itself.

It seems to me that the Court is assigning two untenable, if not harmful, reasons for its action. The first is that this newspaper publisher has done no wrong. I take it that we could not deny the right of the state to punish him if he had done wrong and I do not suppose we could say that the traditional remedy was an unconstitutional one.

The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate

and impartial as the weakness inherent in men will permit. I think this publisher passed beyond the legitimate use of press freedom and infringed the citizen's right to a calm and impartial trial. I do not think we can say that it is beyond the power of the state to exert safeguards against such interference with the course of trial as we have here.

This was a private lawsuit between individuals. It involved an issue of no greater public importance than which of two claimants should be the tenant of the "Playboy Cafe." The public interest in the litigation was that dispassionate justice be done by the court and that it appear to be done.

The publisher had a complete monopoly of newspaper publicity in that locality. For reasons that are not apparent, the papers took an unusual interest in the proceeding. They first made what the court agrees was a "rather sketchy and one-sided report of a case." This is not overstatement. The former tenant had tendered a check and the newspaper report represented it as a payment of rent; it made no reference to the fact that the check was postdated and was therefore no payment at all. Reports played up the fact that its favorite among the litigants was a veteran. The community became aroused. Then the newspaper published editorials which attacked the judge while a motion for retrial was pending with what the prevailing opinion concedes was "strong language, intemperate language, and, we assume, an unfair criticism." The object of the publicity appears to have been to get the judge to reverse himself and to grant a new trial.

The fact that he did not yield to it does not prove that the attack was not an effective interference with the administration of justice. The judge was put in a position in which he either must appear to yield his judgment to public clamor or to defy public sentiment. The consequence of attacks may differ with the temperament of the

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judge. Some judges may take fright and yield while others become more set in their course if only to make clear that they will not be bullied. This judge was evidently of the latter type. He was diverted from the calm consideration of the litigation before him by what he regarded as a duty to institute a contempt proceeding of his own against his tormentors.

For this Court to imply that this kind of attack during a pending case is all right seems to me to compound the wrong. The press of the country may rightfully take the decision of this Court to mean indifference toward, if not approval of, such attacks upon courts during pending cases. I think this opinion conveys a wrong impression of the responsibilities of a free press for the calm and dispassionate administration of justice and that we should not hesitate to condemn what has been done here.

But even worse is that this Court appears to sponsor the myth that judges are not as other men are, and that therefore newspaper attacks on them are negligible because they do not penetrate the judicial armor. Says the opinion: "But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." With due respect to those who think otherwise, to me this is an ill-founded opinion, and to inform the press that it may be irresponsible in attacking judges because they have so much fortitude is ill-advised, or worse. I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame—a good public name—is, as Milton said, the "last infirmity of noble mind," it is frequently the first infirmity of a mediocre one.

From our sheltered position, fortified by life tenure and other defenses to judicial independence, it is easy to say that this local judge ought to have shown more fortitude in the face of criticism. But he had no such protection. He was an elective judge, who held for a short term. I do not take it that an ambition of a judge to remain a judge is either unusual or dishonorable. Moreover, he was not a lawyer, and I regard this as a matter of some consequence. A lawyer may gain courage to render a decision that temporarily is unpopular because he has confidence that his profession over the years will approve it, despite its unpopular reception, as has been the case with many great decisions. But this judge had no anchor in professional opinion. Of course, the blasts of these little papers in this small community do not jolt us, but I am not so confident that we would be indifferent if a news monopoly in our entire jurisdiction should perpetrate this kind of an attack on us.

It is doubtful if the press itself regards judges as so insulated from public opinion. In this very case the American Newspaper Publishers Association filed a brief *amicus curiae* on the merits after we granted certiorari. Of course, it does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one: "This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country. The Association is vitally interested in the issue presented in this case, namely, the right of newspapers to publish news stories and editorials on cases pending in the courts."

This might be a good occasion to demonstrate the fortitude of the judiciary.

NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & CO.

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

No. 419. Argued March 7, 10, 1947.—Decided May 19, 1947.

1. The determination of the National Labor Relations Board that, in the circumstances of this case, certain guards at a private plant of the respondent engaged in war production, though employed in accordance with a requirement of the War Department and enrolled as civilian auxiliaries to the military police of the United States Army subject to Army Regulations, were "employees" of respondent within the meaning of § 2 (3) of the National Labor Relations Act was justified by the evidence and the law; and the cease-and-desist order based thereon should have been enforced by the Circuit Court of Appeals. Pp. 414–415.
2. A determination of the Board that rank-and-file plant guards are "employees" under the Act may in an appropriate case be legally justified, since they bear essentially the same relation to management as maintenance and production employees. Pp. 404–405.
3. A proceeding to enforce a cease-and-desist order of the National Labor Relations Board, based upon a finding that the employer had committed an unfair labor practice by refusing to recognize and bargain with a union selected by private plant guards while they were serving as civilian auxiliaries of the military police of the Army, *held* not to have been rendered moot by the subsequent demilitarization of the guards. P. 402.
4. A determination by the National Labor Relations Board of whether one is an "employee" within the coverage of the National Labor Relations Act must be accepted by the reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications,* 322 U. S. 111. P. 403.
5. In defining and applying the terms "employer" and "employee," as used in the National Labor Relations Act, the Board is not confined to the technical and traditional concepts of "employer" and "employee," but is free to take account of the more relevant economic and statutory considerations. P. 403.

155 F. 2d 567, reversed.

An order of the National Labor Relations Board, 56 N. L. R. B. 1056, issued under the National Labor Relations Act, was denied enforcement by the Circuit Court of Appeals. 155 F. 2d 567. (A previous judgment, 147 F. 2d 730, had been vacated and the case remanded by this Court, 325 U. S. 838.) This Court granted certiorari. 329 U. S. 710. *Reversed,* p. 415.

Ruth Weyand argued the cause for petitioner. With her on the brief were *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Mozart G. Ratner.*

Frederic D. Anderson argued the cause for respondent. With him on the brief was *Kurt F. Pantzer.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

The problem posed by this case is whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of § 2 (3) of the National Labor Relations Act, 29 U. S. C. § 152 (3).

At all material times, the respondent corporation was engaged in the manufacture of saws, tools and armor plate. It employed more than 1,200 production and maintenance employees at its two plants at Indianapolis, Indiana. Before it began to produce armor plate for defense and war purposes, respondent employed about six watchmen or guards. When it entered upon war production, however, the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In 1943, after the necessary additional guards had been recruited, a union [1] petitioned the National Labor Rela-

[1] Local 1683 of the International Association of Machinists, District 90. This union did not represent any of the maintenance or produc-

tions Board for investigation and certification of representatives pursuant to § 9 (c) of the Act. It was alleged that the union represented the sixty-four plant guards employed by respondent at its two plants. The respondent moved to dismiss the petition on the ground that it was not the employer of the guards within the meaning of § 2 (2) and that the guards were not employees as defined by § 2 (3). A hearing was thereupon held and evidence concerning the status of the guards was introduced.

On October 19, 1943, the Board concluded from the evidence thus submitted that these plant guards were employees within the meaning of § 2 (3) despite their status as civilian auxiliaries to the military police. 52 N. L. R. B. 1470. It held that all the plant guards at respondent's two plants, excluding the chief guards, lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constituted a unit appropriate for collective bargaining. An election was therefore directed to be held, which resulted in the union in question being chosen as bargaining representative. The union was certified by the Board as the exclusive representative of the plant guards.

Subsequently, the union filed charges that the respondent had refused to bargain collectively. A complaint was issued by the Board, followed by a hearing at which evidence regarding that refusal was introduced. The Board, on May 30, 1944, issued its decision in which it concluded that the guards were employees of respondent and that the latter had committed unfair labor practices in refusing to bargain with the union. 56 N. L. R. B. 1056.

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tion employees in respondent's plants, but it did admit to membership plant protection employees of other employers as well as those of respondent.

The Board accordingly issued an order requiring respondent to cease and desist from refusing to bargain collectively with the union, and commanding it to bargain with the union, upon request, in respect to rates of pay, wages, hours of employment and other conditions of employment. The Seventh Circuit Court of Appeals declined to enforce the Board's order, holding (1) that the guards were not employees of the respondent within the meaning of § 2 (3) of the Act since they were militarized, and (2) that even if the militarized guards were to be considered as employees of respondent, enforcement of the Board's order should not be allowed because to do so would be or would likely be inimical to the public welfare. 147 F. 2d 730.

In filing a petition in this Court for a writ of certiorari, the Board noted that the guard forces at respondent's plants had been demilitarized early in 1944, but urged that the case was not thereby rendered moot. We granted certiorari, vacated the judgment below and remanded the case to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. The stipulation noted that most of the guards had been released from service and that only eleven of them had been retained as watchmen by respondent as of February 23, 1946; and those eleven had been "sworn in as Deputy Policemen by the City of Indianapolis." The Board then filed a motion in the Circuit Court of Appeals for a decree enforcing its order. This motion was denied and the prior holding was reaffirmed, the court stating that the demilitarization was irrelevant to the issue of whether the plant guards were

employees at the time when the respondent refused to bargain with the union. 155 F. 2d 567. The importance of the problem raised by the case, together with a conflict over the answer to this problem between the court below and the Sixth Circuit Court of Appeals, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 146 F. 2d 718, prompted us to grant a further review of the case.

We agree with the Circuit Court of Appeals that the demilitarization of the guards did not render the case moot and that it had no effect upon the prime issue in the case. The Board's order was based upon a holding that the respondent committed an unfair labor practice by refusing to recognize and bargain with the union selected by the militarized guards. And that refusal occurred at a time when the guards were still militarized. A determination that the respondent had a statutory duty to bargain with the union at that time is therefore essential to the validity of the Board's order. The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.

The Board's order, moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. If the guards were employees of respondent entitled to the benefits of the Act during the period of militarization, *a fortiori* they are employees now that all connections with the Army have been severed; and their statutory rights continue to be entitled to full respect. Respondent's guard force still remains in existence, although considerably reduced in size, and the union presumably continues to be the representative of the guards. Under such circumstances, the case is not moot. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271; *J. I.*

Case Co. v. *Labor Board,* 321 U. S. 332, 334. See also *Federal Trade Commission* v. *Goodyear Co.,* 304 U. S. 257, 260.

As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications,* 322 U. S. 111. Realizing that labor disputes and industrial strife are not confined to those who fall within ordinary legal classifications, Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. The relevant portion of § 2 (3) simply provides that "The term 'employee' shall include any employee, . . ." In contrast, § 2 (2) states that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, . . ." As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.

And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the

Board's familiarity with the problems and its experience in the administration of the Act.

Laying aside for the moment the matter of militarization, we cannot say in this case that the Board would be legally unjustified in holding that the rank-and-file plant guards are employees within the meaning of the Act. They bear essentially the same relation to management as maintenance and production employees. In fact, they are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards—persons who have universally been regarded and treated as employees for purposes of union membership and employee benefits. They perform such duties as inspecting persons, packages and vehicles, carrying cash to various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. Moreover, the guards in question are not supervisors; they possess no power to affect the working conditions of other employees. Without collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work. Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees. Even under conventional standards, they are controlled by management to an extent sufficient to justify designating them as employees.

Nor can we say, as a matter of law, that permitting plant guards to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer in carrying out their designated tasks. In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the em-

ployer on matters affecting their own wages, hours and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management. As in the case of foremen, we see no basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. *Packard Motor Car Co.* v. *Labor Board,* 330 U. S. 485.

We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

The crucial problem in this case, however, is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case, the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all

the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute.

The Board's determination that the militarization of the guards in respondent's plants was of a type that did not alter their status as employees under the Act must therefore be tested by the applicable War Department regulations and by the evidence introduced at the hearing before the Board. If such a result is consistent with the regulations and has a reasonable basis in the other evidence, the Board's order must be sustained.

The plant guards in this case were enrolled as civilian auxiliaries to the military police under War Department regulations issued pursuant to Executive Order No. 8972, dated December 12, 1941. That order authorized the Secretary of War to establish and maintain military guards and patrols, and to take other appropriate measures, to protect certain strategic premises, materials and utilities from injury and destruction. The Secretary of War accordingly directed the military organization of plant guard forces as auxiliary military police at plants important to the prosecution of the war, the directive to that effect being issued by the Adjutant General on July 2, 1942. Supplementary regulations were contained in Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces.[2]

As stated by these regulations, the purpose of the military organization of the plant guards was "to increase the authority, efficiency, and responsibility of guard forces

[2] Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483–484.

at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations." [3] It was made clear, however, that plant managements were not relieved of their responsibility "for providing adequate protection at all times against all hazards." [4] In other words, employers who wished to obtain government contracts for the production of war materials were required to provide "adequate protection" for their plants where the material was to be produced; if the existing plant protection forces were inadequate, additional guards were to be recruited by the employers. But all the original and additional guards were to be enrolled as civilian auxiliaries to the military police.

The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of the guard force.[5] And the military plant guard officers were authorized to take appropriate action "through the plant management" to correct conditions which might result in "defective or inadequate performance by the guard forces of its ordinary protective duties." [6]

The functions of these civilian auxiliaries to the military police were stated to be twofold: "(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards. (2) To serve with the Army in providing protection to the plant and its environs in emergency situations." [7] They were subject to call for military service even where emergencies arose at places other than the plants where they normally

[3] Circular No. 15, par. 1a.

[4] *Id.* par. 1b.

[5] *Id.* par. 6b (2).

[6] *Id.* par. 1b.

[7] *Id.* par. 2a.

worked. To these ends, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as Auxiliary Military Police." [8] But such orders "will be issued only after consultation with and, if possible, concurrence by the plant management. . . . Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management." [9] The regulations also provided that the military drill of the guard forces should not exceed one hour per week "except with the approval of the plant management." [10]

As to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no militarization. According to Circular No. 15: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer." [11] A veto power over employment and dismissal, of course, was retained by the military. It was further provided: "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and

[8] *Id.* par. 5a (2).

[9] *Id.* pars. 5c (2) and 6a (1).

[10] *Id.* par. 7g (1).

[11] *Id.* par. 6b (1).

employer's liability provisions remain unaffected." [12] And the employer was expected to train the guard forces in their ordinary protective duties and was required to furnish them with uniforms and weapons.[13]

The right of the plant guards to bargain collectively was recognized by Circular No. 15, paragraph 6h (2) of which provided: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. & United Rubber Workers of America, CIO, Case No. R–4826, February 1943) [*Lord Manufacturing Co.*, 47 N. L. R. B. 1032], the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies." Provision was also made that collective bargaining agreements covering plant guards who were civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as auxiliary military police.[14]

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[12] *Id.* par. 6f.

[13] The guards were required to salute Army officers and had the right to arrest anyone in the plants. They carried identification cards issued by the War Department and wore arm bands on which appeared the words "Auxiliary Military Police." *Id.* par. 7.

[14] *Id.* par. 6h (1).

The guards were required to sign agreements with the United States.[15] Each agreement stated that the individual, who had been or was about to be employed by the particular company as a guard at its plant, agreed that he would support and defend the Constitution, bear true faith and allegiance to the Constitution, and faithfully discharge his duties as a civilian auxiliary to the military police. He also acknowledged in this agreement that appropriate Articles of War had been read and explained to him and that he was subject to military law during his employment. The applicable regulations then provided that he could be court-martialed where no other effective form of punishment would be effective. But "Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment."[16] In all other respects, the guards remained subject to the civil courts.

The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations. The guards at each plant were under the direct supervision of a chief guard and several lieutenants—all of whom were civilians recruited by the respondent like the rank-and-file guards. The military superior of the chief guards was the District Plant Guard Officer

[15] If a guard refused to sign this agreement, he might be, but need not be, temporarily retained with the understanding that he would be dismissed as soon as he could be replaced, and in any event within a reasonable time. *Id.* par. 5b (1).

[16] *Id.* par. 8d.

stationed at the Continuous Security District Office of the War Department, Cincinnati, Ohio, an officer who also had charge of guard forces at other plants in the district. A general directive issued by this office repeated many of the provisions of Circular No. 15.[17] It also provided that orders and regulations for the auxiliary military police would be issued in the name of the Chief of the District "after plant management has indicated its concurrence by signing the guard order in the lower left hand corner." But the only guard orders received by the chief guards at respondent's plants were three general ones signed by the District Plant Guard Officer, orders that were applicable to all militarized guards in the district. All the specific orders that were ever issued emanated from the chief guards. About the only direct contact between the military authorities and these guards occurred during the weekly drill period.

Respondent recruited the necessary additional guards through its ordinary employment channels and it had the power to initiate dismissals from the force. Such actions, however, were subject to the approval of the military. Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent actually bore the cost of the guards' wages.[18] Respondent

[17] This directive, however, omitted par. 6h (2) of Circular No. 15, dealing with the right of guards to bargain collectively.

[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being

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did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed. Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them. Finally, respondent maintained its liability as to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour requirements.

From the foregoing, an ample basis is evident to support the Board's determination that militarization did not destroy the employee status of the guards in respondent's plants. The War Department regulations and the actual practice in these plants were based upon the explicit assumption that the guards were the private employees of respondent rather than employees or soldiers of the United States. The regulations made it unmistakable that the normal, private employer-employee relationship was to remain substantially intact. Especially clear was the fact that the right of the guards to join unions and to bargain collectively was to be respected. The military authorities took over from respondent only those attributes of control which were necessary to effectuate the rather limited military program, many aspects of that transferred power being exercisable by the Army only in the gravest emergencies.

We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained "a sufficient residual measure of control over the terms and conditions of employment of the guards" so that they

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respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts.

might fairly be described as employees of respondent.[19] The most important incidents of the employer-employees relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another,

[19] The Board's conclusion in this respect is confirmed by the results reached under other statutes. Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act. *Walling* v. *Lum*, 4 WH Cases 465. And they have consistently been treated as such by the National War Labor Board. *Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *Brewster Aeronautical Corp.*, 11 War Lab. Rep. 286, 15 War Lab. Rep. 239, 240–243; *Great American Industries*, 11 War Lab. Rep. 287; *Youngstown Sheet & Tube Co.*, 15 War Lab. Rep. 500, 19 War Lab. Rep. 813; *General Motors Corp.*, 18 War Lab. Rep. 541. And see *Labor Board* v. *Carroll*, 120 F. 2d 457.

coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *Labor Board* v. *Hearst Publications, supra,* 129.

The Board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of its administration of the Act during the war, the Board was faced with this problem many times.[20] It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. See *Southern Steamship Co.* v. *Labor Board,* 316 U. S. 31, 47. In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. We find no such evidence in this case.

Here we have the Board's considered and consistent judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby.

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[20] See, *e. g., Chrysler Corporation,* 44 N. L. R. B. 881; *Budd Wheel Co.,* 52 N. L. R. B. 666; *Dravo Corporation,* 52 N. L. R. B. 322. See also National Labor Relations Board, Seventh Annual Report (1943), p. 63; Eighth Annual Report (1944), p. 57.

In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem. Its regulations and directives have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities. This policy of the Board, moreover, has been confirmed by experience. The Board states that it has certified bargaining representatives for units of militarized guards in more than 105 cases, in none of which has any danger to the public interest or to the war effort resulted.

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied in this case.[21] Since the Board's order is in accord with the law and has substantial roots in the evidence, it should have been enforced by the Circuit Court of Appeals. Respondent's objections to the language and scope of the order are either without merit or have been removed by the demilitarization of the guards. And any issues concerning the subsequent deputization of the guards as policemen are answered by our decision in *Labor Board* v. *Jones & Laughlin Steel Corp., post,* p. 416. The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent substantially for the reasons set forth in the opinion of the court below, 155 F. 2d 567.

[21] In adopting the War Labor Disputes Act, 57 Stat. 163, Congress provided in § 7 (a)(2) that all actions of the National War Labor Board must conform to the provisions of the National Labor Relations Act—an indication that Congress deemed the preservation of the right to collective bargaining to be essential in war industries.

NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP.

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

No. 418. Argued March 7, 1947.—Decided May 19, 1947.

1. In the circumstances of this case, the militarization of certain guards employed by a private plant engaged in war production did not preclude the National Labor Relations Board from grouping them in a separate unit for collective bargaining and permitting them to choose as their bargaining representative a union which also represented production and maintenance employees. Pp. 422–427.
2. The determination of the National Labor Relations Board that, in the circumstances of this case, certain guards at a private plant of the respondent engaged in war production, though employed in accordance with a requirement of the War Department and enrolled as civilian auxiliaries to the military police of the United States Army subject to Army Regulations, were "employees" of respondent within the meaning of § 2 (3) of the National Labor Relations Act was justified by the evidence and the law. *Labor Board* v. *Atkins & Co., ante*, p. 398. P. 422.
3. A proceeding under the National Labor Relations Act to enforce a Board order requiring an employer to bargain with the representative of militarized plant guards, *held* not rendered moot by their subsequent demilitarization, in and of itself. *Labor Board* v. *Atkins & Co., ante*, p. 398. Pp. 421–422.
4. The provision of § 10 (e) of the National Labor Relations Act that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," refers to objections which might have been but were not raised in the original proceeding before the Board. P. 427.
5. The reviewing court has power to consider an issue which has come into existence since the proceeding was before the Board. Pp. 427–428.

6. When circumstances arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. P. 428.
7. In the circumstances of this case, it is unnecessary to remand the case to the National Labor Relations Board for consideration of the issue as to the status of plant guards who were deputized as municipal policemen subsequently to the issuance of the Board's order, there being nothing in the instant case which would make inapplicable the Board's known policy with respect to deputized guards. P. 428.
8. The facts and law of this case would justify a determination by the Board that the guards at the private plant in question were "employees" within the meaning of § 2 (3) of the National Labor Relations Act, notwithstanding their deputization as municipal policemen; and that they were entitled to select as their bargaining agent a union which also represented production and maintenance workers. Pp. 429–431.

154 F. 2d 932, reversed.

An order of the National Labor Relations Board, 53 N. L. R. B. 1046, issued under the National Labor Relations Act, was denied enforcement by the Circuit Court of Appeals. 154 F. 2d 932. (A previous judgment, 146 F. 2d 718, had been vacated and the case remanded by this Court, 325 U. S. 838.) This Court granted certiorari. 329 U. S. 710. *Reversed,* p. 431.

Ruth Weyand argued the cause for petitioner. With her on the brief were *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Mozart G. Ratner.*

John C. Bane, Jr. argued the cause for respondent. With him on the brief were *H. Parker Sharp* and *Paul J. Winschel.*

Arnold F. Bunge filed a brief for the Packard Motor Car Company, as *amicus curiae,* in support of respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Like *Labor Board* v. *Atkins & Co., ante,* p. 398, this case involves the rights of militarized plant guards under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* But certain problems are raised here which are not present in the *Atkins* case.

Respondent owns and operates several large steel manufacturing works and was engaged in the production of war materials during the recent war. At respondent's Otis Works at Cleveland, Ohio, about 4,700 individuals are employed. Production and maintenance employees constitute the great bulk of these workers. But there is also included in the total a group of guards and watchmen, numbering about sixty men normally.

A union affiliated with the United Steelworkers of America, C. I. O., has been the exclusive bargaining agent for the production and maintenance employees. Under a contract made with respondent late in 1942, this union disclaimed any representation of "Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses." On March 15, 1943, this union filed a petition for investigation and certification of representatives pursuant to § 9 (c) of the Act, in which it sought to be certified as the collective bargaining representative of the guard force. A hearing was then held. Respondent claimed that a unit composed of these guards was inappropriate because they "perform certain assigned work that is strictly representative of management." Respondent also claimed that any allegation by the union that a unit including watchmen is appropriate was "a direct contravention" of the 1942 contract. And it was further alleged that any unionization of watchmen or guards was particularly inappropriate during a time of war, that their duties "do not differ greatly from the duties

performed by members of a city, county or state police force" and that these guards had been sworn in as auxiliary military police of the United States Army.

The testimony at the hearing showed that there were currently 72 plant protection employees. Of these, 58 were patrolmen whose sole duty was to protect and guard the Otis Works; there were 2 firemen to maintain the fire equipment; 2 dump laborers were assigned to work at a refuse dump while watching that section of the plant; and there were 8 lieutenants and 2 fire captains supervising the others. All of them were carried on respondent's payroll and were under respondent's control as to pay, benefits and conditions of employment. And, as respondent had alleged, they had been sworn in as civilian auxiliaries to the military police of the United States Army, in the same manner and under the same conditions as detailed in the *Atkins* case.

On May 3, 1943, the Board issued its decision and direction of election. 49 N. L. R. B. 390. It found that "all patrolmen, watchmen, and firemen, including dump laborers employed by the Company at its Otis Works, but excluding lieutenants, captains, and supervisors" constituted an appropriate unit and that an election should be held by the employees in this unit to determine if they desired to be represented by the Steelworkers union. It rejected all of respondent's contentions, pointing out among other things that the union, while representing production and maintenance employees, intended to bargain for the plant guards and watchmen as a separate unit.

The election resulted in the selection of the Steelworkers union as the bargaining representative of the unit in question. The union was certified as the exclusive representative of the unit, respondent refused to bargain with the union and the Board issued its complaint based upon that

refusal. On December 2, 1943, the Board reaffirmed the appropriateness of the unit and found that respondent had committed unfair labor practices in refusing to bargain. The usual order was entered. 53 N. L. R. B. 1046.

The Sixth Circuit Court of Appeals denied the Board's petition for a decree enforcing its order. 146 F. 2d 718. While upholding the Board's determination that the militarized guard forces were employees within the meaning of the National Labor Relations Act, the court felt that the unit selected for bargaining purposes was inappropriate and reflected a disregard by the Board of the national welfare. In the eyes of that court, the Board's fatal error was its authorizing the militarized guards to join the same union which represented the production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government." 146 F. 2d at 722.

The Board filed a petition in this Court for a writ of certiorari. As in the *Atkins* case, the Board pointed out that the plant protection employees had been demilitarized at a date (May 29, 1944) subsequent to the refusals to bargain, but urged that this fact did not make the case moot. We granted the writ of certiorari at the same time as we granted the writ in the *Atkins* case, vacated the judgment below and remanded the cause to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent then entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. From this stipulation it appeared that the qualifications, strength, functions and duties of the guards continued to be the same after demilitarization as before. Also included in the stipulation were facts showing that both before and after the period of militarization, August 5, 1942, to May 29, 1944, the guards were commissioned, sworn and bonded as private policemen of the City of Cleveland and exercised "the legal powers of peace officers in their work as plant guards." It was further stipulated that because of "the magnitude and other characteristics of the Otis Works, its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force. For similar reasons, the work of preventing and extinguishing fires has been in large part the responsibility of the guard force, rather than that of the municipal fire department."

The Board filed a motion in the Circuit Court of Appeals for a decree enforcing its order. That court denied the motion and held that the facts concerning both the demilitarization and the deputization were to be considered as though they had been presented at the hearing before the Board; on that basis, the court reaffirmed its belief that the guards were employees within the meaning of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, it was "improper for the Board to permit their organization by the same union which represents the production employees." 154 F. 2d 932, 934.

Our decision in the *Atkins* case makes clear that the demilitarization of the guards did not render this case

moot. The order was a continuing command which may be effectuated in the future. But unless the order was valid when it was issued, there is no basis whatever for it and no court can decree its enforcement in the future. Hence its validity must be judged as of the time when it was issued, a time when the guards were still militarized. This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced. All that we hold is that demilitarization in and of itself is not enough to render the order or the case moot.

The *Atkins* decision likewise disposes of any issues relating to the effect of militarization upon the status of the guards as employees within the meaning of § 2 (3) of the National Labor Relations Act. To that extent, the Board's order here was plainly valid. Unanswered by the *Atkins* decision, however, is the question whether the militarization of the plant guards precluded the Board from grouping the guards in a separate unit and permitting them to choose as their bargaining representative a union which also represented production and maintenance employees. To that issue, which is the primary one raised by this case, we now turn.

The Board, of course, has wide discretion in performing its statutory function under § 9 (b) of deciding "the unit appropriate for the purposes of collective bargaining . . . ." *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146. It likewise has discretion to place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policies so dictate. Its determinations in these respects are binding upon reviewing courts if grounded in reasonableness. *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 380. A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consider-

ation to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict.

Thus, in determining the proper unit for militarized guards and in deciding whether they should be permitted to choose the same union that represents production and maintenance employees, the Board must be guided not alone by the wishes of the guards or the union or by what is appropriate in the case of non-militarized guards. It must also give due consideration to the military duties and obligations of the guards and their possible relationships to a union representing other employees; it must consider what limitations, if any, on the normal freedom to choose whatever representative the guards may desire are necessitated by the war effort.

It is clear that the Board has given these matters due consideration. It has not acted in this case in disregard of the national welfare. Sanctioning the creation of a separate unit of respondent's guards and permitting them to select a union of their own choosing, a union which happened to be the representative of the production and maintenance employees, are indicative of a considered, mature judgment on the Board's part. The problem has been raised in many cases before the Board and its conclusion is in accord with that reached by the War Department.

In *Chrysler Corp.*, 44 N. L. R. B. 881, *Dravo Corp.*, 52 N. L. R. B. 322, and *Armour and Co.*, 63 N. L. R. B. 1200, the Board has spelled out the various considerations that have led it to adopt the policy applied in this case. Those cases reveal the Board's belief that freedom to choose a bargaining agent includes the right to select an agent which represents other employees in a different bargaining unit. This principle may safely be applied to militarized guards, in the Board's opinion, since the collective bargaining

process is flexible enough to allow for the increased responsibilities placed upon the militarized guards. And the Board has concluded that the remedy for inefficiency or wilful disregard or neglect of duty on the part of such guards lies in the power of the employer to discipline or discharge them and in the power of the military authorities to take whatever steps may be necessary to protect the public interest. Moreover, the Board has discovered no serious question as to any conflict between loyalties to the Army and to the union, the Board finding no basis to assume that membership in a union tends to undermine the patriotism of militarized guards or that loyalty to the United States would be secondary in their minds to loyalty to the union. But one restriction is placed upon the statutory freedom of the militarized guards. The Board insists that they be placed in separate bargaining units so that they may be better able to function within the military sphere and so that the military authorities may be able to exercise greater control over them.

This policy of the Board coincides with that expressed in the regulations of the War Department. As we pointed out in the *Atkins* case, *ante*, p. 398, the military authorities have given full sanction to collective bargaining on the part of militarized guards, provided only that such action does not interfere with their military obligations. Paragraph 6h (2) of Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces, acknowledges with approval the Board's policy of permitting militarized guards to be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, even though both bargaining units may be affiliated with the same labor organization. A clarifying memorandum of the War Department, dated July 10, 1943,

reiterates the War Department attitude still further: "In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, both bargaining units may be affiliated with the same trade-union local, provided they are, in fact, separate bargaining units."

We are unable to say that the policy formulated by the Board is without reason. When the employer retains unfettered power to fix the wages, hours or other working conditions of militarized guards, the guards stand in the same relation to the employer regarding those matters as do production and maintenance employees. In disputes with the employer over those matters, they suffer from the same inequality of bargaining power as suffered by other unorganized employees; the appropriateness and need of collective bargaining on their part through freely chosen representatives are equally as great. But to prevent them from choosing a union which also represents production and maintenance employees is to make the collective bargaining rights of the guards distinctly second-class. Such a union may be the only one willing and able to deal with the employer. Its experience and acquaintance with the employer and the plant may make it specially qualified to bargain for the guards. The guards might thus be deprived of effective bargaining rights if they are denied the right to choose such a union. Freedom to choose, in this statutory setting, must mean complete freedom to choose any qualified representative unless limited by a valid contrary policy adopted by the Board.

After deliberation, the Board has concluded that this freedom can safely be recognized to the fullest extent as

to militarized guards, provided only that they be placed in separate bargaining units. We cannot say that this conclusion is one so lacking in an appreciation of the military necessities of the situation that we should voice our disapproval and substitute our own views of public policy. It is significant that the Board, in weighing the military requirements against the normal policies of the Act, has arrived at a result which coincides with that reached by the War Department. The latter agency has been satisfied that militarized guards can safely join and choose unions representing other employees without impairing their loyalty to the United States or their ability to perform their military duties satisfactorily. We assume that attitude was adopted after a full consideration of all the military necessities, matters which are peculiarly within the competence and knowledge of the War Department. In light of that fact, it is impossible to say that a civilian agency erred in failing to insist upon what the military experts found to be unnecessary. To prohibit militarized guards from joining or choosing unions representing production and maintenance workers on grounds of military necessity is to erect limitations which not even those most familiar with the military situation thought essential or desirable. And in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity, especially pleas that are unsupported by military authorities. Certainly it would take more than the speculation and theories advanced by the court below to undermine the foundation of the policy adopted in this respect by the Board.

Moreover, the experience of the Board has revealed none of the dire consequences which the court below feared might flow from the application of the policy in question. 146 F. 2d at 722–723. In its brief before us, the Board has stated that it has certified bargaining representatives for

units of militarized guards in more than 105 cases; in more than 80 of these cases, the certified union also represented a separate bargaining unit of other employees of the same employer. Employer recognition of the unions, collective bargaining and contractual relations have resulted in many instances. Yet the Board states that it has received "no indication from any source that the dangers to the public interest and particularly to the war effort which the courts below thought to inhere in that policy have in fact materialized in any case."

One final matter remains. After the Board's order was issued and after the guards at respondent's Otis Works were demilitarized, the guards were deputized by the police authorities of the City of Cleveland. The Board claims that since this matter was not raised before it, the court below was precluded by § 10 (e) of the Act from considering the effect of the deputization upon the propriety of enforcing the Board's order. *Labor Board* v. *Newport News Co.*, 308 U. S. 241, 249–250; *Marshall Field & Co.* v. *Labor Board,* 318 U. S. 253; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385.

But the provision of § 10 (e), that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. In this case, however, the deputization of the guards occurred after the Board had concluded its hearing and issued its order and after the court below had refused the first time to enforce the order. It was thus a matter which could not have been raised before the Board. And the failure of respondent to raise the then non-existent issue before the Board could not deprive the court below of power to

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consider the issue once it did come into existence. See *Labor Board* v. *Blanton Co.*, 121 F. 2d 564, 571.

When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order. In this case, however, the Board and the respondent have stipulated the facts concerning the deputization of the guards. The only issue is whether the deputization is so inconsistent with the policies of the Act that the statutory guarantees must be denied to the guards and the enforcement of the Board's order refused. That issue is one normally to be determined by the Board in the first instance, it being the function of the Board rather than the courts initially to correlate the policies of the Act with conflicting interests. But we do not believe that a remand is necessary under the special circumstances of this case.

The Board has frequently considered the status of plant guards who have been deputized as deputy sheriffs or special police. Where the private employer retains the right to fix the wages, hours or other working conditions of such guards, the Board's uniform conclusion has been that they are employees of the private employer and that they retain their rights under the National Labor Relations Act. See, *e. g.*, *Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 189; *American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1363–1364; *American Brass Co.*, 41 N. L. R. B. 783, 785; *Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906; *Standard Steel Spring Co.*,

62 N. L. R. B. 660, 662–663. As in the case of militarized guards, the Board has found no evidence that when deputized guards join unions or engage in collective bargaining through freely chosen representatives their honesty, their loyalty to police authorities, or their competence to execute their police duties satisfactorily is undermined. It is sufficient, in the Board's judgment, to protect the special status of these guards by segregating them in separate bargaining units.

We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto. *Thornton* v. *Missouri Pacific R. Co.,* 42 Mo. App. 58; *Dempsey* v. *New York Central & Hudson River R. Co.,* 146 N. Y. 290, 40 N. E. 867; *McKain* v. *Baltimore & Ohio R. Co.,* 65 W. Va. 233, 64 S. E. 18; *Neallus* v. *Hutchinson Amusement Co.,* 126 Me. 469, 139 A. 671. But it has never been assumed that such deputized guards thereby cease to be employees of the company concerned or that they become municipal employees for all purposes. See *Chicago & N. W. R. Co.* v. *McKenna,* 74 F. 2d 155. Wages, hours, benefits and various other conditions of work normally remain subject to determination by the private employers. At least as to those matters, the deputized guards remain employees of the private employers. See *Walling* v. *Merchants Police Service,* 59 F. Supp. 873. Hence they may be held to be employees within the meaning of § 2 (3) of the National Labor Relations Act. *Labor Board* v. *Hearst Publications,* 322 U. S. 111.

Deputized guards bear the same relationship to management that non-deputized guards bear, a relationship that we discussed in the *Atkins* case, *ante*, p. 398, and that we found to be adequate for the Board to find the existence of an employer-employee status. Likewise, their relationship to police or municipal authorities is not one that is necessarily inconsistent with their status as employees under the Act. Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents. The state and municipal authorities, in short, have adequate means of punishing infidelity and assuring full police protection.

We find nothing in the instant case which would make inapplicable the Board's policy with respect to deputized guards, and the Board has so argued before us. The stipulated facts reveal that the guards at respondent's Otis Works were commissioned as private policemen of the City of Cleveland under § 188 of the Cleveland Municipal Code (1924), and as such are members of the municipal police force and exercise the legal powers of peace officers in their work as plant guards. They are under the control of a police captain and his lieutenants, the police captain being directly responsible to respondent's director of plant security at Pittsburgh and to respondent's executive officer in general charge of the Otis Works. The police captain is also a deputy sheriff of Cuyahoga County, Ohio. It is not denied that the guards continue to be paid by respondent and that their hours, benefits and other conditions of work remain the responsibility of respondent.

The court below pointed out that the Ohio law on the status and duties of special policemen is in accord with the general rule which we have noted. In other words, special policemen are public officers when performing their public duties. *New York, Chicago & St. Louis R. Co.* v. *Fieback,* 87 Ohio St. 254, 100 N. E. 889; *Pennsylvania R. Co.* v. *Deal,* 116 Ohio St. 408, 156 N. E. 502. But none of the Ohio cases attempts to say that the public status of special policemen destroys completely their private status as employees of individual companies. Nor is there any basis for the intimation that their public duties are such as to render incompatible the recognition of rights under the National Labor Relations Act.

We therefore conclude that the facts and the law are sufficiently clear to justify a determination that the guards at respondent's Otis Works are employees within the meaning of the Act despite their deputization as municipal policemen. And they have as much right to select as their bargaining agent a union which represents production and maintenance workers as have militarized guards, the same considerations being applicable. It is obvious that the Board would apply such a policy to this case, thereby making a remand to the Board a mere formality and a needless addition to an already over-prolonged proceeding. Under such circumstances, a remand to the Board is unnecessary.

It follows that the court below should have enforced the Board's order.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent substantially for the reasons set forth in the opinion of the court below, 154 F. 2d 932.

UNITED STATES *v.* WALSH, TRADING AS KELP LABORATORIES.

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

No. 718. Argued April 29, 1947.—Decided May 19, 1947.

1. Under § 301 (h) of the Federal Food, Drug, and Cosmetic Act of 1938, which prohibits the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act, it is an offense to give a false guaranty to one engaged wholly or partly in an interstate business, irrespective of whether the guaranty leads in any particular instance to an illegal shipment in interstate commerce. P. 437.
2. As thus construed, § 301 (h) is a valid exercise of the power of Congress under the Commerce Clause of the Federal Constitution. Pp. 437–438.

Reversed.

In a prosecution for violation of the Federal Food, Drug, and Cosmetic Act, the District Court sustained the defendant's motion to dismiss the information. The Government appealed directly to this Court under the Criminal Appeals Act. *Reversed,* p. 438.

Robert S. Erdahl argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Sheldon E. Bernstein* and *Vincent A. Kleinfeld.*

Eugene W. Miller argued the cause and filed a brief for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This appeal brings before us § 301 (h) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 1042,

21 U. S. C. § 331 (h), which prohibits the giving of a false guaranty that any food, drug, device or cosmetic is not adulterated or misbranded within the meaning of the Act.

Appellee does business in San Diego, California, under the name of Kelp Laboratories. An information has been filed, charging appellee with having given a false guaranty in violation of § 301 (h). The following facts have been alleged: In February, 1943, appellee gave a continuing guaranty to Richard Harrison Products, of Hollywood, California, stating that no products thereafter shipped to the latter would be adulterated or misbranded within the meaning of the Act. On February 24, 1945, while the guaranty was in full force and effect, appellee consigned to Richard Harrison Products, at Hollywood, a shipment of vitamin products which were allegedly adulterated and misbranded—thereby making the guaranty false in respect of that shipment. Prior and subsequent to the date of the shipment, Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of the vitamin product supplied by appellee.

Appellee moved to dismiss the information on the ground that it did not state an offense. The argument was that § 301 (h) applies only to a guaranty that is false relative to an interstate shipment, whereas the alleged shipment here was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for someone outside California or that it intended to sell the products in its interstate rather than its intrastate business. The District Court gave an oral opinion sustaining appellee's contention and granting the motion to dismiss. The case is here on direct appeal by the United States.

The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. *United States* v. *Dotterweich,* 320 U. S. 277, 280. It is in that interstate setting that the various sections of the Act must be viewed.

But § 301 (h), with which we are concerned, does not speak specifically in interstate terms. It prohibits the "giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false," the only exception being as to a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article.[1] Nothing on the face of the section limits its application to guaranties relating to articles introduced or delivered for introduction into interstate commerce. From all that appears, its proscription plainly extends to the giving of any false statutory guaranty, without regard to the interstate or intrastate character of the shipment in question, to those who are engaged in the business of making interstate shipments.

Nor do we find any interstate limitation of the type which appellee proposes in the reference made in § 301 (h)

[1] Section 301 (h) prohibits "The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303 (c) (3), which guaranty or undertaking is false."

to § 303 (c) (2).[2] That reference is made simply to define the type of guaranty or undertaking the falsification of which is prohibited by § 301 (h). Instead of spelling out the matter, § 301 (h) adopts the reference in § 303 (c) (2) to "a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect . . . that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act . . . ." The fact that § 303 (c) (2) relieves a holder of such a guaranty from the criminal penalties provided by § 303 (a) for violating § 301 (a) does not carry over the interstate limitation of § 301 (a) to § 301 (h). Section 301 (a) prohibits the introduction or delivery for introduction into interstate commerce of illicit articles,[3] and § 303 (c) (2) relieves one from the liabilities of such introduction if one has a guaranty or undertaking as therein described. Section 301 (h) has adopted that description for the entirely different purpose of informing persons what kind of a guaranty or undertaking may not be given falsely. In other words,

[2] Section 303 (c) (2) provides that no person shall be subject to the penalties of § 303 (a) "for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce . . . "

[3] Section 301 (a) prohibits "The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

§ 301 (a) is directed to illegal interstate shipments, while § 301 (h) is directed to the giving of false guaranties. Guaranties as described in § 303 (c) (2) may be used by interstate dealers in connection with either interstate or intrastate shipments and those guaranties that are false are outlawed by § 301 (h).

It is true, of course, that the guaranty referred to in § 303 (c) (2) is one given for the purpose of protecting the dealer "in case of an alleged violation of section 301 (a)," thereby relieving him of liability if he reships adulterated or misbranded goods in interstate commerce. But where such a guaranty, as in this case, is given to a dealer regularly engaged in making interstate shipments and who may therefore have need of the guaranty, § 301 (h) imposes liability on the guarantor if that guaranty turns out to be false. And that liability attaches even where the particular shipment which renders the guaranty false is not alleged to have been an interstate one.

It is significant that § 301 (h) had no counterpart in the predecessor statute, the Food and Drugs Act of 1906, 34 Stat. 768. Under § 9 of that Act, a dealer could not be prosecuted for shipping adulterated or misbranded articles in interstate commerce if he had a guaranty of a type similar to that referred to in the present statute. If there were such a guaranty, the guarantor was subject to the penalties which would otherwise attach to the dealer. The result was that the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. *Steinhardt Bros. & Co.* v. *United States,* 191 F. 798, 800; *United States* v. *Charles L. Heinle Specialty Co.,* 175 F. 299, 300–301. There was no liability for issuing a false guaranty as such to one engaged in an interstate business. But in the 1938 Act, Congress added a new liability in the form

of § 301 (h), making the guarantor liable for giving a false guaranty of the type referred to in § 303 (c) (2). We find it impossible to say that the framers of the 1938 Act added § 301 (h) for the useless purpose of achieving the same result as had been reached under the 1906 Act without such a provision.

We thus conclude that § 301 (h) definitely proscribes the giving of a false guaranty to one engaged wholly or partly in an interstate business irrespective of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. Such a construction is entirely consistent with the interstate setting of the Act. A manufacturer or processor ordinarily has no way of knowing whether a dealer, whose business includes making interstate sales, will redistribute a particular shipment in interstate or intrastate commerce. But if he guarantees that his product is not adulterated or misbranded within the meaning of the Act, he clearly intends to assure the dealer that the latter may redistribute the product in interstate commerce without incurring any of the liabilities of the Act. And the dealer is thereby more likely to engage in interstate distribution without making an independent check of the product. The possibility that a false guaranty may give rise to an illegal interstate shipment by such a dealer is strong enough to make reasonable the prohibition of all false guaranties to him, even though some of them may actually result only in intrastate distribution. By this means, some of the evils which Congress sought to eliminate are cut down at their source and the effectiveness of the Act's enforcement is greatly enhanced.

So construed, § 301 (h) raises no constitutional difficulties. The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce.

Where that effectiveness depends upon a regulation or prohibition attaching regardless of whether the particular transaction in issue is interstate or intrastate in character, a transaction that concerns a business generally engaged in interstate commerce, Congress may act. Such is this case.

The judgment of the District Court is accordingly

Reversed.

MR. JUSTICE JACKSON, dissenting.

Stretch the Food and Drugs Act as we will, I cannot make it cover this charge as a crime. The statutory scheme is to make a crime of "The introduction or delivery for introduction into interstate commerce" of adulterated or misbranded goods. 52 Stat. 1042, 21 U. S. C. § 331 (a) and (d).

But since many shippers buy goods of others and do not know their precise ingredients, Congress allowed an escape for the violator, provided he acted in good faith and could trace the responsibility to another. This he must do by producing a signed guaranty or undertaking, and the statute requires that it shall be conditioned "to the effect, *in case of an alleged violation of* section 331 (a), that such article is not adulterated or misbranded . . . or to the effect, *in case of an alleged violation of* section 331 (d), that such article is not an article" forbidden shipment by stated paragraphs of the Act. (Emphasis added.) 52 Stat. 1043, 21 U. S. C. § 333 (c).

It will be noticed that Congress not only provided but repeated that the statutory bond required is "in case of an alleged violation" by introducing or delivering for introduction of goods in interstate commerce. No such violation has been alleged here; these goods were never introduced or delivered for introduction into interstate

commerce. But the Court seems to think it is enough that there are some grounds for expecting that this crime possibly, or probably, or perhaps pretty certainly, would eventually be committed.

Of course, if the assured had committed this offense and had fallen back on the guarantor, the statute which reached the assured would not be sufficient. To punish the responsible person, it was made a crime to give a false guaranty "referred to in" the statute. 52 Stat. 1042, 21 U. S. C. § 331 (h).

The Government now seeks to exact criminal responsibility on a guarantee, expressly conditioned only "in case of violation," in a case of no violation. Until a violation is alleged, the guaranty plays no statutory role at all. It might afford a cause of action if false, but that is quite different from making it a crime. For it is no guaranty at all for criminal prosecution purposes if violation of neither § 331 (a) nor § 331 (d) is alleged. The statute requires such violation to be alleged only, not proved, in order to put the guarantor rather than the assured to the proof. This is the only instance I recall where the guarantor is liable when there is no breach of the condition of the bond. The whole plan was to have a substituted liability in case the violator of the Act became such in good faith. This decision makes a new, independent and original liability where there has been no alleged violation by moving the goods in interstate commerce.

I do not think we should take such liberties in expanding criminal statutes in which the sovereign once was considered under a duty to be explicit and the subject entitled to the doubt.

UNITED STATES *v.* WYOMING ET AL.

No. 10, Original. Argued April 7, 1947.—Decided June 2, 1947.

1. Title to lands within a section granted to the State as school lands by the Wyoming Enabling Act of July 10, 1890, but which, prior to completion of an official survey, were included in a petroleum reserve by a Presidential order promulgated under authority of the Act of June 25, 1910, *held* not to have vested in the State. Pp. 443–455.

   (a) The Wyoming Enabling Act, though containing words of present grant, did not vest in the State, immediately upon admission into the Union, an indefeasible proprietary interest in the unsurveyed section, of such nature as precluded disposition by the Federal Government for other purposes. Pp. 444–446.

   (b) Nothing in the legislative history of § 14 of the Organic Act of 1868, nor of other Acts passed prior to the Wyoming Enabling Act, supports the State's claim to title in this case. Pp. 446–448.

   (c) The words "but shall be reserved for school purposes only" in § 5 of the Enabling Act, together with the words of present grant in § 4, are not to be construed as immediately vesting in the State an indefeasible interest in the granted lands, nor as a limitation on the Federal Government's power to deal with such lands in a manner consistent with applicable federal statutes. Pp. 448–455.
2. The State can not be deemed to have acquired an indefeasible equitable right to the section on the basis of a survey which was incomplete. Pp. 455–456.
3. On the claim of the United States to recover for oil taken from public lands, the pleadings in this case put in issue the defendants' good faith, and the master erred in excluding evidence relating to this issue and in finding that either or both of the defendants had acted innocently. Pp. 457–459.
4. The plaintiff's exception to the master's failure, even on the present record, to make findings of the defendants' bad faith and to recommend a decree awarding damages accordingly, can not be sustained. Pp. 459–460.
5. The good faith issue having been foreclosed in defendants' favor by the master before any evidence had been introduced and consistently throughout the hearing, it was not incumbent upon the defendants to make an offer of proof of good faith in order to have a trial of the issue if the master should be found to have been wrong. P. 459.

6. Constructive knowledge of the owner's title does not demonstrate a trespasser's bad faith as a matter of law. P. 460.
7. Upon the record in this case, it is necessary to try the issue of defendants' good faith throughout the entire period in dispute, as the basis for determining the measure of plaintiff's recovery. P. 460.
8. The master should make special findings—so far as the parties request them and adduce competent evidence to support them—as to the value of the oil produced and the amount and nature of any collateral proceeds from the operation, separately, and as to the amount of each item of income and expense by the month and year. P. 460.

This was an original suit in equity in this Court, brought by the United States against the State of Wyoming and the Ohio Oil Company, to quiet title in the United States to certain lands in Wyoming and to recover for oil removed from the lands by the Company under a lease from the State. The case was referred to a special master. Upon exceptions by the plaintiff and the defendants to the master's report, the case is recommitted to him for further proceedings in conformity with the opinion of this Court, p. 461.

Marvin J. Sonosky argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Walter H. Williams* and *Robert M. Vaughan.*

Donald R. Richberg and *C. R. Ellery* argued the cause for defendants. With them on the brief were *Norman B. Gray,* Attorney General of Wyoming, *A. M. Gee, Hal W. Stewart, Harold H. Healy* and *W. H. Everett.*

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

The United States filed a complaint in this Court against the State of Wyoming and The Ohio Oil Company to establish plaintiff's title to certain Wyoming lands claimed by the State, and to recover for oil which the

Company has taken from the lands under a lease from the State.[1]

By joint answer, the defendants claimed title in the State, and that both defendants have at all times in good faith believed title to be in the State.

The case was referred to a special master, who heard evidence and argument, and submitted to the Court a report, in which he recommended a decree quieting plaintiff's title to the lands in question, but denying plaintiff any recovery for the oil heretofore taken. Both plaintiff and defendants have entered exceptions to the adverse parts of the report, and the case is now before us on such exceptions.[2]

The lands in dispute are those lying within Section 36, Township 58, Park County, Wyoming. It is conceded that plaintiff originally had title to these lands as part of the public lands of the United States. The master held that the Enabling Act of July 10, 1890,[3] on which defendants rely as the source of their rights, properly construed, would operate to vest title in the State only as of the date that an official survey of the lines of the Section was approved by the Commissioner of the General Land Office, and then only if no inconsistent disposition of the lands had been previously made. The master found, however, that no such survey was made and approved until July 27, 1916. Several months earlier, on December 6, 1915, these lands had been placed in a petroleum reserve by Presidential order.[4]

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[1] Jurisdiction of this Court is invoked under Article III, § 2, cl. 2, of the Constitution, and § 233 of the Judicial Code (28 U. S. C. § 341). *United States* v. *Texas*, 143 U. S. 621 (1892).

[2] The master's report was filed October 14, 1946. Plaintiff's exceptions thereto were filed on November 29 and defendants' on December 2, 1946. Argument was heard by the Court on April 7, 1947.

[3] 26 Stat. 222.

[4] This order was promulgated under authority of the Act of June 25, 1910, 36 Stat. 847.

Defendants' exceptions to the master's findings and conclusion relating to title give expression to two basic contentions: first, that the Enabling Act immediately vested in the State an indefeasible right to whatever lands would be found on later survey to lie within Section 36; second, that a so-called Coleman survey of 1892 identified Section 36 sufficiently to create then in the State an indefeasible equity, which ripened into full legal title when the complete survey was made and approved in 1916. These contentions will be further elaborated and discussed in order.

Consistent with the policy first given expression in the Ordinance of 1785, the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.[5] This Court has frequently been called upon to construe the provisions and limitations of such grants. It has consistently been held that under the terms of the grants hitherto considered by this Court, title to unsurveyed sections of the public lands which have been designated as school lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. Prior to survey, those sections are a part of the public lands of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. If upon survey it is found that the Federal Government has made a previous disposition of the section, the State is then entitled to select lieu lands as indemnity in accordance with provisions incorporated into each of the school-land grants. The interest of the

[5] The Land Ordinance of 1785 provided: "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township; . . ." Between 1802 and 1846 the grants were of the 16th section in each township; thereafter, of sections 16 and 36. In some instances additional sections have been granted. *United States* v. *Morrison,* 240 U. S. 192, 198 (1916).

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State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government.[6]

Defendants contend, however, that regardless of the rule generally applicable in school-grant cases, the provisions of the Wyoming Enabling Act are such that upon her admission into the Union in 1890, an indefeasible proprietary interest in Sections 16 and 36 in each township, whether surveyed or unsurveyed, vested immediately in the State, except as to such sections as had been disposed of previously by the Federal Government for other purposes. This interest, it is contended, is of such a nature, as to preclude any appropriation or reservation of unsurveyed Sections 16 and 36 by the Federal Government after the date of Wyoming's admission into the Union. It is defendants' position, therefore, that the order of the President of the United States issued December 6, 1915, which caused the lands here in issue to be included in Petroleum Reserve No. 41, was not sufficient to defeat the State's interest, even if it be assumed that a survey of that section had not been completed at that time. We, accordingly, turn our attention to the provisions of the Wyoming Enabling Act which defendants rely upon to support their contentions.

Section 4 of the Enabling Act provides:

> "That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto

[6] *Wisconsin* v. *Lane*, 245 U. S. 427 (1918); *United States* v. *Stearns Lumber Co.*, 245 U. S. 436 (1918); *United States* v. *Morrison, supra; Minnesota* v. *Hitchcock*, 185 U. S. 373 (1902); *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634 (1877). And see *Wyoming* v. *United States*, 255 U. S. 489, 500–501 (1921).

> . . . are hereby granted to said State for the support of common schools, . . . *Provided,* That section six of the act of Congress of August ninth, eighteen hundred and eighty-eight,[7] . . . shall apply to the school and university indemnity lands of the said State of Wyoming so far as applicable."

Defendants first point to the fact that in the granting clause, Congress employed words of present grant. This is said to evince an intention to vest immediately in the State, not only legal title to sections 16 and 36 when surveyed and not otherwise disposed of, but also an indefeasible proprietary interest in the unsurveyed sections of the school lands. We believe that this contention is precluded by earlier decisions of this Court. In *Heydenfeldt* v. *Daney Gold & Silver Mining Co.,* 93 U. S. 634 (1877), decided some thirteen years before the passage of the Wyoming Act, this Court construed the granting clause of the Nevada Enabling Act, which contains language substantially identical to that of § 4 of the Wyoming Act,[8] as not

[7] Section 6 of the Act of August 9, 1888, 25 Stat. 393, provides: "That where lands in the sixteenth and thirty-sixth sections, in the Territory of Wyoming, are found upon survey to be in the occupancy, and covered by the improvements of an actual pre-emption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional or have been or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the Territory not otherwise legally claimed or appropriated at the time of selection, ..."

[8] Section 7 of the Nevada Enabling Act, 13 Stat. 30, 32, provides: "That sections numbers sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal subdivisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools."

immediately vesting in the State title to sections of the school lands unsurveyed at the date of admission.[9] In *United States* v. *Morrison,* 240 U. S. 192, 205 (1916), this Court stated: "We regard the decision in the *Heydenfeldt Case* as establishing a definite rule of construction."

It is significant, also, that three years before the passage of the Wyoming Act, the Secretary of the Interior, in construing the granting clause of the Colorado Enabling Act, which also contains language of present grant, took the position that title to unsurveyed school lands passes to the State only at the date of survey and then only where the Federal Government has made no other disposition of the land prior to that time.[10]

Defendants urge, however, that the pertinent language of the Wyoming Enabling Act should be considered in connection with the legislative history of the Organic Act of 1868,[11] under the authority of which Wyoming was organized into a territory. It is pointed out that § 14 of the Organic Act as originally introduced reserved sections 16 and

[9] Defendants assert that the *Heydenfeldt* case cannot be regarded as authority here because in reaching its result in the *Heydenfeldt* case, this Court relied in part upon circumstances peculiar to Nevada. The same argument was rejected in the *Morrison* case, *supra* at 205: "It is also urged that the court emphasized the fact that there had been no sale or disposition of the public lands in Nevada prior to the Enabling Act and therefore that the clause could refer only to future disposition; whereas, in the case of Oregon, there had been earlier provisions for the disposal of the public domain. But Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the States on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another; it covered other dispositions, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed."

[10] *State of Colorado,* 6 L. D. 412.

[11] 15 Stat. 178.

36 in each township for school purposes at the time "when the lands in said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market. . . ." During the course of the debates on the bill, § 14 was amended to eliminate the phrase quoted above, so that as finally enacted the Organic Act made a present reservation of the lands for school purposes.[12] It is not defendants' contention that § 14 of the Organic Act must necessarily prevail over the provisions of the Enabling Act. It is urged, however, that as a guide to construction, the legislative history of § 14 of the Organic Act clearly indicates an intention on the part of Congress to vest in Wyoming, at the date of its admission as a State, immediate interests in all school lands, whether surveyed or unsurveyed, such as to defeat any subsequent attempts by the Federal Government to reserve the sections for other purposes.

We find the argument unconvincing. During the course of the congressional debates which preceded the amending of § 14 of the Organic Act, concern was expressed by certain members of Congress that delaying the reservation for school purposes until the date of survey would leave open the possibility that the most choice school lands would be settled upon by squatters, preemptors, or homesteaders, prior to survey so as to defeat the reservation of those lands for school purposes. It was apparently to deal with that situation that the amendment was passed. We find nothing in the desire of Congress to preserve the reservation of the school lands against the claim of individual settlers, however, as evincing any intention to strip from the Federal Government the power to deal with those lands in the public interest as authorized by the applicable federal statutes. That Congress did not so intend is indicated by the fact that only four

[12] Cong. Globe, 40th Cong., 2d Sess., 2801–2802.

years after the passage of the Organic Act, Congress reserved a large tract of the public lands in Wyoming for the Yellowstone National Park.[13] In the Enabling Act, it was specifically provided that Wyoming was not entitled to indemnity for sections 16 and 36 in the townships included within the Yellowstone reservation. Even as to the rights of individual settlers on the school lands, Congress pursued no consistent course. Although the amendment to § 14 of the Organic Act apparently was passed to protect the right of the Territory to the school lands against the claim of such individuals, Congress, in the Act of August 9, 1888,[14] gave recognition to the claims of homesteaders and preemptors established prior to survey and granted to the Territory the right to select other portions of the public lands in lieu thereof. We conclude, therefore, that nothing in the legislative history of the acts passed before the Wyoming Enabling Act gives support to the State's claim to title in this case.

Defendant's principal contention, however, is that, regardless of the construction which might be required if the granting clause of the Enabling Act stood alone, that clause, read in connection with § 5 of the Act, gives clear support to their position. Section 5 provides as follows:

> "That all lands herein granted for educational purposes shall be disposed of only at public sale, . . .; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Defendants vigorously assert that the phrase "but shall be reserved for school purposes only" completely and irrevocably divested the Federal Government of power

[13] Act of March 1, 1872, 17 Stat. 32.

[14] See note 7, *supra*.

to dispose of or to deal with any sections 16 and 36 of the public lands in the State not sold or otherwise disposed of prior to the passage of the Enabling Act. This phrase read in connection with the language of present grant in § 4, it is asserted, reveals a clear intention to vest immediately in the State an indefeasible interest in all such lands. We do not believe that the language should be so construed.

The phrase "but shall be reserved for school purposes only" should not be considered apart from the language which immediately precedes it. The clause beginning with the semicolon in the last sentence in the section clearly and explicitly treats the claims of individuals to school lands asserted under the federal land laws and provides that those claims should not prevail against the State. The phrase upon which Wyoming relies should be construed as an affirmation of the State's interest as opposed to the claims of such individuals. The phrase, however, should not be construed as a limitation on the Federal Government's powers to deal with such lands in a manner consistent with the applicable federal statutes. The powers of the Federal Government with respect to the public lands, as contrasted to the claims of individuals asserted under the land laws, are nowhere mentioned in the section. We think that in the absence of such language, the section should not be construed as a limitation on those powers.[15]

Convincing support for this construction is found both in the legislative history of the language contained in § 5 of the Wyoming Act and in subsequent congressional enactments. Language identical to the last clause of § 5 first appeared as part of § 11 of the Act of February 22,

[15] Cf. *United States* v. *United Mine Workers of America,* 330 U. S. 258 (1947); *Guarantee Title & Trust Co.* v. *Title Guaranty & Surety Co.,* 224 U. S. 152, 155 (1912).

1889,[16] the Enabling Act for the States of Washington, Montana, North Dakota, and South Dakota. A bill authorizing the admission of South Dakota, and containing language similar to that later included in § 5 of the Wyoming Act, was first passed by the Senate.[17] When the bill came before the House for consideration, an amendment was approved which struck out all the provisions of the Senate bill following the enacting clause and substituted a bill calling for the admission of Washington, Montana, North Dakota, and South Dakota.[18] As finally passed by the House, the substitute bill provided that rights of settlers to the school lands should be preserved where settlements were made prior to survey or before approval of the Act of admission.[19] The conference committee, however, rejected those provisions; and the Act as passed included language similar to that in the original Senate bill and identical to that later incorporated into the Wyoming Act, providing that the claims of the States to the school sections should prevail over those of the individual settlers.[20] It will be observed that the conflict between the provisions in the House bill and the Senate bill related to the competing interests of the States and the individual settlers. Nothing in this history indicates that by accepting the alternative provided in the Senate bill and resolving the conflict in favor of the States, Congress intended, also, to extinguish the powers of the Federal Government, theretofore exercised, with respect to the

[16] 25 Stat. 676.

[17] 19 Cong. Rec. 2802; Sen. Journ. 50th Cong., 1st Sess., p. 696. Section 6 of that bill contained the following language: ". . . ; and such sections shall not be subject to pre-emption or entry, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

[18] 20 Cong. Rec. 806–812.

[19] *Id.* at 948, 951.

[20] *Id.* at 2104, 2116.

unsurveyed sections of the school lands. Nor is there any evidence that Congress intended such a departure from previous practice when it incorporated an identical clause into § 5 of the Wyoming Act. Indeed, the House Committee Report states that the Enabling Act gives to Wyoming "the usual land grants," [21] and the manager of the bill in the House of Representatives during the course of the debates made a similar statement.[22]

Additional support for the construction which we have indicated as proper may be found in subsequent congressional enactments. Thus in the Act of February 28, 1891, which became law only seven months after the passage of the Wyoming Enabling Act, Congress clearly revealed its understanding that the Federal Government had retained its powers to reserve and dispose of the unsurveyed school lands. That Act, the pertinent language of which is set out in the margin,[23] attempts, among other things, to establish a uniform policy with respect to the granting of lieu lands to the States where upon survey it is found that the designated sections are subject to homestead and pre-emption claims or where the Federal Government has included such sections within a reser-

[21] H. R. Rep. No. 39, 51st Cong., 1st Sess., 26.

[22] 21 Cong. Rec. 2707.

[23] 26 Stat. 796. "Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: . . . ."

vation or has disposed of them in some other way. It should be observed that when dealing with the right of the States to select lieu lands where homestead and preemption claims are involved, Congress first inserted language in the Act designed to create in individuals holding such claims rights superior to those of the States to the school sections upon which settlement before survey has been made. But in dealing with the selection of lieu lands where the Federal Government prior to survey has included the designated school sections in a reservation or has otherwise disposed of them, Congress did not find it necessary first to create the power in the Federal Government to make such reservations or dispositions. Rather, on the apparent assumption that such powers had been retained by the Federal Government and were presently existing, Congress merely provided for the selection of lieu lands by the States where upon survey it is found that those powers have been exercised. It is apparent that Congress intended that the Act of 1891 should apply to Wyoming as well as to the other school-land States.[24] Indeed, Wyoming on at least two previous occasions so contended and succeeded in obtaining benefits under the Act.[25] We need not now consider the effect of the Act of 1891 insofar as it may be inconsistent with the provisions of the Wyoming Enabling Act, for it is our view that with respect to the problem of this case no inconsistency exists. It is not without significance, also, that in 1934, Congress, after having been fully apprised of the administrative construction of the school-land provisions of the Wyoming Enabling Act,[26] which is in accord with the construction which we have made, amended § 5

[24] H. R. Rep. No. 2384, 51st Cong., 1st Sess.

[25] *Wyoming* v. *United States,* 255 U. S. 489 (1921); *State of Wyoming,* 27 L. D. 35.

[26] H. R. Rep. 229, 73d Cong., 1st Sess.; S. Rep. No. 10, 73d Cong., 1st Sess.

of that Act but reenacted all the provisions of that section which are pertinent to the present case.[27]

Defendants' view that, by virtue of the language of the Enabling Act, Congress extinguished the powers of the Federal Government subsequently to dispose of the unsurveyed school sections in the exercise of its governmental functions, admittedly would place Wyoming in a favored position among the school-grant States. Such a result does not accord with the congressional expectation that the school grant should have "equal operation and equal benefit in all the public land States and Territories." [28] Defendants suggest no special circumstances or peculiar considerations of policy which convincingly indicate a purpose on the part of Congress to place Wyoming on other than an equal footing with other States with respect to the powers of the Federal Government in the unsurveyed school sections.

Furthermore, one of the important recurring problems faced by Congress during the period in which the Wyoming Enabling Act was passed was the necessity of reserving tracts of the public lands to accomplish such important purposes as preserving the national forests and mineral resources, establishing public parks, and the like.[29] Vesting in the State an immediate and irrevocable interest in the school sections before such sections had been identified by survey would be to complicate the performance of the Government's obligation with respect to the public

[27] 48 Stat. 350. Section 5 of the Enabling Act was amended so as to permit the State to lease the school lands for periods of ten years as contrasted to a five year limitation contained in the section as originally enacted.

[28] H. R. Rep. No. 2384, 51st Cong., 1st Sess., 1. S. Rep. No. 502, 51st Cong., 1st Sess., 1.

[29] Thus the same volume of the Statutes at Large containing the Wyoming Enabling Act also contains at least two pieces of such legislation. 26 Stat. 478, 650.

lands. That Congress intended such complication seems most unlikely when it is observed that the policy underlying the grant of lands to the State for school purposes could be achieved without producing that result. Thus § 4 of the Enabling Act makes provision for indemnification to the State where the designated school sections are disposed of for other purposes by authorizing the selection of lands by the State in lieu thereof. Section 6 of the Act of August 9, 1888,[30] which was incorporated into § 4 of the Enabling Act "so far as applicable," specifically provides for the selection of lieu lands where the school sections "have been or shall hereafter be reserved for public purposes."

It is significant that for a period extending over half a century, the land decisions of the Department of the Interior have consistently taken the position that title to unsurveyed school sections passes to the State only upon completion of the survey, and prior to that time the Federal Government is not inhibited from making such reservations and dispositions of the lands as required by the public interest and as authorized by applicable statutes. Many of those decisions involved statutory language substantially identical to that in the Wyoming Enabling Act.[31] We should be slow at this late date to upset the rulings ". . . of the department of the Government to which is committed the administration of public lands." [32]

For the reasons stated above, we hold that at the date of her admission to the Union, Wyoming acquired no such

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[30] See note 7, *supra.*

[31] *South Dakota* v. *Riley,* 34 L. D. 657; *State of Montana,* 38 L. D. 247; *State of Utah,* 53 L. D. 365. And see *F. A. Hyde & Co.,* 37 L. D. 164; *State of New Mexico,* 52 L. D. 679. Also in accord are decisions in *Utah* v. *Work,* 55 App. D. C. 372, 6 F. 2d 675 (1925); *Thompson* v. *Savidge,* 110 Wash. 486, 188 P. 397 (1920).

[32] *California* v. *Deseret Water, Oil & Irrigation Co.,* 243 U. S. 415, 421 (1917).

interest in the lands in issue that could not be defeated by the inclusion of those lands in a petroleum reserve by the Federal Government acting prior to survey.

We also think that defendants' reliance on the Coleman survey of 1892 as the basis of an indefeasible equitable right to Section 36 is misplaced, and may be answered briefly.

That survey was undertaken pursuant to a request from the State to the United States Surveyor General that Township 58 be surveyed and subdivided, in order to permit the State to make selections of school lands, and the contract and instructions for the survey so directed. The survey which was then made, however, actually fixed only the boundaries of Township 58, and marked one-mile intervals on those boundaries, but did not subdivide the township. Section 36 lies in the township's southeast corner, and its southern and eastern boundaries are concurrent with part of the southern and eastern township boundaries, but the northern and western section boundaries remained undetermined. This was not a completed survey of Section 36.[33]

Defendants no longer contend that it was. They argue only that it "identified" Section 36, or made it "susceptible of identification by protraction," sufficiently that the State should in equity be held to have acquired vested rights in the Section as of the date this survey was approved. They claim support for this position in several decisions recognizing that the title of certain western railroads granted lands by the United States vested when the line of route was selected and a plan thereof filed, whether or not the adjacent lands had then been surveyed.[34]

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[33] R. S. 2395, 43 U. S. C. § 751. *Barnhurst* v. *State of Utah,* 30 L. D. 314; *Harris* v. *State of Minnesota,* Copp L. L. (1875–82) 631.

[34] Cf. *Santa Fe Pac. R. Co.* v. *Lane,* 244 U. S. 492 (1917); *St. Paul & Pac. R. Co.* v. *Northern Pac. R. Co.,* 139 U. S. 1 (1891); *Grinnell* v. *Chicago, Rock Island & Pac. R. Co.,* 103 U. S. 739 (1881).

We find no merit in this argument. The railroad land grant cases are not apropos. Not only do they deal with statutes different from the one before us in the present case, but also they have nothing to do with the identification of unsurveyed lands by the protraction of partial surveys. In the *Morrison* case [35] this Court held a completed but unapproved survey inadequate to vest any rights to school lands. *A fortiori,* defendants are not benefited by the Coleman survey.

For the foregoing reasons, defendants' exceptions to the master's findings and conclusions in respect to title are overruled.

Having decided that plaintiff has title to Section 36, we now turn to the question of its right to recover a money judgment because of the defendant Company's oil operations thereon.

It was shown that in 1917, under a lease from the State, the Company entered Section 36 and drilled five wells, some of which are still in production. For the period from the Company's entry on the land until December 31, 1944,[36] there was evidence of the amount and market value of oil produced and of the capital and operating expenses of this production, each by the month, and of the collateral "steam earnings," the royalties and taxes paid to the State, and the overhead expenses allocable to this production, each by the year.[37] For the purpose of proving the bad faith of the trespass, plaintiff offered

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[35] *United States* v. *Morrison, supra,* note 5.

[36] Accounts for the period January 1, 1945, to date of hearing were to be prepared and submitted later, along with those for any subsequent periods for which defendants might be liable.

[37] The total of each of these items for the entire period was as follows: value of oil produced, $167,049.54; steam earnings, $1,267.99; capital expenses, $118,628.84; operating expenses, $70,083.73; overhead expenses, $22,461.00; taxes, $4,317.40; royalties, $17,306.30. It does not appear what the nature of the so-called "steam earnings" was.

evidence tending to show that defendants knew of plaintiff's claim to the land and realized its superiority over their own claim at least as early as 1929.

This last evidence the master refused to admit. He thought that, in order to recover for a "bad faith" trespass, plaintiff was required to put the question in issue by alleging "bad faith" in the complaint, which it had not done. He also thought that plaintiff's allegation of defendants' claim of right in Section 36 was, in effect, an admission of defendants' good faith. Without having tried the bad faith issue, the master stated that both defendants sincerely believed in their asserted rights, and made a finding of the State's good faith. From this he concluded that plaintiff's recovery should be measured by the gross proceeds realized on the operation, less the proper expenses incurred.

From the other evidence heretofore mentioned, the master found that the total amount of the Company's gross proceeds, including both the value of oil produced and steam earnings, was $168,317.53, and that its total expenses were $232,797.27, including royalties paid in the amount of $17,306.30.[38] He held that all proven elements of the Company's expenses except royalties were properly deductible. As expenses so allowed had been about $47,000.00 greater than gross proceeds, the master concluded that plaintiff should recover nothing.

Plaintiff excepts to these findings and conclusions in several respects. First, it maintains that the pleadings properly framed the issue of bad faith, and contends that the master therefore erred in excluding evidence relating to this issue, and in finding that either or both of the defendants had acted innocently.

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[38] The totals found by the master are the sums of the appropriate individual items which were in evidence, and which were recited in footnote 37. No question was raised as to the accuracy of any of these figures.

An agreed premise is found in the rule that one who "wilfully" or "in bad faith" trespasses on the land of another, and removes minerals, is liable to the owner for their full value computed as of the time the trespasser converted them to his own use, by sale or otherwise, but that an "innocent" trespasser, who has acted "in good faith," may deduct from such value the expenses of extraction.[39] It is also clear that when suit is brought for the value of minerals wrongfully removed from the plaintiff's land, and the trespass and conversion are established, the burden of pleading and proving good faith is on the defendant.[40] The "good faith" contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals.[41]

Thus, in this case, plaintiff's allegation that defendants claimed rights in Section 36, made as a basis for a prayer to have title quieted in plaintiff, cannot be deemed equivalent to an admission of defendants' good faith. Plaintiff also alleged its own title, the lack of any right or title in defendants, that the Company was there engaged in the production of oil, and that the value of the oil theretofore extracted was in excess of $165,000. It then prayed for a recovery of "the full value of all gas, oil, and other

[39] See *Martel* v. *Hall Oil Co.*, 36 Wyo. 166, 178, 253 P. 862, 864, 255 P. 3 (1927); *United States* v. *St. Anthony R. Co.*, 192 U. S. 524 (1904); *Pine River Logging Co.* v. *United States*, 186 U. S. 279 (1902); *Wooden-ware Co.* v. *United States*, 106 U. S. 432 (1882); *United States* v. *Homestake Mining Co.*, 117 F. 481 (C. C. A. 8th 1902); *Winchester* v. *Craig*, 33 Mich. 205 (1876); *Livingstone* v. *Rawyards Coal Co.*, 5 L. R. App. Cas. 25 (H. L. 1880); Summers, *Oil and Gas*, §§ 23, 24.

[40] *Liberty Bell Gold Mining Co.* v. *Smuggler-Union M. Co.*, 203 F. 795, 802 (C. C. A. 8th 1913); *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corp.*, 20 F. 2d 67, 71 (C. C. A. 6th 1927).

[41] *Guffey* v. *Smith*, 237 U. S. 101 (1915); *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428 (1892). Cf. *Hall Oil Co.* v. *Barquin*, 33 Wyo. 92, 137, 237 P. 255, 270 (1925).

petroleum products extracted from said land by the defendants or either of them." In the answer, besides claiming title and oil rights, defendants averred their good faith belief that they had such rights, which plaintiff traversed in a reply. We have no doubt that these pleadings put the question of defendants' good faith in issue. Obviously, the master's statement in his report that the defendants believed in their asserted rights is unwarranted on the present record. We conclude, therefore, that the master erred in excluding any competent evidence material to the good faith issue, and in finding that either or both defendants acted in good faith.

Second, plaintiff excepts to the master's failure, even on the present record, to make findings of defendants' bad faith and to recommend a decree awarding damages accordingly.[42] It urges, as one ground for this exception, that defendants, having the burden of proof on that issue, failed to introduce sufficient evidence to make a *prima facie* showing of good faith.

For reasons already suggested, we need not consider whether defendants carried that burden. The view that the good faith issue was foreclosed in defendants' favor was expressed by the master before any evidence had been introduced, and consistently throughout the hearing. Even if defendants had doubted the correctness of this view, they were not bound to repudiate it and make an offer of proof of good faith in order to have a trial of the issue if the master should prove to be wrong.

As another ground, plaintiff urges that defendants have at all times since the beginning of this trespass had constructive knowledge of plaintiff's title, and that either they have "intentionally or negligently failed to ascertain

[42] The measure of damages claimed by plaintiff's exceptions on the theory about to be stated are, as against the Company, the full proceeds of the oil plus "steam earnings," and as against the State, the amount of royalties received.

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from the readily available public records who owned the land," or they have acted "with full knowledge that the section belonged to the United States."

It is clear, however, that constructive knowledge of the owner's title does not demonstrate defendants' bad faith as a matter of law.[43] As to whether an intentional or negligent failure to ascertain the true incidence of title alone constitutes bad faith, we need not now decide, as no such fact has been established.

Plaintiff's alternative contention that we should now enter a finding of defendants' bad faith for the post-1929 period at least, because as to it "there is positive proof that the Company knew . . . the United States, not Wyoming, owned the land," may be answered in the same way. Plaintiff proffered evidence of such knowledge, but we cannot say that this evidence amounted to conclusive proof. We think the necessity of trying the issue of defendants' good faith throughout the entire period in dispute, preliminary to determining the measure of plaintiff's recovery, cannot be avoided.

Third, plaintiff urges and we agree that the master should make special findings—insofar as the parties request, and offer competent evidence to support them—as to the value of the oil produced and the amount and nature of any collateral proceeds from the operation, separately, and as to the amount of each item of income and expense by the month or year. Such action should enable the Court to dispose of the case on the next hearing, regardless of any revisions it might make in the master's findings, conclusions, or recommended decree.

In its exceptions to the master's report and its argument here, plaintiff has raised several other questions, the materiality of each of which depends on whether the trespass

[43] *Guffey* v. *Smith, supra,* 237 U. S. at 118.

was committed in good faith. Obviously, such questions must remain moot until this issue is decided.

The case is recommitted to the master for further proceedings in conformity with this opinion.

So ordered.

COPE *v.* ANDERSON, RECEIVER.

NO. 593. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued April 28, 1947.—Decided June 2, 1947.

1. Within the meaning of the Ohio "borrowing statute," the "cause of action" in a suit brought in Ohio against residents of that State to enforce their statutory double liability on shares of an insolvent Kentucky national bank "arose" in Kentucky, and the applicable statute of limitations was the five-year statute of Kentucky. Pp. 464–468.
2. Within the meaning of the Pennsylvania "borrowing statute," the "cause of action" in a suit brought in Pennsylvania against a resident of that State to enforce a statutory double liability on shares of an insolvent Kentucky national bank "arose" in Kentucky, and the applicable statute of limitations was the five-year statute of Kentucky. P. 468.
3. The national bank having been authorized to do its banking business in a Kentucky city and not having done business elsewhere, the fact that its shares were held in the portfolio of a Delaware corporation did not make its business any the less local. P. 467.
4. No federal statute having fixed any period of limitations in respect of suits to enforce the statutory double liability of shareholders of insolvent national banks, the statute of limitations of the State in which the suit is brought applies. P. 463.
5. Where the concurrent jurisdiction of equity to enforce a legal obligation derives only from the scope of the relief sought and the multitude of the parties sued, equity will withhold relief if the applicable statute of limitations would bar the concurrent legal remedy. Pp. 463–464.

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*Together with No. 656, *Anderson, Receiver,* v. *Helmers et al.,* on certiorari to the Circuit Court of Appeals for the Sixth Circuit.

6. Although the period in which a suit to enforce the statutory double liability of a shareholder of an insolvent national bank must be brought is governed by state statutes of limitation, the question of when the period begins to run depends upon when, under federal law, the Comptroller of the Currency, or his authorized agent, is empowered by federal law to bring suit. P. 464.
7. In the instant cases, the suits could not be brought by the Comptroller or his agent until the date fixed by the Comptroller for payment, so the period of limitations did not begin to run until that date. P. 464.

156 F. 2d 972, reversed.

156 F. 2d 47, affirmed.

No. 593. A suit brought against petitioner to enforce a statutory double liability on shares in an insolvent national bank was dismissed by the District Court as barred by limitations. 62 F. Supp. 705. The Circuit Court of Appeals reversed. 156 F. 2d 972. This Court granted certiorari. 329 U. S. 707. *Reversed,* p. 468.

No. 656. In a suit against respondents to enforce a statutory double liability on shares of an insolvent national bank, a motion to dismiss on the ground, *inter alia,* that the suit was barred by limitations was overruled by the District Court. The Circuit Court of Appeals reversed. 156 F. 2d 47. This Court granted certiorari. 329 U. S. 707. *Affirmed,* p. 468.

Harold Evans argued the cause for petitioner in No. 593. With him on the brief was *John Wintersteen.*

Robert S. Marx argued the cause for petitioner in No. 656 and respondent in No. 593. With him on the briefs were *Frank E. Wood, Harry Kasfir* and *Wm. C. Kelly.*

Murray Seasongood argued the cause for respondents in No. 656. With him on the brief were *Robert P. Goldman* and *Joseph A. Segal.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In *Anderson* v. *Abbott,* 321 U. S. 349, we held that the shareholders of BancoKentucky Company, a bank-stock-holding company, were liable under 12 U. S. C. §§ 63, 64, for an assessment on shares of an insolvent national bank held in the portfolio of the holding company. That suit was brought in a Kentucky District Court against Banco stockholders residing in that District. These suits in equity were brought in Federal District Courts in Ohio and Pennsylvania to enforce assessments against Ohio and Pennsylvania stockholders of Banco. In No. 656 the District Court in Ohio overruled a motion to dismiss made on the ground, among others, that the bill showed on its face that the action was barred by an Ohio statute of limitations.[1] The Sixth Circuit Court of Appeals reversed. 156 F. 2d 47. In No. 593 the Third Circuit Court of Appeals reversed the decision of the District Court in Pennsylvania which had held the action there barred by the Pennsylvania statute of limitations. 156 F. 2d 972. We granted certiorari to consider both cases. 329 U. S. 707.

There is no federal statute of limitations fixing the period within which suits must be brought to enforce the statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. *McDonald* v. *Thompson,* 184 U. S. 71; *McClaine* v. *Rankin,* 197 U. S. 154, 158; *Rawlings* v. *Ray,* 312 U. S. 96, 97. Even though these suits are in equity, the states' statutes of limitations apply. For it is only the

[1] For convenience, the motion was made by only four defendants who are respondents here. The case was continued as to the others pending final disposition of the question concerning the statute of limitations, the only ground of the motion to dismiss upon which the District Court passed.

scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. *Russell* v. *Todd,* 309 U. S. 280, 289 and cases cited. See also *Guaranty Trust Co.* v. *York,* 326 U. S. 99; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395–396.

But even though the period in which suit must be brought is governed by state limitations statutes, we have previously decided that the question of when the applicable state statute of limitations begins to run depends upon when, under federal law, the Comptroller of the Currency, or his authorized agent, is empowered by federal law to bring suit. And the Comptroller's agent, the Receiver here, could not bring these actions until the date for payment fixed by the Comptroller. *Rawlings* v. *Ray, supra,* 98, 99; *Fisher* v. *Whiton,* 317 U. S. 217, 220, 221. The date for payment fixed by the Comptroller in this instance was April 1, 1931. These actions were instituted more than five but less than six years after the payments became due under the Comptroller's assessment order.

With regard to No. 656, the Ohio proceeding, the Ohio statute of limitations provides that suit "upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued." Ohio Gen. Code (Page, 1938) § 11222. This statute describes the liability sued on here, and if applicable does not bar this suit. But the scope of this general provision is narrowed by another known as the "borrowing statute" which reads:

> "If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the

> statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years." Ohio Gen. Code (Page, 1938) § 11234.

If the cause of action arose in Kentucky, the "borrowing statute" applies Kentucky's statute of limitations, and this suit is barred. For Kentucky's law requires that an "action upon a liability created by statute . . . shall be commenced within five years after the cause of action accrued." Ky. Rev. Stat. (Baldwin, 1943) § 413.120.

The Receiver contends that the Ohio borrowing statute's language "the laws of any state or country where the cause of action arose" has reference to "a system of jurisprudence other than Ohio's," and does not refer "necessarily to territorial limits" within which events occurred giving rise to an enforceable obligation. The place where the events giving rise to a cause of action occur is said to be "important only insofar as the laws of that place are controlling." Under this argument, the cause of action here could not have "arisen" in any state since the statutory obligation of shareholders was not imposed or controlled by state law. Hence, the argument runs, the Ohio law did not contemplate borrowing any state statute of limitations in a case where liability is governed by federal law. And no federal statute of limitations could be borrowed in this case for none existed. Therefore, it is argued, only Ohio's general six-year statute of limitations applies.

The consequence of accepting this contention would be that the Ohio borrowing statute would have no effect at all as to suits brought in Ohio state courts to enforce actions authorized by federal law. For, of course, Ohio courts could never borrow a non-existent federal statute of limitations. And if there were a federal statute of limitations governing a federally created right, that statute

would control of its own force. *Herget* v. *Central National Bank & Trust Co.*, 324 U. S. 4. We have been cited to no decision by any Ohio court which would lead us to believe that its borrowing statute should be given such a sterilizing interpretation. *Cf. Townsend* v. *Eichelberger*, 51 Ohio St. 213, 216, 38 N. E. 207, 208.

We find it unnecessary to our decision to discuss the contentions made here concerning differences between a "cause of action" and a "liability." The Ohio Supreme Court has itself said that a "cause of action is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf." *Baltimore & O. R. Co.* v. *Larwill*, 83 Ohio St. 108, 115–116, 93 N. E. 619, 621. We have been referred to nothing in Ohio statutes or decisions which indicates that it used "cause of action" in any different sense in its borrowing statute. The purpose of the state's borrowing statute,[2] as those of other states,[3] was apparently to require its courts to bar suits against an Ohio resident if the right to sue him had already expired in another state where the combination of circumstances giving rise to the right to sue had taken place. Moreover, limitations on federally created rights to sue have similarly been considered to be governed by the limitations law of the state where the crucial combination of events transpired. *Seaboard Terminals Corp.* v. *Standard Oil Co.*, 24 F. Supp. 1018, 104 F. 2d 659; *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 19–20. See *Campbell* v. *Haverhill*, 155 U. S. 610; *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390, 397.

Our appraisal of the Ohio borrowing statute, the opinions of the courts of that state, and the circumstances

[2] See 25 Ohio Jurisprudence 435–440 (1932).

[3] See Note, 75 A. L. R. 203 (1931); Note, 35 Col. L. Rev. 762 (1935).

leading to this suit, persuade us that the cause of action "arose" in Kentucky within the meaning of the Ohio borrowing statute. The bank was authorized to do its banking business in Louisville and did business in no other place. See 12 U. S. C. § 81. Nor was this bank's business any the less local because its shares were held in the portfolio of a Delaware corporation. Many provisions of federal law make national banks, in important aspects, peculiarly local institutions. See 12 U. S. C. §§ 30, 33, 34 (a), 36, 51, 62, 72. For jurisdictional purposes, a national bank is a "citizen" of the state in which it is established or located, 28 U. S. C. § 41 (16), and in that district alone can it be sued. 12 U. S. C. § 94. True, when insolvency occurs, there is a shift in bank management, but the bank's activities are still necessarily rooted in its local habitat. In this case the Receiver's office was located in Louisville, the home of the bank; payment of assessments, like other obligations due the bank, could have been made there, and, in fact, shareholders were notified by the Receiver to pay at his office in Louisville.[4] Liquidation of a local bank, like its daily operations, must from necessity and in the interest of good business be carried on, in the main, in the community where the bank did business with its depositors and other customers. Practically everything that preceded the final fixing of liability of shareholders derived from Kentucky transactions. We have been referred to no Ohio decisions, and have been unable to find any, which contradict our conclusion that events which culminated in this suit justify our holding that this "cause of action" "arose" in Kentucky within the meaning of the Ohio statute. See *Hunter* v. *Niagara Fire Ins. Co.*, 73 Ohio St. 110, 76 N. E. 563; *Alropa Corp.* v. *Kirchwehm,*

[4] Whether notice by the Receiver to pay at a particular place could alter the conclusive situation as to where a cause of action might be considered to "arise" under other circumstances is a question we need not decide.

138 Ohio St. 30, 33 N. E. 2d 655; *Payne* v. *Kirchwehm,* 141 Ohio St. 384, 48 N. E. 2d 224; *Bowers* v. *Holabird,* 51 Ohio App. 413, 1 N. E. 2d 326; *National Bondholders Corp.* v. *Stoddard,* 22 Ohio O. 145, 8 Ohio Supp. 19. See also *Hilliard* v. *Pennsylvania R. Co.,* 73 F. 2d 473, 475–476; Note, 15 U. of Cin. L. Rev. 337 (1941); Note, 21 Ohio O. 107 (1941). Therefore the judgment in No. 656 is affirmed.

In No. 593, the Pennsylvania action, the same considerations are controlling. The general statute of limitations of that state which would be applicable to this action had it arisen in Pennsylvania, like Ohio's general statute, provides a six-year period in which this suit could be brought. 12 Pa. Stat. § 31 (Purdon, 1931). But Pennsylvania also has a "borrowing statute" which provides: "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth." 12 Pa. Stat. § 39 (Purdon, 1931). Our review of Pennsylvania decisions construing this statute persuades us that the borrowing statute is applicable to this case, that under that statute this cause of action "arose" in Kentucky, and that the five-year statute of Kentucky bars this action. See *Mister* v. *Burkholder,* 56 Pa. Super. 517; *Fletcher's Estate,* 45 Pa. D. & C. 673, 674; *Bell* v. *Brady,* 346 Pa. 666, 31 A. 2d 547; *Shaffer's Estate,* 228 Pa. 36, 40, 76 A. 716, 717. *Cf. Rosenzweig* v. *Heller,* 302 Pa. 279, 153 A. 346. See also Notes, 88 U. of Pa. L. Rev. 878 (1940), 4 U. of Pitt. L. Rev. 215 (1938). The judgment of the Circuit Court of Appeals in No. 593 is therefore reversed.

So ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of these cases.

UNITED STATES *v.* SMITH, U. S. DISTRICT JUDGE, ET AL.

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

No. 498. Argued March 11, 1947.—Decided June 2, 1947.

1. After a judgment of conviction has been affirmed by the Circuit Court of Appeals (upon an appeal in which the district court's denial of a motion for a new trial was one of the errors assigned) and the defendant has begun service of the sentence, a federal district court is without power under Rule 33 of the Rules of Criminal Procedure to order a new trial *sua sponte*. Pp. 471–477.
2. Where, in such circumstances, a district court has ordered a new trial, the Government is entitled to writs of mandamus and prohibition from the Circuit Court of Appeals requiring that the order be vacated. Pp. 470,477.

156 F. 2d 642, reversed.

The Circuit Court of Appeals denied a petition by the United States for writs of mandamus and prohibition directed to the District Court and the judges thereof. 156 F. 2d 642. This Court granted certiorari. 329 U. S. 703. *Reversed*, p. 477.

Assistant to the Attorney General McGregor argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Sewall Key* and *Melva M. Graney.*

Robert T. McCracken argued the cause for Memolo, respondent. With him on the brief were *Stanley F. Coar* and *C. Russell Phillips.*

No appearance for Smith, United States District Judge, respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The United States in this case sought writs of mandamus and prohibition from the Court of Appeals directed to the judges of the District Court for the Middle District of Pennsylvania to require that an order by which a new trial was granted to one John Memolo be vacated.

Memolo was convicted of tax evasion after jury trial before Judge William F. Smith. Three days later Memolo filed a motion for new trial and was given leave to file reasons in its support. He filed fifty-four reasons, such as the trial court's denial of continuance, of motion to quash the indictment, of motion for a bill of particulars, and of motion for a directed verdict. He complained also of the court's action in discharging some of the petit jurors, in admission and exclusion of evidence, in instructing the jury, and in conduct toward defendant and his counsel said to have been prejudicial. On the same day, Judge Smith denied the motion and sentenced Memolo to three years imprisonment and fines.

Memolo appealed, assigned as errors all of the motion grounds and, in addition, the denial of the motion for new trial. The Court of Appeals for the Third Circuit affirmed with a *per curiam* opinion declaring that it could perceive no substantial error in the proceedings. *United States* v. *Memolo,* 152 F. 2d 759. Petition for certiorari was denied by this Court, *Memolo* v. *United States,* 327 U. S. 800. Therefore, the Court of Appeals issued its mandate of affirmance and, in the conventional form, commanded that "such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding." Memolo was then taken into custody and, on April 8, 1946, imprisoned in a federal penitentiary.

The following day the Clerk of the District Court received from Judge Smith an order dated April 8th "that judgment heretofore entered be vacated and that the verdict heretofore returned be set aside, and that a new trial be granted the defendant." It was accompanied by a "memorandum" reciting the history of the case and that "This Court, while the appeal was pending, reconsidered the grounds urged by the defendant in support of his motion for a new trial. It is our opinion upon this reconsideration that in the interest of justice a new trial should be granted the defendant." It assigned no more particular ground for the order. Memolo was thereupon released from the penitentiary on bail.

On the Government's petition to the Court of Appeals for writs directing that the order be vacated, Memolo was allowed to intervene. Judge Smith also answered asserting that his order "was in accordance with the mandate of this Court and was authorized by the Rules of Criminal Procedure of 1946, effective March 21, 1946, particularly Rule 33 thereof." He referred to his memorandum but did not further elucidate his reasons for granting a new trial. On consideration, the court below sitting *en banc* denied the petition for writs of mandamus and prohibition. 156 F. 2d 642. Two of the five judges dissented.

The mandate which the appellate court returned to the District Court was in the conventional and long-used form adapted to all appealed causes and contained no special directions peculiar to this case. It was neutral on the issues here raised and nothing in its terms either expressly authorized or prohibited the order for new trial. The power of the District Court to make such an order turns entirely on the Rules of Criminal Procedure cited and relied upon by Judge Smith.

Rule 33 provides:

"NEW TRIAL. The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

The first sentence of this rule is declaratory of the power to grant a new trial "in the interest of justice" instead of for reasons catalogued as they might have been.[1] The generality of the reasons assigned by Judge Smith for the order in question is all that is required. But this sentence says nothing of the time within which the court must act or of the effect of an intervening appeal and affirmance

[1] Section 269 of the Judicial Code, 28 U. S. C. § 391, provides less generally that "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." That section, like Rule 33, does not expressly put a limit of time on the power granted, yet it was never suggested that it gave district courts power to grant a new trial at any time. It may be said that the term rule applied, but the first sentence of § 269 might as readily have been interpreted as an exception to that rule as the first sentence of the present rule may be construed to be restricted by no period of time.

It may be worthy of note that Rule 33 provides that a court may *grant* a new trial *to* a defendant, and does not say that the court may *order* a new trial.

on the power. Such time provisions as there are relate to filing of motions by the defendant.

The last sentence of the rule, which puts a five-day limit on motions for new trial on any ground other than newly-discovered evidence, was suggested by the law as it stood before adoption of the new Rules. Generally speaking, the power of a court over its judgments at common law expired with the term of court. *United States* v. *Mayer,* 235 U. S. 55, 67–69. There was, however, a three-day limitation on the right to move for a new trial. Rule II, Criminal Appeals Rules of May 7, 1934, 292 U. S. 662, 18 U. S. C. § 688. Rule 33, in its last sentence, extended that period to five days, and otherwise extended the time in which to move for new trial because of newly discovered evidence. The limitation by expiration of the term was repealed by Rule 45 (c).

It is now said that because the literal language of the Rule places the five-day limit only on the making of the motion, it does not limit the power of the court later to grant the motion, and the power survives affirmance of the judgment by appellate courts. Briefly, Judge Smith thought and intervenor argues that the rule prevents a defendant from asking the court to grant a new trial after the times specified, but that it permits the judge to order retrial without request and at any time. The result, in view of annulment of the term limitation,[2] would be that the power of the trial court to grant new trials on its own

[2] Before the new Rules, there was no question that the power of the trial judge to grant a new trial was limited by the duration of the term. *United States* v. *Mayer, supra.* If the Rules had extended that power indefinitely, it would seem that considerable comment on this fundamental change would have been called forth. Yet hardly anyone suggested that Rule 33 means what respondent contends it does. But *cf.* Stewart, *Comments on Federal Rules of Criminal Procedure,* 8 John Marshall L. Q. 296, 303. The Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed. The policy

motion lingers on indefinitely. There are several reasons why this construction of the Rules is not acceptable.

It is not the function of appellate courts to review tentative decisions of trial courts. The Circuit Court of Appeals had no jurisdiction to review the denial of the motion for a new trial unless the denial was "final." Judicial Code § 128 (a), 28 U. S. C. § 225 (a). Question of finality would be raised if the trial court, while formally denying the motion for new trial on the record, reserves the right to change its mind after the opinion of an appellate court has been elicited. In this case the Court of Appeals reviewed fifty-four specifications of error and found none to warrant reversal. All of this was but vain if the trial court was to act as its own reviewing body or if it had not reached a conclusive determination of the orders being appealed. Such a practice would authorize the appellate process to be exercised in an advisory capacity while the trial court, regardless of appellate decision, could set aside all that was the basis of appeal.

Moreover, it would be a strange rule which deprived a judge of power to do what was asked when request was made by the person most concerned, and yet allowed him to act without petition. If a condition of the power is that request for its exercise be not made, serious constitutional issues would be raised. For it is such request which obviates any later objection the defendant might make on the ground of double jeopardy. *Murphy* v. *Massachusetts,* 177 U. S. 155, 160; *cf. Ex parte Lange,* 18 Wall. 163. This intervenor, for example, has been tried, convicted and imprisoned and has served some, although little, time on the sentence of the court. After remand of his case, he made no further motion for a new trial and could make none. It is not necessary for us now to decide whether

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of the Rules was not to extend power indefinitely but to confine it within constant time periods. See Notes to Rules of Criminal Procedure, Rule 45.

his retrial on the court's own motion would amount to double jeopardy.[3] That a serious constitutional issue would be presented by such a procedure is enough to suggest that we avoid a construction that will raise such an issue.

For yet another reason, we would be reluctant to hold that the court has a continuing power on his own initiative to grant what the defendant has not the right to go into open court and ask. To approve the practice followed in this case would almost certainly subject trial judges to private appeals or application by counsel or friends of one convicted. We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the court's own initiative. If the judge needs time for reflection as to the propriety of a new trial, he is at liberty to take it before denying a timely made motion therefor.

Support for the interpretation urged by respondent rises from fear of miscarriage of justice. New trials, however, may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment. For the latter, the Rules make adequate provision. Newly-discovered evidence may be made ground for motion for new trial within two years after judgment. Rule 33. For the former, *habeas corpus* provides a remedy for jurisdictional and constitutional errors at the trial, without limit of time. *Johnson* v. *Zerbst,* 304 U. S. 458; *Walker* v. *Johnston,* 312 U. S. 275; *Waley* v. *Johnston,* 316 U. S. 101; *Adams* v. *United States ex rel. McCann,* 317 U. S. 269. Possibility of unredressed injustice therefore remains only in prejudicial happenings during trial.[4] The trial judge is given power by the Rules

[3] Nor need we decide whether his intervention in this case in support of the trial judge's power amounts to a consent to a second trial.

[4] Although this Court has reserved decision on whether the federal district courts are empowered to entertain proceedings in the nature

to entertain motions for new trial within five days after verdict and may extend that time for so long as he thinks necessary for proper consideration of the course of the trial. But extension of that time indefinitely is no insurance of justice. On the contrary, as time passes, the peculiar ability which the trial judge has to pass on the fairness of the trial is dissipated as the incidents and nuances of the trial leave his mind to give way to immediate business. It is in the interest of justice that a decision on the propriety of a trial be reached as soon after it has ended as is possible, and that decision be not deferred until the trial's story has taken on the uncertainty and dimness of things long past.

A majority of the Court of Appeals thought it a shocking suggestion that on mature reflection a District Judge may not correct an injustice because his first reaction was different. We doubt if many cases will occur in which very shocking injustices will survive after the trial court denies a motion based on detailed recital of grounds for new trial and a Court of Appeals affirms. This possibility seems too remote to induce us to hold that a trial court's denial of a new trial, affirmed on appeal, has no finality and that a trial judge may, even after service of a sentence has begun, set the whole proceedings aside and start over—if indeed a new start would not also be forbidden.[5]

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of *coram nobis* "to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself . . .," *United States* v. *Mayer*, 235 U. S. 55, 68, it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate. Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time. *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575.

[5] When the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words. Rule 59 (d), Rules of Civil Procedure.

We hold that the Government was entitled to the relief sought. The judgment is accordingly reversed with direction that writs issue to effect vacation of the order for new trial.

Judgment reversed.

MYERS *v.* READING COMPANY.

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

No. 367. Argued February 6, 1947.—Decided June 2, 1947.

1. In this action under the Federal Employers' Liability Act, by an employee against a carrier to recover damages for personal injuries alleged to have been caused by the defendant's use, in violation of the Safety Appliance Acts, of a freight car not equipped with efficient hand brakes, the evidence at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the plaintiff; and it was error to enter judgment for the defendant notwithstanding the verdict. Pp. 478–486.
2. Although a carrier is not subject under the Federal Employers' Liability Act to an absolute liability to its employees for injuries, it is subject to liability for injuries resulting from a violation of its absolute duty to comply with the Safety Appliance Acts. P. 485.

155 F. 2d 523, reversed.

Notwithstanding a verdict for the plaintiff in a suit under the Federal Employers' Liability Act and the Safety Appliance Acts, the District Court entered judgment for the defendant. 63 F. Supp. 817. The Circuit Court of Appeals affirmed. 155 F. 2d 523. This Court granted certiorari. 329 U. S. 699. *Reversed,* p. 486.

By special leave of Court, *B. Nathaniel Richter* argued the cause for petitioner, *pro hac vice.* With him on the brief was *John H. Hoffman.*

Henry R. Heebner argued the cause for respondent. With him on the brief was *Wm. Clarke Mason.*

MR. JUSTICE BURTON delivered the opinion of the Court.

This action for damages alleged to have been caused to the petitioner by the respondent's use, in violation of the Safety Appliance Acts,[1] of a railroad freight car not equipped with efficient hand brakes, presents the question whether the evidence at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the petitioner. We hold that it was.

The action was brought in the District Court of the United States for the Eastern District of Pennsylvania by the petitioner, John Myers, against his employer, the Reading Company. He claimed that he received personal injuries caused by the respondent's use in interstate commerce, in its railroad yards at Port Richmond, Philadelphia, of a freight car equipped with a defective hand brake in violation of the Safety Appliance Acts requiring such cars to be equipped with "efficient hand brakes."[2] At the close of the evidence, respondent moved for a directed verdict. The motion was not granted, and the jury returned a verdict for $5,000 in favor of the petitioner. The respondent then moved to have the verdict set aside and to have judgment entered in its favor.[3] On

[1] "SEC. 2. . . ., it shall be unlawful for any common carrier subject to the provisions of this Act [of April 14, 1910] to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and *efficient hand brakes;* all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: . . . ." (Italics supplied.) 36 Stat. 298, 45 U. S. C. § 11.

[2] See note 1, *supra.*

[3] "RULE 50. MOTION FOR A DIRECTED VERDICT.

. . . . .

"(b) RESERVATION OF DECISION ON MOTION. . . . Within 10 days after the reception of a verdict, a party who has moved for a directed

December 28, 1945, this motion was granted and judgment was so entered. 63 F. Supp. 817. On May 29, 1946, the Circuit Court of Appeals for the Third Circuit affirmed the judgment, *per curiam*. 155 F. 2d 523. We granted certiorari in order to review this procedure, in a case based upon a violation of the Safety Appliance Acts, in the light of our decision rendered on March 25, 1946, in *Lavender* v. *Kurn,* 327 U. S. 645, subsequent to the trial of this case.

The petitioner testified to the following:

On June 11, 1944, he was working for the respondent as a freight conductor in charge of a crew consisting of an engineer, a fireman and two brakemen. He had been employed by the respondent for six or seven years, rising from the rank of crossing watchman to that of conductor and, for five or six months immediately preceding June 11, he had worked practically every day in the job in which he was engaged when injured. At about nine o'clock that evening his crew moved a string of seven coal cars on to a yard track where the crew coupled those cars to three others. One of the brakemen, new on the job that day, made the coupling and the petitioner directed him "to tie the handbrakes on"—that is, to tighten them so as to insure against further movements of the cars on the slightly graded track. The brakeman did this, but before the petitioner left the cars he checked them over and saw that the brakes were not all on, because one brake chain, instead of being wrapped around the shaft, was hanging loose. He climbed up on the brake platform, eight feet above the ground, on the car where the hand brake was

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verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ." Federal Rules of Civil Procedure.

not set, and tried to set it by turning the brake wheel. While doing this, he carried his signaling lantern on his left arm with his hand through the handle. As to the condition and operation of the brake he testified:

"A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

"Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

"A. Not ordinarily.

"Q. What was the difference between this wheel and the ordinary wheel?

"A. It was kind of stiff, and like a spring—like a shoe kicking back.

"Q. And you started to try to set it?

"A. That is right.

. . . . .

"A. As I was tightening the brake—just that quick—I felt something like the slack being run out, getting ready to uncouple.

"Q. What did you feel on your car?

"A. A quick jar, and I took this hand to signal 'stop.' (Indicating.)

"Q. What did you signal?

"A. I signaled 'stop' the best I could and hold on, but I went down; I lost my hold and down I went.

"Q. What happened to the wheel on the hand-brake while you were holding the wheel?

"A. That kicked back.

"Q. What do you mean by that?

"A. I was putting it on this way (indicating), and it kicked right back off.

"Q. Could you hold it?

"A. No, I couldn't.

"Q. Was it pulled all the way on?

"A. Oh, no.

"Q. What happened to you?

"A. Down I went." [4]

The jury found, in a special verdict, that the brake was not an efficient brake; that its inefficiency contributed to or caused injuries to the petitioner; that the train did not move after the seven shifted cars were coupled to the three standing cars; and that the petitioner was not thrown from a moving train.[5] The jury thus reached factual conclusions supporting its general verdict for the petitioner, and reducing the legal basis for recovery to the respondent's use of a car not equipped with efficient hand brakes.

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[4] Further testimony stated that his injuries were due to this fall. Other testimony supported the petitioner's claim, under the Federal Employers' Liability Act, 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51, that the respondent was negligent in moving the train while the petitioner was trying to tighten the brake and without any direction from him. This charge, however, was disposed of by the special verdict of the jury, stating that the train did not move, thus strengthening the probative force of the testimony that the petitioner's fall was caused by the stiffness and kickback of the brake.

[5] The special verdict was as follows:

"1. Was the brake in question an efficient brake?

Answer 'yes' or 'no.' [Answer] No.

"2. If you find that the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff?

Answer 'yes' or 'no.' [Answer] Yes.

"3. Did the train move after the seven shifted cars were coupled to the three standing cars?

Answer 'yes' or 'no.' [Answer] No.

"4. If you find that the train moved after the cars were coupled, did that fact contribute to or cause any injuries sustained by the plaintiff?

Answer 'yes' or 'no.' [Answer] No.

"5. Was the plaintiff thrown from a moving train?

Answer 'yes' or 'no.' [Answer] No.

"6. Did the plaintiff become ill while walking on the ground, without having been thrown from the train?

Answer 'yes' or 'no.' [Answer] No."

The only question before us is whether there was sufficient probative evidence, with the inferences that the jury could draw from it, to support the verdict for the petitioner.

There was an absolute and unqualified prohibition against the respondent's using or permitting to be used, on its line, any car not equipped with "efficient hand brakes." [6] In speaking of a like prohibition, imposed by the same Section of the Safety Appliance Acts, against the use of any car not equipped with "secure hand holds or grab irons," Mr. Chief Justice Hughes said:

> "This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." *Brady* v. *Terminal R. Assn.*, 303 U. S. 10, 15, and cases there cited.

See also, *Atlantic City R. Co.* v. *Parker*, 242 U. S. 56, 59 (automatic couplers required by 27 Stat. 531, 45 U. S. C. § 2); *Great Northern R. Co.* v. *Otos*, 239 U. S. 349, 351 (couplers); *Chicago, B. & Q. R. Co.* v. *United States*, 220 U. S. 559, 574–575; *St. Louis & Iron Mountain R. Co.* v. *Taylor*, 210 U. S. 281, 294–295 (couplers and drawbars); *Spotts* v. *Baltimore & O. R. Co.*, 102 F. 2d 160, 162 (hand brakes).

This simplifies the issue beyond that presented in the ordinary case under the Federal Employers' Liability Act where the plaintiff must establish the negligence of his employer. Here it is not necessary to find negligence. A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the

[6] See note 1, *supra*.

injuries was on a car which the railroad was then using on its line, in interstate commerce, and that the brake was not an "efficient" hand brake. Furthermore—

> "There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner." *Didinger* v. *Pennsylvania R. Co.*, 39 F. 2d 798, 799.
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> "Proof of an actual break or visible defect in a coupling appliance is not a prerequisite to a finding that the statute has been violated. Where a jury finds that there is a violation, it will be sustained, if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Philadelphia & R. R. Co.* v. *Auchenbach*, 3 Cir., 16 F. 2d 550. Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate. . . .
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> . . . . . .
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> ". . . the testimony of plaintiff that the brake was used in the normal and usual manner and failed to work efficiently but did so inefficiently, throwing him to the ground, is such substantial evidence of inefficiency as to make an issue for the jury. *Detroit, T. & I. R. Co.* v. *Hahn*, 6 Cir., 47 F. 2d 59. In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not one for plaintiff." *Spotts* v. *Baltimore & O. R. Co.*, *supra*, at p. 162.

See also, *Wild* v. *Pitcairn,* 347 Mo. 915, 149 S. W. 2d 800; and *Newkirk* v. *Los Angeles Junction R. Co.,* 21 Cal. 2d 308, 131 P. 2d 535.

The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony. That testimony was not descriptive of precise mechanical defects in the structure of the brake. It was, however, simple and direct testimony from which a jury reasonably might infer the brake's defectiveness and its inefficiency in the sense necessary to establish a violation of the Safety Appliance Acts. After a brakeman had attempted to set all of the brakes, the chain on this brake still hung loose, indicating that it was not set. When the brake was partially tightened by an experienced freight conductor familiar with that kind of an operation, he found that it differed from the ordinary brake. He found that "it was kind of stiff, and like a spring—like a shoe kicking back." While he was holding the wheel, before it was "pulled all the way on," it "kicked back," he couldn't hold it, and "down" he went. This resulted in serious injuries to his hand and back. While different conclusions might be possible, the jury, which heard the testimony and saw the petitioner's illustrations of his handling of the brake, reasonably could infer from that evidence that the condition of this brake and its action were not those of an efficient hand brake.

The questions at issue were questions of fact. The jury was entitled to draw inferences from the evidence. From the evidence presented, the jury reasonably could find, as it did in its special verdict, (1) that the brake was not an efficient brake, and (2) that the fact that the brake was not an efficient brake contributed to or caused injury to the petitioner. In the face of this, the trial court erred

in entering a judgment for the respondent in accordance with the motion for a directed verdict.

The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a workmen's compensation law.[7] As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts. The evidence here was sufficient to support the verdict for the petitioner, whether tested by the formula used by this Court in *Improvement Co.* v. *Munson,* 14 Wall. 442; *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364; *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29; or *Lavender* v. *Kurn, supra.* The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' *Galloway* v. *United States,* 319 U. S. 372, 395; . . . ." *Tennant* v. *Peoria & P. U. R. Co., supra,* at pp. 32–33.

See also, *Blair* v. *Baltimore & O. R. Co.,* 323 U. S. 600; *Brady* v. *Southern R. Co.,* 320 U. S. 476; *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 343; *Western & A. R. Co.* v. *Hughes,* 278 U. S. 496; and *Baltimore & O. R. Co.* v. *Groeger,* 266 U. S. 521, 524.

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury

[7] See *Griswold* v. *Gardner,* 155 F. 2d 333, 334, 337.

is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn, supra,* at p. 653.

We believe that the evidence given at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict originally rendered for the petitioner. Accordingly, the judgment of the Circuit Court of Appeals sustaining the judgment entered for the respondent by the District Court is hereby

Reversed.

GREENOUGH ET AL., TRUSTEES, *v.* TAX ASSESSORS OF NEWPORT ET AL.

APPEAL FROM THE SUPERIOR COURT OF NEWPORT COUNTY, RHODE ISLAND.

No. 461. Argued March 7, 1947.—Decided June 9, 1947.

1. A Rhode Island municipality assessed a tax against a resident of Rhode Island for half the value of intangibles held jointly by him and a resident of New York as trustees under the will of a resident of New York. The evidences of the intangible property were at all times in New York and the life beneficiary of the trust resided there, the future beneficiaries being undetermined. The Rhode Island resident did not actually exercise his powers as trustee in Rhode Island. *Held:* The tax did not violate the due process clause of the Fourteenth Amendment. Pp. 491–498.
2. So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of evidences of ownership is immaterial. P. 492.
3. Since intangibles have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. P. 493.

4. Since normally intangibles are subject to the immediate control of the owner, this close relationship between intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. P. 493.
5. The same rules apply to the taxation of intangibles held by a trustee as assets of a trust, since the trustee can sue and be sued as such and in this way the state of his residence affords him protection as the owner of intangibles. Pp. 493–496.
6. *Brooke* v. *Norfolk,* 277 U. S. 27; *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Graves* v. *Schmidlapp,* 315 U. S. 657, distinguished. Pp. 496–497.
7. It is not constitutionally significant that the Rhode Island trustee is not the sole trustee of the New York trust, since the tax was only upon his proportionate interest, as a trustee, in the *res* and he possessed an interest in the intangibles sufficient to support a proportional tax for the benefit and protection afforded to that interest in Rhode Island. P. 498.
8. State courts are the final judicial authority upon the meaning of statutes of their states; but where their judgments collide with rights secured by the Federal Constitution this Court has power to protect or enforce such rights. Pp. 489, 497.

71 R. I. 477, 47 A. 2d 625, affirmed.

The Supreme Court of Rhode Island sustained a tax against a resident of Rhode Island for one-half of the value of intangibles held jointly by him and a resident of New York as trustees of a New York trust, and remanded the case to the Superior Court of Newport County, Rhode Island. 71 R. I. 477, 47 A. 2d 625. On appeal to this Court, *affirmed,* p. 498.

William Greenough and *William R. Harvey* argued the cause for appellants. With them on the brief was *J. Russell Haire.*

John C. Burke argued the cause for appellees. With him on the brief was *Alexander G. Teitz.*

MR. JUSTICE REED delivered the opinion of the Court.

Appellants are testamentary trustees of George H. Warren, who died a resident of New York. His will was duly probated in that state and letters testamentary issued to appellants as executors. A duly authenticated copy of said will was filed and recorded in Rhode Island and there letters testamentary were also issued. Letters of trusteeship were granted to appellants by a surrogate's court in New York. None were needed or asked for or granted by Rhode Island. At all times pertinent to this appeal, appellants, as trustees under the will, held intangible personalty for the benefit of Constance W. Warren for her life and then to certain as yet undetermined future beneficiaries.

The evidences of the intangible property in the estate of George H. Warren and in the trust in question were at all times in New York. The life beneficiary and one of the trustees are residents of New York. The other trustee resides in Rhode Island. During the period in question, he did not, however, exercise his powers, as trustee, in Rhode Island.

A personal property tax of $50 was assessed by the City of Newport, Rhode Island, against the resident trustee upon one-half of the value of the corpus of the trust. The applicable assessment statute for *ad valorem* taxes appears in the margin.[1] At the time of this assessment, the property consisted of 500 shares of the capital stock of Standard Oil Company of New Jersey. The tax was paid by the

[1] General Laws of Rhode Island (1938), c. 30, § 9:

"*Fifth.* Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such executor,

trustees and this suit instituted, under appropriate state procedure, in the Superior Court of the County of Newport to recover the tax from the city. The Superior Court by decision denied the petition. A bill of exceptions was prosecuted by these petitioners to the Supreme Court of Rhode Island which overruled the exceptions and remitted the case to the superior court.[2] Thereupon judgment was entered for the appellees and an appeal allowed to this Court. All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island.[3]

The appellants' contention throughout has been that the Rhode Island statute, under which the assessment was made, if applicable to the resident trustee, was unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Their objection in the state courts and here is that Rhode Island cannot tax the resident trustee's proportionate part of these trust intangibles merely because that trustee resides in Rhode Island. Such a tax, they urge, is unconstitutional under the due process clause because it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which that state does not give protection or benefit. Appellants specifically disclaim reliance upon the argument that the Rhode Island tax exposes them to the danger of other *ad*

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administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside."

[2] General Laws of Rhode Island (1938), c. 31, § 14; c. 545, § 6, as amended by c. 941, Public Laws of Rhode Island (1939–40); *Greenough* v. *Tax Assessors,* 71 R. I. 477, 47 A. 2d 625.

[3] *Chase Securities Corporation* v. *Donaldson,* 325 U. S. 304, 311; see *Huddleston* v. *Dwyer,* 322 U. S. 232, 237; *American Federation of Labor* v. *Watson,* 327 U. S. 582, 595.

valorem taxes in another state.[4] The same concession was made in the Supreme Court of Rhode Island.[5] We therefore restrict our discussion and determination to the issue presented by appellants' insistence that Rhode Island cannot constitutionally collect this tax because the state rendered no equivalent for its exaction in protection of or benefit to the trust fund.

For the purpose of the taxation of those resident within her borders, Rhode Island has sovereign power unembarrassed by any restriction except those that emerge from the Constitution. Whether that power is exercised wisely or unwisely is the problem of each state. It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust.[6] Or, it may be that the actual domicile of the trustee should be preferred for a single tax. Utilization by the states of modern reciprocal statutory tax provisions may more fairly distribute tax benefits and burdens, although the danger of competitive inducements for obtaining a settlor's favor are obvious.[7] But our question here is whether or not a provision of the Constitution forbids this tax. Neither the expediency of the levy nor its economic effect on the economy of the taxing state is for our consideration.[8] We are dealing with the totality

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[4] See McKinney's Consolidated Laws of New York, Tax Law, §§ 3, 350 (7), 365, 369, 377. *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54. Compare *Blackstone* v. *Miller*, 188 U. S. 189; *Curry* v. *McCanless*, 307 U. S. 357, 363; *Graves* v. *Elliott*, 307 U. S. 383; *Graves* v. *Schmidlapp*, 315 U. S. 657; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 177, with *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *First National Bank* v. *Maine*, 284 U. S. 312.

[5] *Greenough* v. *Tax Assessors*, 71 R. I. 477, 488, 47 A. 2d 625, 631.

[6] Compare *Harrison* v. *Commissioner of Corporations and Taxation*, 272 Mass. 422, 172 N. E. 605.

[7] Compare Mr. Justice Holmes' dissent, *Baldwin* v. *Missouri*, 281 U. S. 586, 595.

[8] *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 181.

of a state's authority in the exercise of its revenue raising powers.

The Fourteenth Amendment has been held to place a limit on a state's power to lay an *ad valorem* tax on its residents.[9] Previous decisions of this Court have held that mere power over a resident does not permit a state to exact from him a property tax on his tangible property permanently located outside the jurisdiction of the taxing state.[10] Such an exaction, the cases teach, would violate the due process clause of the Fourteenth Amendment, because no benefit or protection, adequate to support a tax exaction, is furnished by the state of residence.[11] The domiciliary state of the owner of tangibles permanently located in another state, however, may require its resident to contribute to the government under which he lives by an income tax in which the income from the out-of-state property is an item of the taxpayer's gross income. It is immaterial, in such a case, that the property producing the income is located in another state. *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308. And, where the tangible property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles because the cor-

[9] See *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 279. Art. I, § 10, cl. 2 and 3, contain limitations on a state's power to levy import or export or tonnage duties.

[10] *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 202; *Frick* v. *Pennsylvania,* 268 U. S. 473, 488; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328–29; *Curry* v. *McCanless,* 307 U. S. 357, 363–65, and note 3; see *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444; *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174, 178.

[11] Even where our cases have spoken of power over the person as though it alone might be a sufficient justification for *ad valorem* taxation of a resident on tangibles outside the taxing jurisdiction, the language was used in instances where there were other bases for the tax. *State Tax on Foreign-held Bonds,* 15 Wall. 300, 319; *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 76; *Pearson* v. *McGraw,* 308 U. S. 313, 318.

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poration exists under the law of its domicile. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63.[12]

The precedents, holding it unconstitutional for a state to tax tangibles of a resident that are permanently beyond its boundaries, have not been applied to intangibles where the documents of owner interest are beyond the confines of the taxing jurisdiction or where the choses in action are mere promises of a nonresident without documents.[13] One reason that state taxation of a resident on his intangibles is justified is that when the taxpayer's wealth is represented by intangibles, the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangibles represent. There may be no "papers." If the assessment is not made at the residence of the owner, intangibles may be overlooked easily by other assessors of taxes. A state is dependent upon its citizens for revenue. Wealth has long been accepted as a fair measure of a tax assessment. As a practical mode of collecting revenue, the states unrestricted by the federal Constitution have been accustomed to assess property taxes upon intangibles "wherever actually held or deposited," belonging to their citizens and regardless of the location of the debtor.[14] So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat

[12] See discussion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292.

[13] *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; compare *Blodgett* v. *Silberman*, 277 U. S. 1, 8–12; *Maguire* v. *Trefry*, 253 U. S. 12; *Curry* v. *McCanless*, 307 U. S. 357, 365–68; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174, 180.

[14] *Kirtland* v. *Hotchkiss*, 100 U. S. 491. Compare *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308.

the tax of the domiciliary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles.[15] Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. The state of the owner's residence supplies the owner with the benefits and protection inherent in the existence of an organized government. He may choose to expand his activities beyond its borders but the state of his residence is his base of operations. It is the place where he exercises certain privileges of citizenship and enjoys the protection of his domiciliary government. Does a similar relationship exist between a trustee and the intangibles of a trust?

The trustee of today moves freely from state to state. The settlor's residence may be one state, the seat of a trust another state and the trustee or trustees may live in still another jurisdiction or may constantly change their residence.[16] The official life of a trustee is, of course, different from his personal. A trust, this Court has said, is "an abstraction." For federal income tax purposes it is sometimes dealt with as though it had a separate existence. *Anderson* v. *Wilson,* 289 U. S. 20, 27. This is because Con-

[15] See *Curry* v. *McCanless,* 307 U. S. 357, 365–68; *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193. Certain evidences of indebtedness have been held sufficient in themselves to justify a state's imposition of a succession tax upon their nonresident owner. *Wheeler* v. *New York,* 233 U. S. 434.

[16] See *Hutchison* v. *Ross,* 262 N. Y. 381, 393, 187 N. E. 65, 70.

gress has seen fit so to deal with the trust. This entity, the trust, from another point of view consists of separate interests, the equitable interest in the *res* of the beneficiary [17] and the legal interest of the trustee. The legal interest of the trustee in the *res* is a distinct right. It enables a settlor to protect his beneficiaries from the burdens of ownership, while the beneficiary retains the right, through equity, to compel the legal owner to act in accordance with his trust obligations. The trustee as the owner of this legal interest in the *res* may incur obligations in the administration of the trust enforceable against him, personally.[18] Nothing else appearing, the trustee is personally liable at law for contracts for the trust.[19] This is the rule in Rhode Island.[20] Specific performance may be decreed against him.[21] Of course, the trustee when acting within his powers for the trust is entitled to exoneration

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[17] *Brown* v. *Fletcher,* 235 U. S. 589, 598–600; *Blair* v. *Commissioner,* 300 U. S. 5, 13.

[18] Scott, Trusts (1939), pp. 487, 1469 *et seq.;* Williston, Contracts (1936) § 312; Bogert, Trusts and Trustees (1935) § 146.

[19] *Duvall* v. *Craig,* 2 Wheat. 45, 56; *Taylor* v. *Davis,* 110 U. S. 330, 335: "A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such."

Lazenby v. *Codman,* 28 F. Supp. 949; *Prudential Ins. Co.* v. *Land Estates,* 31 F. Supp. 845; *Peyser* v. *American Security & Trust Co.,* 107 F. 2d 625.

[20] *Roger Williams N. Bk.* v. *Groton Manufacturing Co.,* 16 R. I. 504, 17 A. 170.

[21] *Warren* v. *Goodloe's Executor,* 230 Ky. 514, 520, 20 S. W. 2d 278, 281.

or reimbursement [22] and the trust *res* may be pursued in equity by the creditor for payment.[23]

The Supreme Court of Rhode Island considered the argument that the laws of the state afforded no benefit or protection to the resident trustee. Although nothing appeared as to any specific benefit or protection which the trustee had actually received, it concluded that the state was "ready, willing and capable" of furnishing either "if requested." A resident trustee of a foreign trust would be entitled to the same advantages from Rhode Island laws as would any natural person there resident. *Greenough* v. *Tax Assessors, supra,* 488, 47 A. 2d at 631. There may be matters of trust administration which can be litigated only in the courts of the state that is the seat of the trust. For example, in the case of a testamentary trust, the appointment of trustees, settlement, termination and distribution under the provisions of the trust are to be carried out, normally, in the courts of decedent's domicile. See *Harrison* v. *Commissioner of Corporations,* 272 Mass. 422, 427, 172 N. E. 605, 608. But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The citizenship of the trustee and not the seat of the trust or

[22] Scott, Trusts, § 244 *et seq.* and § 268.

[23] Scott, Trusts, § 267 *et seq.* See *Ballentine* v. *Eaton,* 297 Mass. 389, 8 N. E. 2d 808; *O'Brien* v. *Jackson,* 167 N. Y. 31, 60 N. E. 238.

the residence of the beneficiary is the controlling factor.[24] The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles. And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state, the same reasons, hereinbefore stated on pages 492 and 493, apply that permit state property taxation of a resident owner of intangibles while denying a state power to tax similarly the resident's out-of-state realty.

No precedent from this Court called to our attention indicates that the federal Constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee. In *Brooke* v. *Norfolk,* 277 U. S. 27, the state property tax there invalidated, evidently as violative of the Fourteenth Amendment, was assessed to a life beneficiary, on a *res,* composed of intangibles, when both the testator and the trustee were residents of another state where the trust was administered. *Safe Deposit and Trust Company* v. *Virginia,* 280 U. S. 83, held invalid a state's tax on a trust's intangibles, actually in the hands of the nonresident trustee and not subject to the control of the equitable owner, because it was an attempt to tax the trust *res,* intangibles actually in the hands of a nonresident trustee. This was said to conflict with the Fourteenth Amendment as a tax on a thing beyond the jurisdiction of the taxing state.[25] See also

[24] *Bullard* v. *Cisco,* 290 U. S. 179, 190. See *Memphis Street R. Co.* v. *Moore,* 243 U. S. 299.

[25] The power of a state to tax the equitable interest of a beneficiary in such circumstances was not presented. *Id.,* pp. 92 and 95.

Graves v. *Schmidlapp,* 315 U. S. 657, 663, where the sovereign power of taxation was held to extend to a state resident who by will disposed of intangibles held by him as trustee with power of testamentary disposition under a nonresident trust. Nothing in these cases leads to the conclusion that a state may not tax intangibles in the hands of a resident trustee of an out-of-state trust.[26]

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal Constitution that we have power to protect or enforce the federal rights. In adjudging the taxability under state law of a resident trustee's ownership of intangibles, without reliance upon the residence of settlor or beneficiary or the location of the intangibles, various conclusions have been reached under state law and without regard to the Constitution of the United States. They are pertinent to our problem only as illustrations of the different viewpoints of state law.[27]

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[26] *Goodsite* v. *Lane,* 139 F. 593 (C. C. A. 6th), holds that a state property tax on a trustee's intangibles for the sole reason that he resides in the taxing state is invalid. It would seem this was so decided because of the Fourteenth Amendment. We do not think this case gives proper recognition to the state's power to tax the owner of the legal title to the *res.*

[27] The state statute taxing property to the trustee validly applies to the resident trustee: *Welch* v. *City of Boston,* 221 Mass. 155, 109 N. E. 174; *Harvard Trust Co.* v. *Commissioner of Taxation,* 284 Mass. 225, 230, 187 N. E. 596, 598; *Mackay* v. *San Francisco,* 128 Cal. 678, 61 P. 382; *Millsaps* v. *Jackson,* 78 Miss. 537, 30 So. 756; *McLellan* v. *Concord,* 78 N. H. 89, 97 A. 552; *Florida* v. *Beardsley,* 77 Fla. 803, 82 So. 794.

The state tax statute is inapplicable to the resident trustee: *Dorrance's Estate,* 333 Pa. 162, 3 A. 2d 682; *Commonwealth* v. *Peebles,*

Nor do we think it constitutionally significant that the Rhode Island trustee is not the sole trustee of the New York trust. The assessment, as the statute in question required, was only upon his proportionate interest, as a trustee, in the *res*. Whatever may have been the character of his title to the intangibles [28] or the limitations on his sole administrative power over the trust,[29] the resident trustee was the possessor of an interest in the intangibles, sufficient, as we have explained, to support a proportional tax for the benefit and protection afforded to that interest by Rhode Island.[30]

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In view of the dissents elicited by the Court's opinion, I should like to state why I join it.

Rhode Island taxes its permanent residents in proportion to the value of their property. The State imposes the tax whether its residents own property outright or

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134 Ky. 121, 135, 119 S. W. 774, 778; *Darrow* v. *Coleman*, 119 N. Y. 137, 23 N. E. 488; *Rand* v. *Pittsfield*, 70 N. H. 530, 49 A. 88. *Newcomb* v. *Paige*, 224 Mass. 516, 113 N. E. 458, and *Harrison* v. *Commissioner*, 272 Mass. 422, 172 N. E. 605, declined taxation on the ground of comity and thus distinguished *Welch* v. *City of Boston*, *supra*, 272 Mass. 428–29, 172 N. E. 609.

[28] Scott, Trusts, §§ 88.1, 103; Bogert, Trusts and Trustees, § 145.

[29] Scott, Trusts, § 194; *Brennan* v. *Willson*, 71 N. Y. 502; *Fritz* v. *City Trust Co.*, 72 App. Div. 532, 76 N. Y. S. 625, aff. 173 N. Y. 622, 66 N. E. 1109; *In re Campbell's Estate*, 171 Misc. 750, 13 N. Y. S. 2d 773.

[30] The state courts have reached varying conclusions under their statutes: See *People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 61 N. E. 280; *Mackay* v. *San Francisco*, 128 Cal. 678, 61 P. 382; *McLellan* v. *Concord*, 78 N. H. 89, 97 A. 552; *Dorrance's Estate*, 333 Pa. 162, 3 A. 2d 682; *Newcomb* v. *Paige*, 224 Mass. 516, 113 N. E. 458; *Harrison* v. *Commissioner*, 272 Mass. 422, 430–31, 172 N. E. 605, 609–10.

own it, legally speaking, in a fiduciary capacity. It is not questioned that the intangible assets in controversy could be included in the measure of the tax against the person of this trustee if he owned them outright. The doctrine that the power of taxation does not extend to chattels permanently situated outside a State though the owner was within it, *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Frick* v. *Pennsylvania,* 268 U. S. 473, is inapplicable. The tax is challenged, as wanting in "due process," because the Rhode Island resident is merely trustee of these intangibles and the pieces of paper that evidence them are kept outside the State.

Rhode Island's system of taxing its residents—subjecting them to the same measure for ascertaining their ability to pay whether they hold property for themselves or for others—long antedated the Fourteenth Amendment. Rhode Island has imposed this tax, "it may be presumed, for the general advantages of living within the jurisdiction." *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54, 58. It can hardly be deemed irrational to say, as Rhode Island apparently has said for a hundred years, that those advantages may be roughly measured, for fiscal purposes, by the wealth which a person controls, whatever his ultimate beneficial interest in the property. "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike." *Jackman* v. *Rosenbaum Co.,* 260 U. S. 22, 31.

In any event, Rhode Island could in terms tax its residents for acting as trustees, and determine the amount of the tax as though a trustee owned his trust estate outright. Rhode Island has, in effect, done so by treating all Rhode Island residents alike in relation to their property holdings, regardless of their beneficial interests. That is the practical operation of the statute. It is that which con-

trols constitutionality, and not the form in which a State has cast a tax. *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 280; *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 443 *et seq.* Whether a Rhode Island trustee can go against his trust estate for the amount of the tax which Rhode Island exacts from him is of no concern to Rhode Island. Rhode Island's power to tax its residents is not contingent upon it. A trusteeship is a free undertaking.

MR. JUSTICE JACKSON, dissenting.

If Rhode Island had laid a tax on one of its citizens individually, I should think it unassailable even if the basis for taxing him was that he held this trusteeship, and perhaps the tax on him could be measured by the value of the trust estate. In that case the state would tax only its own citizen. One is pretty much at the mercy of his own state as to the events or relationship for which it will tax him. If it wants to make the holding of a trusteeship taxable, I know of no federal grounds of objection. But that is not what is being done, nor what this decision authorizes.

If Rhode Island had taxed the individual, he might have sought reimbursement from the estate. Whether the estate was chargeable would be left to determination by the courts of the state supervising the trust. They might consider the nature of the tax to be a personal charge, as an income tax would doubtless be. Or they might find it to be an expense of administration, such as a transfer tax, and properly to be borne by the fund. But here no such decision is left to the courts which control the fund—the tax is laid on the trustee as such—the estate is the taxpayer.

Rhode Island claims the power to tax the estate solely because one of its trustees resides in that state. No property is in Rhode Island and its courts are not supervising administration of the trust. The estate is wholly located

in New York and the trustees derive their authority, powers and title from its courts and to them must account.

I had not supposed that a trust fund became taxable in every state in which one of its trustees may reside. Of course, in this instance it is proposed to tax only one-half of the estate as only one of the two trustees is resident in Rhode Island. But this seems to be an act of grace if there is a right to tax at all. The trustee has no power over, or title to, any fraction of the trust property that he does not have over all of it. If mere residence of a trustee is such a conductor of state authority that through him it reaches the estate, I see no reason why it should stop at a part, nor indeed why a trustee subject to the taxing power of several states, *Cf. Texas* v. *Florida,* 306 U. S. 398, may not also subject the trust fund to several state taxes by merely moving about.

The decision is a hard blow to the practice of naming individual trustees. It seems to me that there is no power in the state to lay the tax on the trust funds, despite unquestionable authority to tax its own citizen-trustee individually.

MR. JUSTICE MURPHY joins in this opinion.

MR. JUSTICE RUTLEDGE, with whom THE CHIEF JUSTICE concurs, dissenting.

I am in agreement with the views expressed by MR. JUSTICE JACKSON, except that I intimate no opinion concerning whether Rhode Island could lay a tax upon one of its residents for the privilege of acting as one of two or more trustees, when the state's only connection with the trust arises from the fact of his residence. This is not such a case.

Whether or not due process under the Fourteenth Amendment forbids state taxation of acts, transactions,

events or property is essentially a practical matter and one of degree, depending upon the existence of sufficient factual connections, having economic and legal effects, between the taxing state and the subject of the tax. I do not think the mere fact that one of a number of trustees resides in a state, without more, is a sufficiently substantial connection to justify a levy by that state upon the trust corpus, by an *ad valorem* tax either fractional or on the entirety of the *res*.

It may become necessary for claimants, beneficiaries or others to sue the trustee in Rhode Island or perhaps for him to join with other trustees in suing third persons there about trust matters. To that extent benefit and protection may be conferred upon the trust. But those needs may arise in connection with any sort of business or activity, trust or other, located and conducted outside the state as largely as this trust's affairs. I had not supposed that merely keeping open the state's courts to such claims would furnish a sufficient basis for bringing within its taxing grasp all property affected by the claims' assertion. That the trust *res* here consists of intangibles does not seem to me a sufficiently substantial factor, in the circumstances presented, to justify so wide a reach of the state's taxing arm.

Mobilia sequuntur personam has its appropriate uses for sustaining the states' taxing powers affecting residents and their extrastate interests. But when it is applied to the split ownership of a trust, not only as between trustee and beneficiary but also as among several trustees, to bring the trust *res* within the several states' powers of taxation, merely by virtue of the residence in each of one trustee and nothing more, the fiction I think is carried too far. Something more than affording a domiciliary basis for service of process, coupled with the split and qualified representative ownership of such a trustee,

should be required to sustain the state's power to tax the trust *res,* whether for all or only a fraction of its value.

Finally, whatever might be true of a single trustee or of several residing in a single state, I should doubt the thesis that the interest of one of two or more trustees in a trust is more substantial than that of a beneficiary or receives greater protection or benefit from the state of his residence. And if the beneficiary's residence alone is insufficient to sustain a state's power to tax the corpus of the trust, cf. *Brooke* v. *Norfolk,* 277 U. S. 27,[1] it would seem that the mere residence of one of a number of trustees hardly would supply a firmer foundation.

CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* ALLEN ET AL.

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

No. 626. Argued April 11, 1947.—Decided June 9, 1947.

1. The provisions of Article IV of the Treaty of 1923 with Germany, which assures to German heirs of "any person" holding realty in the United States the right to inherit the same, to sell it within three years, to withdraw the proceeds, and to be exempt from discriminatory taxation, prevail over any conflicting provision of California law—unless the provisions of the Treaty have been superseded or abrogated. Pp. 507–508.
2. So far as the right to inherit realty is concerned, the Treaty has not been abrogated or superseded—although the right to sell it and withdraw the proceeds may have been abrogated and the Federal Government has discretionary power to vest the property in itself, subject to certain rights of the owners. Pp. 508–514.

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[1] But cf. Holmes, J., dissenting in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 96.

(a) The outbreak of war does not necessarily suspend or abrogate treaty provisions. P. 508.

(b) The national policy expressed in the Trading with the Enemy Act, as amended by the First War Powers Act, is not incompatible with the right of inheritance of realty granted German aliens under Article IV of the Treaty. Pp. 510–512.

(c) The Treaty of Berlin, which accorded the United States all rights and advantages specified in the Joint Resolution of July 2, 1921, vesting in the United States absolute title to property of German nationals then held by the United States, did not abrogate the right of German heirs under the 1923 Treaty with Germany to inherit realty in this country. Pp. 512–514.

(d) There is no evidence that the political departments of the Government have considered that the collapse and surrender of Germany put an end to such provisions of the 1923 Treaty as survived the outbreak of war or the obligations of either party in respect to them. P. 514.

3. The provisions of Article IV of the Treaty of 1923 with Germany, which assures to German nationals the power to dispose of their personal property in this country, does not cover personalty located in this country which an American citizen undertakes to leave to German nationals, but it does cover personalty in this country which a German national undertakes to dispose of by will. Pp. 514–516, 517.

4. Section 259 of the California Probate Code as it existed in 1942, which made the right of non-resident aliens to acquire personal property dependent upon the reciprocal rights of American citizens to do so in the countries of which such aliens are inhabitants or citizens, is not unconstitutional as an invasion by the State of the field of foreign affairs reserved to the Federal Government. Pp. 516–517.

156 F. 2d 653, reversed in part and affirmed in part.

A resident of California having bequeathed her entire estate to certain German nationals after the declaration of war on Germany and the Alien Property Custodian having vested in himself all their right, title and interest in the estate, pursuant to Executive Order 9788, 11 Fed. Reg. 11981, issued under the Trading with the Enemy Act, as amended by the First War Powers Act, a District Court

held that the Custodian was entitled to the entire net estate and that the executor and the California heirs-at-law had no interest in the estate. 52 F. Supp. 850. The Circuit Court of Appeals reversed on the ground that the District Court was without jurisdiction of the subject matter. 147 F. 2d 136. This Court granted certiorari, 325 U. S. 846, and reversed. 326 U. S. 490. The Circuit Court of Appeals then held for the executor and California heirs-at-law. 156 F. 2d 653. This Court granted certiorari, 329 U. S. 706, and substituted the Attorney General as successor to the Alien Property Custodian. 329 U. S. 691. *Affirmed in part, reversed in part, and remanded to the District Court,* p. 518.

Harry LeRoy Jones argued the cause for petitioner. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, M. S. Isenbergh, David Schwartz* and *Armand B. DuBois.*

S. C. Masterson argued the cause for respondents. With him on the brief was *Joseph Wahrhaftig.*

By special leave of Court, *Everett W. Mattoon,* Deputy Attorney General, argued the cause for the State of California, as *amicus curiae,* urging affirmance. With him on the brief was *Fred N. Howser,* Attorney General.

Mr. Justice Douglas delivered the opinion of the Court.

Alvina Wagner, a resident of California, died in 1942, leaving real and personal property situate there. By a will dated December 23, 1941, and admitted to probate in a California court in 1942, she bequeathed her entire estate to four relatives who are nationals and residents of Germany. Six heirs-at-law, residents of California, filed a petition for determination of heirship in

the probate proceedings claiming that the German nationals were ineligible as legatees under California law.[1]

There has never been a hearing on that petition. For in 1943 the Alien Property Custodian, to whose functions the Attorney General has recently succeeded,[2] vested in himself all right, title and interest of the German nationals in the estate of this decedent.[3] He thereupon instituted this action in the District Court against the executor under the will and the California heirs-at-law for a determination that they had no interest in the estate and that he was entitled to the entire net estate,

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[1] Section 259, California Probate Code, in 1942 provided:

"The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

Section 259.2 provided:

"If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

The condition with respect to receipt of moneys in the United States was repealed in 1945, while this case was pending. Cal. Stats. 1945, c. 1160, § 1, effective September 15, 1945. Under the original act, the non-resident aliens had the burden of establishing the fact of existence of the reciprocal rights. § 259.1. By the 1945 amendment the burden of establishing the non-existence of such reciprocal right was placed on him who challenged the right of the non-resident aliens to take. Section 259.2 was repealed.

[2] Exec. Order No. 9788, Oct. 15, 1946, 11 Fed. Reg. 11981.

[3] Vesting Order No. 762, 8 Fed. Reg. 1252.

after payment of administration and other expenses. The District Court granted judgment for the Custodian on the pleadings. 52 F. Supp. 850. The Circuit Court of Appeals reversed, holding that the District Court was without jurisdiction of the subject matter. 147 F. 2d 136. The case came here on certiorari. We held that the District Court had jurisdiction of the suit and remanded the cause to the Circuit Court of Appeals for consideration of the merits. 326 U. S. 490. The Circuit Court of Appeals thereupon held for respondents. 156 F. 2d 653. The case is here again on a petition for a writ of certiorari which we granted because the issues raised are of national importance.

First. Our problem starts with the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, and proclaimed October 14, 1925. 44 Stat. 2132. It has different provisions governing the testamentary disposition of realty and personalty, which we will treat separately. The one pertaining to realty, contained in Article IV, reads as follows:

> "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than

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those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of "any person" holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Techt* v. *Hughes,* 229 N. Y. 222, 240, 128 N. E. 185, 191; *Ahrens* v. *Ahrens,* 144 Iowa 486, 489, 123 N. W. 164, 166. And see *People* v. *Gerke,* 5 Cal. 381; *Scharpf* v. *Schmidt,* 172 Ill. 255, 50 N. E. 182; *Colson* v. *Carlson,* 116 Kan. 593, 227 P. 360; *Goos* v. *Brocks,* 117 Neb. 750, 223 N. W. 13.

If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them. *Hauenstein* v. *Lynham,* 100 U. S. 483, 488–490.

Second. The Circuit Court of Appeals concluded that these provisions of the treaty had been abrogated. It relied for that conclusion on the Trading with the Enemy Act, 40 Stat. 411, 50 U. S. C. App. § 1 *et seq.,* as amended by the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. (Supp. I, 1941) § 5, and the Treaty of Berlin, 42 Stat. 1939.

We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel* v. *New Haven,* 8 Wheat. 464, 494–495. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth* v. *United States,* 279 U. S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with

the enforcement of a treaty in whole or in part. This was the view stated in *Techt* v. *Hughes, supra,* and we believe it to be the correct one. That case concerned the right of a resident alien enemy to inherit real property in New York. Under New York law, as it then stood, an alien enemy had no such right. The question was whether the right was granted by a reciprocal inheritance provision in a treaty with Austria which was couched in terms practically identical with those we have here. The court found nothing incompatible with national policy in permitting the resident alien enemy to have the right of inheritance granted by the treaty. Cardozo, J., speaking for the court, stated the applicable principles as follows:

> "The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. . . . President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *U. S.,* 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc.* Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence

presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 N. Y. pp. 242–243, 128 N. E. p. 192.

To the same effect see *Goos* v. *Brocks, supra; State* v. *Reardon,* 120 Kan. 614, 245 P. 158.[4]

We do not think that the national policy expressed in the Trading with the Enemy Act, as amended, is incompatible with the right of inheritance granted German aliens under Article IV of the treaty. It is true that since the declaration of war on December 11, 1941 (55 Stat. 796), the Act and the Executive Orders issued thereunder have prohibited the entry of German nationals into this country,[5] have outlawed communications or transactions of a commercial character with them,[6] and have precluded the removal of money or property from this country for their use or account.[7] We assume that these provisions abrogate the parts of Article IV of the treaty dealing with the liquidation of the inheritance and the withdrawal of the proceeds, even though the Act provides that the prohibited activities and transactions may be licensed.[8] But the Act and the Executive Orders do not evince such hostility to ownership of property by alien enemies as to imply that its acquisition conflicts with the national policy. There is, indeed, tacit recognition that acquisition of property by inheritance is compatible with the

[4] For a recent review of the authorities see Lenoir, The Effect of War on Bilateral Treaties, 34 Geo. L. J. 129.

[5] § 3 (b).

[6] § 3 (a).

[7] § 7 (c); § 5 (b), as amended; Exec. Order No. 8785, 3 C. F. R. Cum. Supp. 948.

[8] § 5 (a).

scheme of the Act. For the custodian is expressly empowered to represent the alien enemy heir in all legal proceedings, including those incident to succession.[9] Much reliance for the contrary view is placed on the power to vest alien property in an agency of the United States.[10] But the power to vest, *i. e.*, to take away, what may be owned or acquired does not reveal a policy at odds with the reciprocal right to inherit granted by Article IV of the treaty. For the power to vest is discretionary not mandatory. The loss of the inheritance by vesting is, therefore, not inevitable. But more important, vesting does not necessarily deprive the alien enemy of all the benefits of his inheritance. If he owes money to American creditors, the property will be applied to the payment of his debts.[11]

To give the power to vest the effect which respondents urge would, indeed, prove too much. That power is not restricted to property of alien enemies. It extends to the property of nationals of any foreign country, friend or enemy.[12] Provisions comparable to that contained in Article IV of the present treaty are found in existing treaties

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[9] Exec. Order No. 9193, ¶ 5, 3 C. F. R. Cum. Supp. 1174, 1176.

[10] Section 5 (b) (1), as amended, provides in part:

"During the time of war or during any other period of national emergency declared by the President . . . 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 . . . ."

[11] 60 Stat. 925, adding § 34 to the Trading with the Enemy Act.

[12] See note 10, *supra*.

with friendly nations.[13] We will not readily assume that when Congress enacted § 5 (b) and authorized the vesting of property, it had a purpose to abrogate all such treaty clauses. Cf. *Cook* v. *United States,* 288 U. S. 102, 120. Yet if the power to vest is inconsistent with the right of inheritance of an alien enemy, it is difficult to see why it is any less so when other aliens are involved. Finally, there is a distinction between the acquisition of property and the use thereof which § 5 (b) itself recognizes. That section not only grants the President the power to vest; it likewise grants him authority under the same circumstances to "prevent or prohibit, any acquisition . . . of . . . any property in which any foreign country or a national thereof has any interest . . . ." § 5 (b) (1) (B). No action has been taken to prevent or prohibit the acquisition of property by inheritance on the part of enemy aliens. The grant of express power to cut off, *inter alia,* the right of inheritance and the non-exercise of the power lend support to the view that the Trading with the Enemy Act, as amended, did not without more suspend or abrogate Article IV of the present treaty. This conclusion squares with the general rule stated in *Karnuth* v. *United States, supra,* p. 237, that treaty provisions "giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" survive the outbreak of war.

The argument based on the Treaty of Berlin is inconclusive. The Joint Resolution of July 2, 1921, 42 Stat. 105, 106, declared that property of German nationals held by the United States should be retained and no disposition made of it, except as specifically provided by law, until the German government made suitable provision for the satisfaction of claims of American nationals against it.

[13] Treaty with Great Britain, Arts. I, II, March 2, 1899, 31 Stat. 1939. Treaty with Norway, Art. IV, June 5, 1928, 47 Stat. 2135, 2138.

Thus absolute title to the property in question became vested in the United States. *Cummings* v. *Deutsche Bank,* 300 U. S. 115. The Treaty of Berlin accorded the United States all rights and advantages specified in the resolution. But the Treaty of 1828 with Prussia contained a provision substantially similar to Article IV of the present treaty. 8 Stat. 378, 384, Art. XIV. Hence it is argued that if the Treaty of 1828 survived the outbreak of war and thus guaranteed property rights in German nationals by way of inheritance during that war, it would not have been necessary to have negotiated a new convention covering the same ground in 1923. And it is also argued that if the provision in the earlier treaty did not survive the war, it is unlikely that the same parties would intend like provisions in the later treaty to have a different effect.

The attitude of the State Department has varied. In 1918 Secretary Lansing expressed the view that such treaty provisions were not in force during the war with Germany and Austria.[14] Today the Department apparently takes the other view.[15] We have no reliable evidence of the intention of the high contracting parties outside the words of the present treaty. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty. Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine, as *Techt* v. *Hughes, supra,* indicates, whether the provision under which rights are asserted is incompatible with national

[14] U. S. Foreign Rel., 1918 Supp. 2, p. 309 (Dept. State 1933); VI Hackworth, Digest of International Law (1943) p. 327.

[15] Letter to the Attorney General from Acting Secretary of State, Joseph C. Grew, dated May 21, 1945, commenting on the Government's position in the present litigation.

policy in time of war. So far as the right of inheritance of realty under Article IV of the present treaty is concerned, we find no incompatibility with national policy, for reasons already given.

It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. But the question whether a state is in a position to perform its treaty obligations is essentially a political question. *Terlinden* v. *Ames*, 184 U. S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. The Allied Control Council has, indeed, assumed control of Germany's foreign affairs and treaty obligations [16]—a policy and course of conduct by the political departments wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties.

Third. The problem of the personalty raises distinct questions. Article IV of the treaty contains the following provision pertaining to it:

> "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure

[16] The Axis in Defeat, State Dept. Pub. No. 2423, pp. 71, 72, 77.

subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

A practically identical provision of the Treaty of 1844 with Wurttemburg, Art. III, 8 Stat. 588, was before the Court in *Frederickson* v. *Louisiana,* 23 How. 445. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the "case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other . . . ." pp. 447–448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. *Petersen* v. *Iowa,* 245 U. S. 170; *Duus* v. *Brown,* 245 U. S. 176; *Skarderud* v. *Tax Commission,* 245 U. S. 633.

The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes "any person"; and the property covered is that within the territory of either of the high contracting parties. In case of personality, the provision governs the right of "nationals" of either contracting party to dispose of their property within the territory of the "other" contracting party; and it is "such personal property" that the "heirs, legatees and donees" are entitled to take.

Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson* v. *Louisiana, supra,* and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But

we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it.

We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals. We do not know from the present record the nationality of Alvina Wagner. But since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption less favorable to it, viz., that she was an American citizen.

Fourth. It is argued, however, that even though the provision of the treaty is inapplicable, the personalty may not be disposed of pursuant to the California statute because that statute is unconstitutional. Issues under the Fourteenth Amendment are not raised as in *Terrace* v. *Thompson,* 263 U. S. 197. The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. That argument is based on the fact that under the statute the right of nonresident aliens to take by succession or testamentary disposition is dependent upon the existence of a reciprocal right on the part of citizens of the United States to take personalty on the same terms and conditions as residents and citizens of the other nation.[17] The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens

[17] See note 1, *supra.*

reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

In *Blythe* v. *Hinckley,* 180 U. S. 333, California had granted aliens an unqualified right to inherit property within its borders. The alien claimant was a citizen of Great Britain with whom the United States had no treaty providing for inheritance by aliens in this country. The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The Court rejected the argument as being an extraordinary one. The objection to the present statute is equally farfetched.

Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey,* 305 U. S. 188, 193; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham, supra.* Then the state policy must give way. Cf. *Hines* v. *Davidowitz,* 312 U. S. 52. But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country, *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 316–17, or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution. What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.

In summary, we hold that disposition of the realty is governed by Article IV of the treaty. Disposition of the personalty, however, is not governed by the treaty unless it is determined that Alvina Wagner was a German national. If she was an American citizen, disposition of the

personalty is governed by California law. Whether there are other requirements of the California statute which would bar the California heirs-at-law is a question on which we intimate no opinion.

The judgment is reversed in part and affirmed in part, and the cause is remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE RUTLEDGE, concurring in part.

I join in the Court's opinion insofar as it relates to the real estate. But, as to the personal property, I think the cause should be remanded to the District Court for determination of Alvina Wagner's nationality, without expression of opinion here upon the constitutionality of the California statute.

The decision now made on that issue, by virtue of the Court's hypothesizing that she was an American citizen, will be rendered both moot and advisory in character if it is found, as it may well be in the District Court's further proceedings, that she was a German national. This Court has consistently declined to decide constitutional questions on hypothetical presentations. *Rescue Army* v. *Municipal Court,* 331 U. S. 549. The practice should be followed in this case, even though conceivably another appeal might be saved by indulging the presumption which the Court makes. It is more important that constitutional decisions be reserved until the issues calling for them are squarely and inescapably presented, factually as well as legally, than it is to expedite the termination of litigation or the procedural convenience of the parties.

Syllabus.

BROTHERHOOD OF RAILROAD TRAINMEN *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 970. Argued May 6, 1947.—Decided June 9, 1947.

1. Under § 17 (11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, a union duly designated as the representative of employees of a railroad is given an absolute right, within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure, to intervene in a suit brought under § 16 (12) to enjoin the railroad and its employees from violating an order of the Interstate Commerce Commission, where the injunction sought would prevent the railroad from carrying out a contract with the union and was directed in part against the employees. Pp. 525–526.

   (a) The right of intervention granted to representatives of employees of carriers by § 17 (11) applies to a court proceeding under § 16 (12) and not merely to proceedings before the Commission. Pp. 526–530.

   (b) The right to intervene granted by § 17 (11) is absolute and not merely permissive. Pp. 530–532.

   (c) A suit is one "affecting such employees," within the meaning of § 17 (11), if the employees would be prejudiced or bound by any judgment that might be entered in the case. Pp. 530, 531.

2. An order of a district court denying a union the right under § 17 (11) to intervene in such a case is appealable to this Court, which has jurisdiction to consider the appeal on its merits. Pp. 524–525, 531–532.

Reversed.

A district court denied a petition of a union of railroad employees to intervene under § 17 (11) of the Interstate Commerce Act and Rule 24 (a) of the Federal Rules of Civil Procedure in a suit brought under § 16 (12) to enjoin the railroad and its employees from violating an order of the Interstate Commerce Commission. On appeal to this Court, *reversed*, p. 532.

Burke Williamson argued the cause for appellant. With him on the brief was *Jack A. Williamson*. *E. Douglas Schwantes* and *Robert McCormick Adams* were also of counsel.

Ernest S. Ballard argued the cause and filed a brief for appellees.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our concern here is with the intervention rights of representatives of railroad employees in a suit brought against the railroad under § 16 (12) of the Interstate Commerce Act, 49 U. S. C. § 16 (12).

The origin of this suit is to be found in an order issued by the Interstate Commerce Commission on May 16, 1922. *Chicago Junction Case,* 71 I. C. C. 631. See also *Chicago Junction Case,* 264 U. S. 258. The Commission there approved the purchase by the New York Central Railroad Co. (Central) of all the capital stock of the Chicago River & Indiana Railroad Co. (River Road); it also authorized the leasing to River Road of all the properties of the Chicago Junction Railway Co. (Junction) for 99 years and thereafter, at the lessee's option, in perpetuity. Among the properties in question were trackage and switching facilities at the Union Stock Yards, Chicago, Illinois, connecting with various trunk lines. Prior to the Commission order, the practice had been for the trunk line railroads to use their own power and crews to move their empty and loaded livestock cars over these tracks to and from the loading places in the Union Stock Yards. For the privilege of so moving their cars, the railroads were charged $1.00 per car, loaded or empty.

The Commission made various conditions to its approval of the proposed transactions. The third condition provided: "The present traffic and operating relationships

existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." 71 I. C. C. at 639. This condition is still in effect, the Commission's decision and order having been found to be valid and binding on all parties in a proceeding in the District Court in 1929.[1]

The trunk line railroads have continued to use their own power and crews in moving their livestock cars over the trackage operated by River Road and have paid River Road the amount of $1.00 per car. But on January 25, 1946, Central and River Road notified the railroads that on and after February 1, 1946, the cars would be moved over this trackage by means of the power and crews of River Road and that the handling charge would be $12.96 per outbound loaded car. Soon after this new practice went into effect, the trunk line railroads (appellees herein) brought this suit for preliminary and permanent injunctions under § 16 (12) of the Interstate Commerce Act against Central, River Road and Junction. They claimed that the new practice was in violation of the third condition of the 1922 Commission order. They accordingly sought to enjoin the defendants and "their respective officers, agents, representatives, servants, employees and successors," from disobeying the order, especially the third condition thereof, and to force the defendants to permit them to move their cars with their own power and crews. The Commission was allowed to intervene as a party plaintiff; its intervening complaint also prayed for an

[1] *Baltimore & O. R. Co.* v. *United States* (unreported), United States District Court for the Northern District of Illinois, Eastern Division, Equity No. 3427, January 15, 1929. The court approved the Commission order as amended in 150 I. C. C. 32. That amendment is not germane to this case.

injunction against the alleged violation of the third condition by the defendants and their employees.[2]

A stipulation of facts was then filed. After describing the change in handling the cars, it pointed out that this change resulted from a settlement between the River Road and the Brotherhood of Railroad Trainmen of a labor dispute over the work involved in these livestock car movements. The Brotherhood was the bargaining agent under the Railway Labor Act for the River Road trainmen. It made a demand, based upon its contract with River Road, that these trainmen be given the work of moving and switching the livestock cars over the River Road trackage. The Brotherhood threatened to call a strike unless this demand was met before 10:30 p. m., January 23, 1946, a threat that was backed by an almost unanimous strike vote of the trainmen. Under this threat, River Road made an agreement with the Brotherhood shortly before the scheduled strike hour, as a result of which the River Road trainmen were to be permitted to move and switch the cars. The notice to the trunk line railroads of this change in practice subsequently followed.

The District Court thereupon issued a preliminary injunction as requested. Central, River Road and Junction, and "their respective officers, agents, representatives, employees and successors," were restrained from disobeying the 1922 Commission order and from violating the third condition of that order and were commanded to permit the trunk line railroads to move their cars over the River Road line with their own power and crews. The court concluded, as a matter of law, that the facts relative to

[2] The Commission based its complaint upon § 5 (8) of the Interstate Commerce Act, 49 U. S. C. § 5 (8), which authorizes the Commission to seek, and grants jurisdiction to the federal district courts to issue, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under § 5.

the labor dispute between the Brotherhood and River Road were "irrelevant and immaterial." [3]

Three days after the preliminary injunction became effective, the Brotherhood asked leave to file its special appearance for the purpose of moving to vacate the injunction and to dismiss the proceedings for failure to join the Brotherhood and its members as indispensable parties. This motion was denied. River Road then filed its answer to the original complaint, pointing out that the changed arrangement resulted from the labor dispute with the Brotherhood and contending that this new practice did not violate the 1922 Commission order. The Brotherhood thereafter filed its motion to intervene generally as a party defendant, alleging that the primary purpose of the suit was to nullify its agreement with River Road and to deprive the Brotherhood members of the work they were performing under that agreement and that the Brotherhood members were therefore indispensable parties. The contention was made that the Brotherhood had an unconditional right to intervene by virtue of § 17 (11) of the Interstate Commerce Act [4] and Rule 24 (a) (2) of the Federal Rules of Civil Procedure; and 28 U. S. C. § 45a was later added in support of this contention. But the motion to intervene was denied by order, without opinion.

The District Court then allowed an appeal to this Court from its order denying intervention. The appellee railroads moved to dismiss the appeal on the ground that such an order was not final and hence was not appealable, the Brotherhood not being entitled to intervene as a

[3] On appeal by Junction, the Seventh Circuit Court of Appeals reversed the decree as to Junction, holding that Junction had no control over and nothing to do with the acts complained of by the appellees. *Baltimore & O. R. Co.* v. *Chicago Junction R. Co.*, 156 F. 2d 357.

[4] 54 Stat. 916, 49 U. S. C. § 17 (11).

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matter of right. We postponed further consideration of the question of our jurisdiction to review the order to the hearing of the appeal upon the merits.

Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. *United States* v. *California Canneries,* 279 U. S. 553, 556.[5] The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Pipe Line Co.* v. *United States,* 312 U. S. 502, 508.

Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial

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[5] See also *Ex parte Cutting,* 94 U. S. 14; *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578; *In re Engelhard,* 231 U. S. 646; *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219; *New York City* v. *New York Telephone Co.,* 261 U. S. 312.

court and if there is no abuse of discretion, the order is not appealable and we lack power to review it. In other words, our jurisdiction is identified by the necessary incidents of the right to intervene in each particular instance. We must therefore determine the question of our jurisdiction in this case by examining the character of the Brotherhood's right to intervene in the proceeding brought under § 16 (12) of the Interstate Commerce Act.

We start with Rule 24 (a) and (b) of the Federal Rules of Civil Procedure, applicable to a civil proceeding of this type. Rule 24 (a) deals with intervention of right and provides in pertinent part: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." In contrast, Rule 24 (b) is concerned with permissive intervention and reads as follows: "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The Brotherhood claims that as a consequence of either of two federal statutes—§ 17 (11) of the Interstate Commerce Act or 28 U. S. C. § 45a—it has an absolute right to intervene within the meaning of Rule 24 (a) (1). It also alleges that it possesses an absolute right within the contemplation of Rule 24 (a) (2), the representation of its interest by existing parties being inadequate and the possibility that it may be bound by a judgment in the action being a real one. No claim to permissive intervention

under Rule 24 (b) is made; nor is there a contention that the District Court abused any discretion it might have had.

In our view, § 17 (11) of the Interstate Commerce Act does give the Brotherhood an absolute right to intervene in the instant proceeding within the meaning of Rule 24 (a) (1). As set forth in 54 Stat. 916,[6] this portion of the Act reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this Act affecting such employees." The following considerations make obvious the fact that the Brotherhood meets all the requirements of this provision:

First. It is unquestioned that the Brotherhood is the duly designated representative of the River Road trainmen.

Second. The right of intervention granted to such a representative by § 17 (11) applies to a court proceeding under § 16 (12) of the Act, the plain language of § 17 (11) extending its reach to "any proceeding arising under this Act."

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[6] As it appears in the United States Code, 49 U. S. C. § 17 (11), this paragraph reads: "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

The words "this chapter" refer to Part I of the Interstate Commerce Act, which embodies the original statute known by that name prior to its division into parts. Chapter 8 relates to Part II of the Interstate Commerce Act, originally known as the Motor Carrier Act of 1935. Section 305 (h) of Part II is a cross-reference to § 17 of Part I: "All the provisions of section 17 of this title shall apply to all proceedings under this chapter." Chapter 12 is the equivalent of Part III of the Interstate Commerce Act, which deals with water carriers. Section 916 (a) is also a cross-reference to § 17 of Part I: "The provisions of section 12 and section 17 of chapter 1 of this title and sections 46–48 of this title shall apply with full force and effect in the administration and enforcement of this chapter."

On this point, however, the appellee railroads contend that § 17 (11) must be confined to proceedings before the Interstate Commerce Commission, to the exclusion of court proceedings. In support of this contention, they point to the fact that § 17 as a whole is primarily concerned with Commission procedure and organization. That fact is emphasized by the heading of § 17 as it appears in the Statutes at Large, 54 Stat. 913, and the United States Code, 49 U. S. C. § 17, a heading that reads: "Commission procedure; delegation of duties; rehearings." The inference is then made that paragraph (11), with which we are concerned, must be limited by that heading and by the general context of § 17 as a whole. The result of the contention is that the phrase "any proceeding arising under this Act," as found in paragraph (11), is rewritten by construction to refer only to "any proceeding before the Commission arising under this section."

We cannot sanction such a construction of these words. It is true, of course, that § 17 is concerned primarily with the organization of the Commission and its subdivisions and with the administrative disposition of matters coming within that agency's jurisdiction. At least ten of the twelve paragraphs of § 17 deal with those matters. And before § 17 was cast into its present form in 1940, all five of its paragraphs related exclusively to those matters. Congress rewrote the section when it enacted the Transportation Act of 1940, 54 Stat. 898, continuing and modifying previous provisions and consolidating and including matters which had formerly been scattered throughout the Act.[7] At the same time, however, it was expressly recognized that certain paragraphs were being added which were entirely new, paragraphs which went beyond purely administrative matters. Thus the pertinent com-

[7] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 13; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

mittee reports stated [8] that "A new paragraph (9) is included providing that orders of a division, an individual Commissioner, or a board shall be subject to judicial review as in the case of full Commission orders, after an application for rehearing has been made and acted upon." And as to paragraph (11), it was said [9] that "A new paragraph is added at the end of section 17 providing that representatives of employees of a carrier may intervene and be heard in any proceedings arising under part I affecting such employees." By such language in their reports, the framers of § 17 recognized the obvious fact that certain provisions of that section deal with something more than might be indicated by the heading.

That the heading of § 17 fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved. While accurately referring to the subjects of Commission procedure and organization, it neglects to reveal that § 17 also deals with judicial review of administrative orders and with intervention by employee representatives. But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and

[8] H. R. No. 2016, 76th Cong., 3d Sess., p. 67; H. Rep. No. 2832, 76th Cong., 3d Sess., p. 72.

[9] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

the heading of a section cannot limit the plain meaning of the text. *United States* v. *Fisher,* 2 Cranch 358, 386; *Cornell* v. *Coyne,* 192 U. S. 418, 430; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Here the meaning of § 17 (11) is unmistakable on its face. There is a simple, unambiguous reference to "any proceeding arising under this Act" or, as the House committee paraphrased it,[10] to "any proceedings arising under part I." There is not a word which would warrant limiting this reference so as to allow intervention only in proceedings arising under § 17 or in proceedings before the Commission. The proceedings mentioned are those which arise under this Act, an Act under which both judicial and administrative proceedings may arise.[11] The instant case is a ready illustration of a judicial proceeding arising under this Act; a suit of this nature is authorized solely by § 16 (12) of the Act.[12] Hence it is a proceeding to which the right of intervention may attach by virtue of § 17 (11).

Nor do we perceive any reason of statutory policy why the framers of § 17 (11) should have wished to confine the right of intervention by employee representatives to pro-

[10] H. Rep. No. 1217, 76th Cong., 1st Sess., p. 15.

[11] Section 17 (11), by referring to proceedings arising under "this Act," also affects judicial and administrative proceedings arising under Parts II and III of the Act. See note 6, *supra.*

[12] Section 16 (12) is labeled "Proceedings to enforce orders other than for payment of money." 49 U. S. C. § 16 (12). It provides that if any carrier fails to obey a Commission order other than for the payment of money, the Commission, any injured party or the United States may apply to a federal district court for the enforcement of the order.

ceedings before the Commission. Occasions may arise, as in this case, where the employee representatives have no interest in intervening in the original administrative proceeding, but where they have a very definite interest in intervening in a subsequent judicial proceeding arising under the Act. When the framers have used language which covers both types of proceedings, we would be unjustified in formulating some policy which they did not see fit to express to limit that language in any way.

Third. This is a proceeding arising under the Act which affects the employees represented by the Brotherhood. Nothing could make this plainer than the fact that direct injunctive relief was sought and obtained against these employees. The appellee railroads sued to enjoin River Road and its employees from disobeying the third condition of the 1922 Commission order. It was alleged that this condition required River Road and its employees to permit the railroads to use their own power and crews in moving cars over the River Road line. Yet that was precisely the subject matter of the conflict between River Road and the Brotherhood, resulting in the insertion of important provisions in the contract between them. If the Commission order did require the River Road employees to forego operating the livestock cars, their contract rights with River Road were affected in a very real sense. Acts done by the employees in performance of this contract obviously prompted this suit; and any such acts performed after the issuance of an injunction might give rise to contempt action. It is thus impossible to say that this proceeding is not one "affecting such employees" within the meaning of § 17 (11).

Since all the conditions of § 17 (11) have been satisfied in this case, the only question that remains is whether the Brotherhood is thereby accorded a permissive or an absolute right to intervene. The language of § 17 (11) is in

terms of "may intervene and be heard," which might be construed as giving only a discretionary right. But our view, as we have indicated, is that once the requirements of § 17 (11) have been met, the employees' representative acquires an absolute right of intervention.

Some statutes speak of intervention "as of right." Thus where suit is brought by or against the United States to enforce or set aside a Commission order, the Commission or the parties in interest to the proceeding before the Commission "may appear as parties thereto . . . as of right." 28 U. S. C. § 45a. In such a case, the right to intervene is absolute and unconditional. *Sprunt & Son* v. *United States,* 281 U. S. 249, 255.

No less absolute or unconditional is the right to intervene under § 17 (11), which permits intervention where the employees are affected by the proceeding. To be sufficiently affected within the meaning of this provision requires that the employees be prejudiced or bound by any judgment that might be entered in the case, as is the situation relative to the River Road employees. Once it is clear that an effect of that degree is present, however, there is no room for the operation of a court's discretion. Whether the employees' interests should be asserted or defended in a proceeding where those interests are at stake is a question to be decided by the employees' representative, not by the court. The statutory term "may intervene" thus means "may intervene if the employees' representative so chooses" rather than "may intervene in the discretion of the court." And if the representative does choose to intervene, it may do so as a matter of right within the meaning of Rule 24 (a) (1) of the Federal Rules of Civil Procedure. Such is this case.

We thus conclude that § 17 (11) gives the Brotherhood an absolute right to intervene in this proceeding, making it unnecessary to discuss whether, and to what extent, the

Brotherhood would have had such a right apart from § 17 (11). It follows that we have jurisdiction to consider the appeal on its merits. And in the exercise of that jurisdiction, we reverse the judgment of the District Court denying leave to the Brotherhood to intervene.

Reversed.

UNITED STATES *v.* BAYER ET AL.

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

No. 606. Argued April 2, 1947.—Decided June 9, 1947.

1. When a judge's charge to a jury is accurate and correct, the extent of its amplification rests in his discretion; and the fact that the charge is unusually brief does not make it a reversible error where there is no evidence that the jury misunderstood it. Pp. 536–537.
2. In the circumstances of this case, it was not reversible error to refuse to admit in evidence an unsworn unverified long distance call slip from the telephone company records four hours after the case had been submitted to the jury, even if its exclusion would have been prejudicial error had the offer been timely and properly verified. 537–539.
3. The fact that an army officer had made a confession under circumstances precluding its use in evidence against him did not preclude the use in evidence against him of a second confession made voluntarily six months later after fair warning that it might be used against him and when he was under no restraint except that he could not leave his base limits without permission—even though the second confession was but an elaboration of the first. Pp. 539–541.
4. Conviction by court-martial for violating the 95th and 96th Articles of War, by conduct unbecoming an officer and gentleman and conduct prejudicial to good order and military discipline, does not bar, on the ground of double jeopardy, another trial in a civil court for a conspiracy to defraud the Government by depriving it of the faithful services of an army officer in violation of 18 U. S. C. § 88; since the two offenses are not the same even though they arise out of the same facts. Pp. 541–543.

156 F. 2d 964, reversed.

Respondents were convicted in a District Court of conspiracy to defraud the Government by depriving it of the faithful services of an army officer in violation of 18 U. S. C. § 88. The Circuit Court of Appeals reversed. 156 F. 2d 964. This Court granted certiorari. 329 U. S. 706. *Reversed,* p. 543.

Frederick Bernays Wiener argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg.*

Charles H. Tuttle argued the cause for Bayer et al., respondents. With him on the brief were *Joseph B. Keenan, I. Maurice Wormser* and *Archibald Palmer.*

Roger Robb argued the cause for Radovich, respondent. With him on the brief was *Samuel T. Ansell.*

Mr. Justice Jackson delivered the opinion of the Court.

This is a sordid three-sided case. The Government charged all of the defendants with conspiring to defraud by depriving it of the faithful services of an Army officer. 18 U. S. C. § 88, 35 Stat. 1096. The defendant Radovich, the officer in question, admits receipt of money from the other defendants and admits the questioned actions but denies the conspiracy, claiming the others induced him to accept a bribe. The defendants Bayer admit payment of the money but claim they were victims of extortion by Radovich. The jury found all guilty but recommended "the highest degree of clemency for all three defendants." The Court of Appeals for the Second Circuit reversed.[1] We granted the Government's petition for certiorari.[2]

[1] *United States* v. *Bayer,* 156 F. 2d 964.

[2] 329 U. S. 706.

The principal facts are admitted and it is contested inferences which are decisive of the issue of guilt. None of the defendants testified. It would serve no purpose to review the evidence in detail. It justifies finding as follows:

The Bayer brothers were manufacturers of yarn and thread and bore good names in their circle. Samuel had three sons in the service. One of them, Martin, with Melvin Usdan, a nephew of both Bayers, was involved in this case. Martin's health had not been robust. These two boys enlisted in the Air Corps on the day which Samuel had learned was the last on which a volunteer could select the branch in which to serve. They were almost immediately assigned as file clerks at Mitchel Field, Long Island. In January 1943, at a night club, Elias Bayer picked up the acquaintance of two officers stationed there. They were interested in obtaining uniforms at wholesale. The Bayers eventually aided them and others to obtain uniforms and paid for them, though they claim to have understood that the officers were to pay for them. The acquaintance extended to other officers, and there was considerable entertainment. In April 1943 replacement of men in clerical positions by Women's Army Corps personnel was impending and one Col. Jacobson requested a transfer of these two boys with the effect, as Samuel understood it, of assuring them a year's assignment at Mitchel Field. Jacobson was given a dinner at the Waldorf and presented with four new automobile tires.

This transfer placed the two boys under command of Radovich. By July there were rumors that the officers were receiving gifts from the Bayers and Radovich told Samuel that the boys would have to be transferred. Samuel wanted them kept at Mitchel Field. Radovich made a transfer from his unit to the medical detachment at the same field, which at first was disapproved, and then

he accomplished it by an exchange of personnel. After the transfer was made, Samuel paid Radovich some $1,900 or $2,000.

In August 1943 the boys were again transferred, to a unit of airborne engineers for overseas duty. Both Bayers were greatly concerned about this and besought their friends among the officers to prevent it. Radovich had gone. He had joined an Air Commando group with high priority on personnel. But he several times talked with Captain Pepper, in charge of personnel, about transferring these boys from the overseas service to Air Transport Command for service only in continental United States. This could not be done. Then Radovich proposed to use his unit's higher priority to requisition the boys for it, to drop them as surplus, and thereupon to have them transferred to the Air Transport Command for domestic service. Pepper agreed this might be done. Radovich told Pepper it was "worth his while" to get it done and he would see that doing it was worth Pepper's while.

On November 22, 1943 Radovich requisitioned the transfer of the boys to his unit, to report November 25. Almost at once he also requested that they be transferred out of his unit and to Air Transport Command. This was effected shortly. Elias Bayer and one of name unknown to the record then delivered $5,000 to Radovich, who sent Pepper $500. Pepper testified that he destroyed the check.

The Government from these facts and other evidence draws, as did the jury, the inference of conspiracy. The Bayers say they were victims of extortion and there is evidence that Radovich used the transfer to his own unit, one of extremely dangerous mission for which these boys had neither training nor aptitude, to force money out of the Bayers. Radovich denies the conspiracy and pleads certain court-martial proceedings as a bar.

The issue as to whether the Bayers tempted Radovich with a bribe or Radovich coerced them with threats is one with evidence and inferences both ways. Radovich was a gallant and skillful flier and explained his conduct thus: "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them." The Bayers were persons of some means, thoroughly frightened at the prospect of service for these boys in combat areas, and ready to use their means to foster the boys' safety. Whether they were victims of extortion or voluntary conspirators was for the jury to say, and the reversal does not rest on any inadequacy of proof. The grounds of reversal by the Court of Appeals raise for our consideration four questions of law.

1. The Bayers assigned as error the trial judge's charge as to conspiracy. The Court of Appeals unanimously said, "There is no question but that this charge was an accurate, albeit brief, statement of the law." But a majority thought that "the statement was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen," while one Judge thought it "a welcome relief from much judicial verbosity." [3] We are not certain whether a reversal as to the Bayers would have been rested on this criticism of the charge alone. We do not consider objection to the charge to amount to reversible error. Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion. The trial judge, in the light of the whole trial and with the jury before him, may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse. How far any charge on technical questions of law is really understood by those of lay background would be difficult to

[3] 156 F. 2d at 967.

ascertain, but it is certainly more evident in the living scene than in a cold record. In this case the jury asked a rereading of the charge on conspiracy. After repeating his instruction, the court inquired of the jury whether anything about it was not clear, or whether there was anything which they desired to have amplified. Nothing was suggested, although inquiry was made as to other matters. While many judges would have made a more extended charge, we think the trial court was within its area of discretion in his brevity.

2. The Bayers won reversal on another ground. After the jury had been out about four hours, it returned for instructions and asked to have parts of the summations of counsel read. The court declined to read parts. It was at this point that counsel for the Bayers asked to reopen the case and to put in evidence a long distance call slip from telephone company records. It was the memorandum of a call on November 24, 1943, from one we assume to be Radovich, spelled on the ticket "Ravish," from Arlington, Virginia, to Bayer's number in New York. The ticket tended to corroborate Samuel Bayer's secretary who testified to receiving such a call and who was the Bayers' chief witness on the subject of extortion. It also tended to contradict a Government witness. The matter had become of importance because of the District Attorney's argument that the Bayers' witness falsified her story. The court had already, at respondents' request, after the jury had been instructed, told them that a check of the Bayers' records showed a collect-call from Washington that day, but on request of counsel for Radovich the court had also stated that the record did not show who made the call. We will assume that the proffered evidence was relevant, corroborative of the Bayers' contentions, and had the offer been timely and properly verified, its exclusion would have been prejudicial error.

But the item of evidence was disputed. The District Attorney had not seen the slip and did not admit the interpretation Bayer's counsel put upon it. Counsel for Radovich objected. To have admitted it over his objection might well have been prejudicial to him. The trial court had already, as he admitted, and as Radovich's counsel charged, given the Bayers the benefit of an irregular conveyance of information to the jury about the call which had not been regularly proved. Moreover, defendants offered no witness to authenticate the slip. As the trial court pointed out to counsel, his proposal was merely to hand to the jury "an unverified memorandum from the telephone company." Even during the trial such an offer, with no foundation in testimony and against objection, would have been inadequate. To have admitted it with no witness to identify or support it would have cut off all cross-examination by both the Government and Radovich, and cross-examination would not have been unreasonable concerning a slip in which the Bayers wished Arlington to be taken as equivalent to Washington and "Ravish" to identify Radovich. The evidence, if put in after four hours of deliberation by the jury, would likely be of distorted importance. It surely would have been prejudicial to the Government, for the District Attorney would then have had no chance to comment on it, summation having been closed. It also would have been prejudicial to the other defendant, Radovich, who, with no chance to cross-examine or to comment, would be confronted with a new item of evidence against him. The court seems to have faced a dilemma, either to grant a mistrial and start the whole case over again or to deny the Bayers' request. Certainly a defendant who seeks thus to destroy a trial must bring his demand within the rules of proof and do something to excuse its untimeliness.

Not only was the proffer of the evidence technically deficient, but no excuse for the untimeliness of the offer

appeared. It is true, no doubt, that counsel was surprised at the argument made by the District Attorney which would have been less effective had this evidence been in. But Miss Solomon, an employee of defendants and, hence, an interested witness, was left to carry the burden of proving extortion without the corroboration of the testimony of her employer-defendants. This was defendants' right, but it should have been apparent that every bolster to her credibility would be important. It is well known that the telephone companies keep such records and they seem to have been easily obtained when asked for. We do not consider it reversible error to refuse to let this unsworn, unverified slip be put into evidence four hours after the case had been submitted to the jury. The judgment of reversal as to the Bayers was, in our opinion, erroneous.

3. Radovich's case raises additional questions. The first concerns the receipt in evidence of his confession of March 15 and 17, 1945. In absence of the jury, the Court heard testimony before admitting it and thereafter most of it was repeated before the jury. The proof against Radovich largely rested on the confession.

After service of distinction in Burma, Radovich, then 24 years of age, was ordered to report to Mitchel Field. Upon arrival on August 9, 1944, he was placed under arrest and confined in the psychopathic ward in the station hospital. Here, for some time, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges for court-martial were not promptly served on him as said to be required by the 70th Article of War, nor was he taken before a magistrate for arraignment on any charges preferred by civil authorities. Military charges were finally served on May 30, 1945. Meanwhile, under such restraint, he made a first confession on September 5 or 6, 1944. Without more, we will assume this confession to be inadmissible under the rule

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laid down in *McNabb* v. *United States,* 318 U. S. 332, and *Anderson* v. *United States,* 318 U. S. 350. But this confession was neither offered nor received in evidence.

A second confession made to Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945 was received, however, and the Court of Appeals has held it to be "patently the fruit of the earlier one" [4] and equally inadmissible, citing *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Nardone* v. *United States,* 308 U. S. 338.

At the time of this confession Radovich was still at Mitchel Field, but only under "administrative restrictions," which meant that he could not depart the limits of the base without leave. Flynn testified that Radovich had a number of conversations with F. B. I. agents. He had volunteered some facts not in the original statement and the meeting of March was to incorporate the whole story in one statement. Flynn warned him his statement might be used against him. Radovich requested the original statement and read it before making the second. The March statement is labeled a "supplementary" statement and is "basically" the same as the earlier one but went into more detail. The District Attorney refused to produce the first statement, which was not offered in evidence, and the court sustained him, having examined the statement and found no material conflict between them.

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so

[4] 156 F. 2d at 970.

far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. The second confession in this case was made six months after the first. The only restraint under which Radovich labored was that he could not leave the base limits without permission. Certainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons* v. *Oklahoma,* 322 U. S. 596.

4. Lastly, we must consider whether the court-martial proceedings instituted against Radovich bar this prosecution on the ground of double jeopardy. Radovich was tried and, on June 29, 1945, convicted by court-martial of violating the 95th and 96th Articles of War, 10 U. S. C. §§ 1567, 1568, 41 Stat. 806–807. The offense charged and found was that of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specifications set forth receipt of the same payments of money from the Bayers for effecting the same transfers that are involved in this indictment. Radovich's plea in bar was overruled by the trial court upon the ground that the conspiracy charged in the indictment was not the same offense as that under the Articles of War. The Court of Appeals disapproved this ground but left the issue of double jeopardy to be decided after retrial because of doubt meanwhile raised about the status of the military judgment.

The Court of Appeals thought the identity of the specifications in the court-martial proceedings and the offense charged in the indictment, and the likelihood that the military court did not distinguish carefully between the passing of the money and the arrangement to that end, required the plea in bar to be sustained under *Grafton* v. *United States,* 206 U. S. 333. In that case a soldier on guard duty in the Philippines shot and killed two Filipinos. He was tried by court-martial on charge of homicide and acquitted. A prosecuting attorney of the Islands then filed in Provincial Court a charge of "assassination" on identical facts. This Court found not merely the evidence but the offense charged to be identical in everything but name, and held retrial of the same offense in Philippine Courts to constitute double jeopardy.

But here we think the District Court correctly ruled that the two charges did not accuse of identical offenses. The indictment is for conspiring and we have but recently reviewed the nature of that offense. *Pinkerton* v. *United States,* 328 U. S. 640. Its essence is in the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself. *Pinkerton* v. *United States,* 328 U. S. 640, 644. In the court-martial proceedings, Radovich alone was accused. No conspiracy was alleged and the specification was confined to Radovich's receipt of money for effecting transfers. This was a substantive offense on his part under the Articles of War. The agreement with others to commit it constituted a separate offense, although among the overt acts proved to establish the conspiracy were the same payments and transfers. Both offenses could be

charged and conviction had on each. The plea in bar was properly overruled.

This conclusion makes it unnecessary to decide whether the disapproval of the court-martial judgment for errors in trial and without ordering retrial creates a status for the military judgment such that in no event would it be available to bar this prosecution.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

MR. JUSTICE FRANKFURTER would affirm the decision of the Circuit Court of Appeals substantially for the reasons set forth below by Judge Clark in reversing the conviction of the Bayers, which, under a charge of conspiracy, carries with it a reversal as to Radovich. 156 F. 2d 964, 967–68.

MR. JUSTICE RUTLEDGE is of the view that the judgment of the Circuit Court of Appeals should be affirmed insofar as it relates to the respondent Radovich, for the reasons stated in that court's opinion. 156 F. 2d 964, 968–70.

GOSPEL ARMY *v.* LOS ANGELES ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 103. Argued February 6, 7, 1947.—Decided June 9, 1947.

1. A judgment of the Supreme Court of California reversing a judgment of a trial court without direction, which under California law has only the effect of remanding the case for a new trial and, so far as appears, places the parties in the same position as if the case had never been tried, is not a "final judgment" within the meaning of § 237 of the Judicial Code, and this Court does not have jurisdiction of an appeal therefrom. Pp. 546–548.
2. *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, distinguished upon the special circumstances appearing in that case as rendering the California Supreme Court's judgment "final" within the meaning of § 237 of the Judicial Code. Pp. 547–548.

3. Although the modern rule is that, in determining whether a state court's remand is for a new trial, this Court will examine both the judgment and the opinion as well as other circumstances that may be pertinent, this does not mean that in the ordinary case this Court will disregard the effect of the judgment under local law. P. 548.

27 Cal. 2d 232, 163 P. 2d 704, appeal dismissed.

An appeal from a judgment of the Supreme Court of California, 27 Cal. 2d 232, 163 P. 2d 704, reversing a judgment of a trial court without direction *dismissed* for want of jurisdiction under § 237 of the Judicial Code. P. 548.

Robert H. Wallis argued the cause and filed a brief for appellant.

John L. Bland argued the cause for appellees. With him on the brief were *Ray L. Chesebro* and *Bourke Jones.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This is a companion case to *Rescue Army* v. *Municipal Court of the City of Los Angeles,* 331 U. S. 549, decided today. Because we dismiss the appeal in this cause for jurisdictional reasons, the facts may be shortly stated.

The Gospel Army is an incorporated religious organization. The trial court found that it is "engaged exclusively in the promulgation, by literature and word of mouth, of its religious beliefs, by and through its auxiliaries, and in the procuring of donations in the form of money and articles of value in the prosecution and furtherance of its religious activities." More particularly, its activities consist of conducting a mission, distributing religious books without charge, giving aid to the poor. It collects salvage which it either sells in a second-hand goods store,[1]

[1] The money received from the sales is used to meet the cost of operating the store, including compensation paid to the manager and

distributes directly to the poor, or sends to a salvage mill.[2]

The Gospel Army instituted this suit to enjoin the enforcement of certain ordinances of the City of Los Angeles on the ground that they violate its religious liberty under the Constitutions of California and the United States.[3]

After trial the Superior Court of Los Angeles County broadly concluded:

> "That a permanent injunction should issue herein restraining and enjoining the Defendants and each of them and any and all persons, associations, departments under whom said Defendants or any of them may be employed or acting and any and all persons, associations or departments who may be acting or claiming by, through or under said Defendants, or any of them from the further interference and threatened acts, which would in any way prevent the free exercise of a religious liberty of said Plaintiff."

From this decision an appeal was taken to the District Court of Appeal of the Second Appellate Division, Division Two, and the cause was then transferred to the Supreme Court of California. That court held, three judges dissenting, that the Superior Court's action in granting the injunction was erroneous. 27 Cal. 2d 232. Some, if not all, of the ordinances in suit were sustained as constitutional. On appeal to this Court determination of jurisdiction was postponed to the merits.

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to those who solicit contributions. Whatever remains goes into the corporate treasury.

[2] Ninety per cent of the money received for the goods sent to the salvage mill is paid to the drivers of trucks used by the Gospel Army to collect the salvage. The other ten per cent goes into the treasury.

[3] It is unnecessary to consider precisely what ordinances were involved in this case or were sustained by the California Supreme Court. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

The jurisdictional difficulties arise from the form of the California Supreme Court's judgment. That court ended its opinion with the statement, "The judgment is reversed." Its judgment was in the same form: "It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby reversed." In California an unqualified reversal, "that is to say, without direction to the trial court," is effective to remand the case "for a new trial and places the parties in the same position as if the case had never been tried." *Erlin* v. *National Union Fire Ins. Co.,* 7 Cal. 2d 547, 549; *Stearns* v. *Aguirre,* 7 Cal. 443, 448; *Central Sav. Bank* v. *Lake,* 201 Cal. 438, 443; *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U. S. 69, 72; 2 Cal. Jur. § 590.

Under § 237 of the Judicial Code, 28 U. S. C., § 344, only "final judgments" of state courts may be appealed to this Court. And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court "except the ministerial act of entering the judgment which the appellate court . . . directed." *Department of Banking* v. *Pink,* 317 U. S. 264, 267. Thus, where the effect of the state court's direction is to grant a new trial, the judgment will not be final.

Increasingly this Court has become less formal in the matter of final judgments. It is no longer the rule that the face of the judgment is determinative of whether it is final.[4] Today "the test is not whether under local rules

[4] For cases incorporating the old "face of the judgment" rule, see, *e. g., Bruce* v. *Tobin,* 245 U. S. 18; *Schlosser* v. *Hemphill,* 198 U. S. 173; *Haseltine* v. *Central Bank,* 183 U. S. 130. There was strong dissent to the abandonment of the rule. See the separate opinion

of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court . . . ." *Department of Banking* v. *Pink,* 317 U. S. at 268.

Thus, this term in *Richfield Oil Corp.* v. *State Board of Equalization, supra,* despite the fact that the Supreme Court of California had reversed a judgment without directions, we determined on the entire record and upon an independent investigation of California law that the judgment was final for the purposes of § 237. In the first place, the facts had been stipulated and, so far as appeared, the stipulation would have been available and controlling upon a second trial. In the second place, the suit was one for a refund of a tax and under California law only those grounds presented in the prior claim for refund could be urged in the suit. The opinion stated: "Since the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided." 329 U. S. at 73–74.

In this case, however, the facts have not been stipulated, nor are there any special procedural restrictions. Thus, under California law, the Gospel Army on the second trial to which it is entitled may amend its complaint and present new facts. "Such a reversal remands the case for a new trial and places the parties in the same position as if the case had never been tried. . . . Of course, upon a retrial the decision of the appellate court becomes the law of the case upon the facts as then

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of McReynolds, J., in *Clark* v. *Williard,* 292 U. S. 112, 129. And for general discussion, cf. Boskey, Finality of State Court Judgments under the Federal Judicial Code (1943) 43 Col. L. Rev. 1002, 1003–1008; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 54–57.

presented. But that law must be applied by the trial court to the evidence presented upon the second trial. 'It is settled beyond controversy that a decision of this court upon appeal, as to a [matter] of fact, does not become the law of the case.' " *Erlin* v. *National Union Fire Ins. Co.*, 7 Cal. 2d at 549.

We cannot assume that the Supreme Court of California would hold the ordinances in question constitutional no matter what facts might be presented upon a second trial. Indeed, experience demonstrates that particularly in constitutional cases issues turn upon factual presentation.

Accordingly, the case does not fall within the specific holding of the *Richfield Oil* case, for, although the modern rule is that in determining whether the state court's remand is for a new trial this Court will examine both the judgment and the opinion as well as other circumstances which may be pertinent, *Department of Banking* v. *Pink, supra; Richfield Oil Corporation* v. *State Board of Equalization, supra,* this does not mean that in the ordinary case we will disregard the effect of the judgment under the local law. In this case, for example, the effect of the judgment under state practice is to remand the case for a new trial. Nothing in the opinion of the court is to the contrary. We cannot assume that the state court made an error in its judgment, clerical or otherwise. If the parties had thought so, they could have moved to have it amended. Indeed, that course may still be open to them.

The appeal is dismissed.

Syllabus.

RESCUE ARMY ET AL. *v.* MUNICIPAL COURT OF LOS ANGELES.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 574. Argued February 6, 7, 1947.—Decided June 9, 1947.

Being charged in a municipal court in California on two counts with violations of three sections of a municipal code governing the solicitation of contributions for charity, which sections incorporated by reference numerous other sections of an intricate and ambiguous chapter, appellants sued for a writ of prohibition to test the jurisdiction of the trial court, claiming that the code unduly abridged the free exercise of their religion contrary to the First and Fourteenth Amendments. In an opinion which ambiguously incorporated by reference parts of its opinion in another case involving a wider range of issues, the Supreme Court of California sustained the validity of the code and the jurisdiction of the municipal court without clearly identifying or construing the relevant provisions of the code or passing upon questions of local procedure necessarily involved. *Held:*

1. The State Supreme Court's judgment is "final" within the meaning of § 237 (a) of the Judicial Code and this Court has jurisdiction of an appeal therefrom. *Bandini Co.* v. *Superior Court,* 284 U. S. 8; *Bryant* v. *Zimmerman,* 278 U. S. 63; *Plessy* v. *Ferguson,* 163 U. S. 537, followed. *Gospel Army* v. *Los Angeles, ante,* p. 543, distinguished. Pp. 556–568.

2. This Court, pursuant to long-settled policy in disposition of constitutional questions, declines to exercise its jurisdiction to pass upon the constitutional issues raised in the appeal; since they are presented in a highly abstract and speculative form and the State Supreme Court has not clearly interpreted the numerous ambiguous and interdependent provisions of the intricate chapter out of which they arise. Pp. 574–585.

3. Decision of the constitutional questions by this Court should await the determination which necessarily will be made in the further proceedings in the municipal court whether in the first count appellants have been charged independently or alternatively under two subsections. Pp. 576–577.

4. In a case such as this, the jurisdiction of this Court to adjudicate constitutional issues should be exerted only when they are presented in clean-cut and concrete form, unclouded by any serious

problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts. P. 584.

5. The appeal is dismissed without prejudice to the determination in the future of any issues arising under the Federal Constitution from further proceedings in the municipal court. Pp. 584–585.

28 Cal. 2d 460, 171 P. 2d 8, appeal dismissed without prejudice.

The Supreme Court of California denied a writ of prohibition to test the jurisdiction of a municipal court to try appellants for alleged violations of a municipal code governing the solicitation of contributions for charity, which they challenged as unduly abridging the free exercise of their religion contrary to the First and Fourteenth Amendments. 28 Cal. 2d 460, 171 P. 2d 8. Appeal *dismissed,* without prejudice to the determination in the future of any issues arising under the Federal Constitution from further proceedings in the municipal court. P. 585.

Robert H. Wallis argued the cause and filed a brief for appellants.

John L. Bland argued the cause for appellee. With him on the brief was *Ray L. Chesebro.*

Mr. Justice Rutledge delivered the opinion of the Court.

On the merits this appeal presents substantial questions concerning the constitutional validity of ordinances of the City of Los Angeles governing the solicitation of contributions for charity. First and Fourteenth Amendment grounds are urged as nullifying them chiefly in the view that they impose prior restraints upon and unduly abridge appellants' rights in the free exercise of their religion. Those rights, as claimed, are to engage in soliciting donations for charity as a part of their religion free from the ordinances' restrictions.

Similar, but also distinct, questions were involved in *Gospel Army* v. *Los Angeles,* dismissed today for jurisdictional reasons. 331 U. S. 543. This case, however, arose procedurally in a different fashion, so that it is not subject to the same jurisdictional defect. And the procedural difference is important, not merely for our jurisdiction but also for determining the propriety of exercising it in the special circumstances presented by this appeal.

The California Supreme Court heard and determined the *Gospel Army* case several months in advance of this one. It sustained the regulations in both instances, filing separate opinions in each case. 27 Cal. 2d 232; 28 Cal. 2d 460. But the attack upon the city ordinances in the *Gospel Army* case covered a much wider range than here, and the court's principal opinion was rendered in that cause. Hence in this case it disposed of overlapping issues merely by reference *a fortiori* to its "approval" of the challenged provisions in the *Gospel Army* opinion.

As will more fully appear, this mode of treatment, together with interlacing relationships between provisions involved here and others in the *Gospel Army* case, has combined with the necessitated dismissal of that appeal to create for us difficult problems in determining exactly how much of the regulatory scheme approved in the *Gospel Army* opinion, and hence also how much of that decision, must be taken as having been incorporated in the disposition of this cause. By virtue of the California court's method of decision, we are largely without benefit of its judgment upon these matters, including possible questions of severability. Consequently, this fact, together with the different jurisdictional postures in which the cases reach this Court, would force us to determine those questions independently before undertaking any decision on the merits.

That necessity and the difficulties tendered by the extricating problem raise substantial questions concern-

ing the disposition appropriate, in the unusual situation, to be made of this appeal. In order to present the problem with a fair degree of precision, it is necessary to state in some detail the nature of the two proceedings, their relationships to each other, and their procedural as well as jurisdictional differences.

I.

This suit is one for a writ of prohibition. The appeal is from the California Supreme Court's judgment denying appellants' application for such a writ. 28 Cal. 2d 460. They instituted the suit in the District Court of Appeal, Second Appellate District, Division Three, of California. Its object was to test the jurisdiction of the respondent Municipal Court of Los Angeles to proceed with a pending criminal prosecution against Murdock, who is an officer of the Rescue Army. In that court he had been charged with violating three provisions of the city ordinances, had been twice convicted, and twice the convictions had been reversed by the Superior Court of Los Angeles County.[1]

While the case was pending in the Municipal Court after the second reversal, appellants filed their petition in this cause in the District Court of Appeal. Alleging that the Municipal Court was threatening to proceed with a third trial on the same charges, they set forth grounds held sufficient under the state procedure to present for adjudication the question of the Municipal Court's jurisdiction. 28 Cal. 2d at 462–467.

The District Court of Appeal denied the writ. Thereupon the state Supreme Court transferred the cause to its own docket and issued an alternative writ of prohibi-

[1] The grounds for reversal in each instance were such as did not determine the cause finally, but resulted in remanding it for further trial. The first reversal was for reception of incompetent evidence; the second, for insufficiency of the evidence to prove violations of the ordinances in question.

tion pending determination there. As in the *Gospel Army* case, the Supreme Court, with three of the seven justices dissenting, decided the issues on the merits against the appellants. It therefore denied the writ, at the same time discharging the alternative writ. In short effect the ordinances, insofar as they were involved, were sustained as against the constitutional and other objections raised concerning them. Probable jurisdiction was duly noted here, and the cause was assigned for argument immediately following the *Gospel Army* case.

Apparently Murdock was charged in the Municipal Court with violating three sections of the Municipal Code. These were §§ 44.09 (a), 44.09 (b), and 44.12 of Article 4, Chapter IV.[2] Sections 44.09 (a) and (b) formed the basis for the first count against Murdock.[3] Colloquially speaking, § 44.09 is a "tin-cup" ordinance. In summary, its two subdivisions, (a) and (b), prohibit solicitations in the specified public places or adjacent areas "by means of any box or receptacle" except, under (a), "by the express

[2] Appellants refer to the code as Ordinance No. 77,000. According to appellee's brief, Ordinance No. 77,000 consists of a "revision and codification of the regulatory and penal ordinances of the City of Los Angeles, to be known as the Los Angeles Municipal Code," and contains nine chapters, I–IX, subdivided into articles, divisions and sections, the latter numbering in excess of 2000.

The brief further states: "The portion of the Los Angeles Municipal Code involved in this proceeding is Article 4 (Charities and Relief) in Chapter IV (Public Welfare) and consists of nineteen sections numbered 44.01 to 44.19, inclusive. However, not all or any considerable number of such sections are actually involved herein, although a complete treatment of the sections primarily involved may require some mention . . . of most if not all of the other sections." Appellants' view, however, is that substantially all of the provisions of §§ 44.01 to 44.19 are incorporated by reference into §§ 44.09 and 44.12 for purposes of determining their constitutional validity.

[3] It is not clear whether the charges under §§ 44.09 (a) and (b) were made in the alternative or conjunctively. See text *infra,* Part IV, following note 43; see also note 42.

written permission of the Board [of Social Service Commissioners]"; under (b), "without first filing with the Department [of Social Service] a 'notice of intention' as required by Sec. 44.05" and, literally, obeying the further command that "every person so soliciting must in all other respects comply with the provisions of this Article." [4] The full text of the section is set forth in the margin.[5]

The second count charged violation of § 44.12 by soliciting without exhibiting or reading to the persons solicited an information card issued by the Los Angeles Board of Social Service Commissioners. Section 44.12 is more general than § 44.09 as to place and manner of solicitation. It is in the following words:

> "No person shall solicit any contributions unless he exhibits an Information Card provided for in Sec. 44.03 of this Article and reads it to the person solicited or presents it to said person for his perusal, allowing him sufficient opportunity to read same, before accepting any contribution so solicited."

Obviously neither § 44.09 (b) nor § 44.12 is self-contained. Each incorporates by reference other sections of the code. Thus, it is necessary to take into account,

[4] The article is Article 4 of Chapter IV. See note 2.

[5] Section 44.09. "(a) No person shall solicit any contribution for any purpose by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by the express written permission of the Board.

"(b) No person shall solicit any charitable contribution, or any contribution for any real or purported charitable purpose, by means of any box or receptacle in any place immediately abutting upon any public sidewalk or way, or in any place of business open to the public, or in any room, hallway, corridor, lobby or entranceway, or other place open to or accessible to the public, or in any place of public resort, without first filing with the Department a 'notice of intention' as required by Sec. 44.05, and every person so soliciting must in all other respects comply with the provisions of this Article."

under § 44.09 (b), the provisions of § 44.05 requiring the filing of the "notice of intention" as well as the omnibus requirement of compliance "in all other respects . . . with the provisions of this Article"; under § 44.12, the requirements of § 44.03 concerning issuance of the information card. Enforcement of § 44.09 (a), which does not refer specifically to other sections, necessarily involves consideration of whatever requirements may relate to securing the board's written permission.

The issue of the Municipal Court's jurisdiction therefore, insofar as it concerns us, turns upon the validity of §§ 44.09 (a), 44.09 (b) and 44.12, together with the other provisions necessarily incorporated in them by reference; and, upon this appeal, their validity not only is relative solely to the effect of the federal constitutional prohibitions, but must be determined in light of the California Supreme Court's interpretation, including the extent to which other provisions have been incorporated. Moreover the jurisdictional question arises substantially as upon demurrer to the charges, since trial has not been had and the issue concerns only the Municipal Court's power to proceed with the criminal cause. Hence only the validity of the provisions on their face, not as applied to proven circumstances, is called in question.[6]

The *Gospel Army* case, on the other hand, was an injunction suit, in which attack was projected on a broad front against the ordinances and the scheme of regulation they embody as a whole. For some reason § 44.09 (a) was not attacked in that suit. But § 44.09 (b) was involved

[6] The California Supreme Court said at the end of its opinion, in relation to appellants' contention that the ordinances are being unconstitutionally applied to them: "The allegations relied upon in support of this contention, however, are denied by the answer and the issues of fact thus presented will not be determined by us in this proceeding." 28 Cal. 2d 460, 473. See *Bandini Co.* v. *Superior Court*, 284 U. S. 8, 14; cf. note 26 *infra*.

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indirectly through its relation to § 44.05 and § 44.12 directly, as well as numerous other provisions both of Article 4, Chapter IV, and outside it. That article, as we have noted above, consists of Code §§ 44.01–44.19, entitled "Charities and Relief," and thus includes all of the sections involved here as well as many others which were in issue in the *Gospel Army* case.

It is this setting of dovetailed legislative enactments and judicial decisions which creates the primary problem for our disposition. Those interrelations, of the cases and of the ordinances they involve, will be better understood in the setting of a summary of the general scheme.

II.

The Municipal Code regulates both charitable and other solicitations, as well as pawnbrokers, secondhand dealers, junk dealers, etc. The regulations affecting those dealers lie outside Article 4 and became pertinent in the *Gospel Army* case because of that organization's activities in collecting, repairing, selling and giving away used articles.[7] None of those regulations, however, appears to be involved here.[8] The Municipal Court charges, so far as we can now ascertain, relate exclusively to charitable solicitations and consequently are comprehended within Article 4.[9] We therefore are relieved of the necessity for

[7] These operations were performed through the Gospel Army's so-called industrial department. For details see the California Supreme Court's opinion, 27 Cal. 2d 232.

[8] No charges in the Municipal Court purported expressly to be grounded upon the provisions of the ordinance dealing with pawnbrokers, secondhand dealers and junk dealers; and §§ 44.09 (a), (b) and 44.12 do not relate explicitly or, it would seem, by necessary implication, upon their face, to such activities.

[9] Not only are §§ 44.09 (a), (b) and 44.12 located within that article but other provisions of the ordinance which they expressly purport to incorporate are so placed.

taking account of any of the code provisions outside that article.

Article 4, however, comprehends numerous interrelated sections and subdivisions. They provide a broad and general, though also highly detailed and integrated, plan for regulating solicitations in Los Angeles. The sections here in question are integral parts of that plan.

It is designed primarily, though not exclusively, to secure a maximum of information and publicity for the public. It seeks to make available to all persons solicited detailed information concerning the persons soliciting, the causes or organizations on behalf of which they act, and the uses to which the donations will be put. The plan also undertakes, in other ways, to assure responsibility, both moral and financial, on the part of soliciting individuals and agencies; and to see to it that the funds collected are applied to their appropriate purposes.

Machinery for executing the scheme is created through the establishment of a Department of Social Service and a Board of Social Service Commissioners, each with specified administrative powers.[10] Comprehensive and detailed definitions of activities affected and correlative prohibitions are prescribed, together with various provisions for exemption. Violation of the prohibitions, which generally require compliance with one or more other regulations, is made punishable by criminal sanctions.

More narrowly, insofar as the plan is relevant here, any person or association desiring to solicit contributions for a charitable purpose[11] must file with the department, at

[10] See notes 13, 16, and text *infra*.

[11] Section 44.01 defines "charitable" to "include the words philanthropic, social service, benevolent, patriotic, either actual or purported." "Contribution" is defined to "include the words alms, food, clothing, money, property or donations under the guise of a loan of money or property." "Solicitation" is broadly defined to include oral or written requests, and requests made by distributing, mailing or pub-

least ten days before beginning to solicit, a written "Notice of Intention." § 44.05. This is, in substance, an application for the "Information Card" provided for in § 44.03 (d). It will be recalled that § 44.09 (b), in issue here, expressly requires the filing of this notice. And § 44.12, also directly in issue, requires exhibition of the card before solicitation may lawfully take place.

The notice must be filed on a form furnished by the department and must contain the "complete information" specified in the margin.[12] § 44.05. The department is

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lishing "any handbill," by press announcement, radio, telephone concerning specified types of events, the offering to sell or selling any advertising, book, card, chance, etc., in connection with charitable appeals.

[12] "(a) The purpose of the solicitation and use of the contribution to be solicited;

"(b) A specific statement, supported by reasons and, if available, figures, showing the need for the contribution proposed to be solicited;

"(c) The character of such solicitation and how it will be made or conducted;

"(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable;

"(e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation;

"(f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention. The expenditures or use made of such contributions, together with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof;

"(g) The names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made;

"(h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of

authorized, among other things, to investigate the statements contained in the notice and to issue information cards "to all solicitors." [13] § 44.03. Those cards must show the detailed matters specified below.[14] *Ibid.* The board is empowered to publish the results of the investigations provided for in § 44.03 [15] and to exercise other powers, such as endorsing a soliciting association, waiving specified requirements, and recalling the information cards for correction.[16] §§ 44.02, 44.03. A fee of four cents per

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the original of such resolution by the officer of such association having charge of the records thereof;

"(i) A statement that the signers of such Notice have read and are familiar with the provisions of this Article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation." § 44.05.

[13] The department's powers are specified in § 44.03 as follows:

"(a) To investigate the allegations of Notice of Intention, or any statement or reports;

"(b) To have access to and inspect and make copies of all books, records and papers of such person, by or on whose behalf any solicitation is made;

"(c) To investigate at any time the methods of making or conducting any such solicitation;

"(d) To issue to all solicitors Information Cards which cards shall show" the matters set forth below in note 14.

[14] "(1) That same is issued as information for the public and is not an endorsement;

"(2) The Board may, pursuant to Ordinance No. 34982, omit above provision and state that they endorse such charitable association;

"(3) The pertinent facts set forth in Notice of Intention required under Section 44.05 of this Article; [See note 12 *supra*.]

"(4) Any additional information obtained as shall in the opinion of the Board be of assistance to the public to determine the nature and worthiness of the purpose for which the solicitation is made."

[15] See note 13.

[16] The board's power to endorse charitable associations is conferred by § 44.02. The powers given by § 44.02 are as follows, except for subsection (e) which for brevity is summarized:

"(a) To publish results of any investigation provided for or au-

card is charged, when issued, unless more than twenty-five are issued at one time for the same solicitation. In that event the fee becomes one cent per card.

The foregoing regulations apply, on the face of the ordinance, to charitable solicitations as requirements in the nature of conditions precedent, compliance with which is necessary before solicitation may be lawfully made. There are also other requirements which become applicable during and after the act of solicitation. One is that of § 44.15, which commands persons soliciting for charity to tender to each contributor a written receipt containing specified detailed information.[17] And by

thorized in Section 44.03 subdivisions (a), (b) and (c) of this Article;

"(b) To give such publicity to any such results by such means as may be deemed best to reach the general public and persons interested;

"(c) To waive the whole or part of any provisions of Sections 44.03, 44.05, 44.06, 44.10, 44.11, 44.12, 44.13, 44.15, and 44.02 excepting this subsection, of this Article for the purpose of meeting any extraordinary emergency or calamity;

"(d) To request return of Information Cards to the Department upon completion of solicitation for which they are issued or at the expiration of the period for which they are valid;"

[Subsection (e) authorizes the board to recall and amend or correct the information cards on receiving additional information which, in its opinion, renders inaccurate any statement contained in it.]

"(f) To waive all conditions of this Article upon application of person filing Notice of Intention, in respect to Information Cards and filing copies of written authorization when a campaign or drive for raising funds for any charitable purpose is given general publicity through the press or otherwise, and when more than twenty-five (25) persons serve as solicitors without compensation, if it shall be proved to the satisfaction of the Board that the publicity concerning the solicitation fully informs the general public and the persons to be solicited as to the facts required to be set forth on the Information Card."

[17] In addition to "the amount and kind of the contribution," the receipt must show "substantially" the name of the association aided;

§ 44.14 every such solicitor must file with the department, within thirty days after "the close of any such solicitation" or demand, a report showing the contributions secured and "exactly for what uses and in what manner" they "were or are to be disbursed."

Article 4, moreover, classifies persons soliciting into three groups, two of which are primary, namely, "promoters" and "solicitors." "Solicitors," as will appear, are subdivided into two classes. The regulations bearing upon promoters are more onerous than those touching solicitors and are contained in § 44.19, which itself includes numerous subdivisions.[18]

The exact definitive distinction between solicitors and promoters, who may be either institutions or individuals, is not clear from the definitions given in the ordinance,[19] or indeed from the opinions filed in the state

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a statement whether the contribution is to be applied to its "general purposes" or to special ones and, if the latter, "the nature thereof . . . clearly stated"; that the information card was presented for perusal prior to the making of the contribution. But tender of the receipt is not required if the donation is made, in money, by placing it in a locked receptacle previously approved by the board.

[18] The regulations governing promoters require a license from the Board distinct from or additional to the information card which solicitors must secure, § 44.19 (1); the payment of a $25.00 license fee, § 44.19 (4); the filing of a bond in the sum of $2000 conditioned as specified in § 44.19 (3); and proof to satisfy the board that the applicant is "of good character and reputation" and has "sufficient financial responsibility to carry out the obligations incident to any solicitation such applicant may make." § 44.19 (5). The ordinary solicitor, on the other hand, must secure only the information card, which is in effect a permit; pay the cost of the card; and generally, it would seem, comply with the other requirements heretofore outlined for securing the card.

[19] Section 44.01 defines "promoter" to mean "any person who for pecuniary compensation or consideration received or to be received, *solicits* or is engaged in the business of or holds himself out to the public as engaged in the business of soliciting contributions for or on behalf of any other person or any charitable association, corpora-

court.[20] But, so far as we can gather, the promoter differs from the solicitor, generally at any rate, as being one who engages in solicitation as a business or by exercising a managerial or supervisory capacity over other persons acting as paid solicitors under his direction or pursuant to a program in his charge.[21]

Section 44.19 also regulates the relations between promoters and paid solicitors associated with them. A pro-

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tion or institution, or conducts, manages or carries on or agrees to conduct, manage or carry on or is engaged in the business of or holds himself out as engaged in the business of conducting, managing or carrying on any drive or campaign for any such purpose . . . ." (Emphasis added.)

Section 44.01, entitled "Definitions," contains no definition of "solicitor," but defines "solicitation" broadly, as we have indicated in note 11 *supra*. The meaning of "solicitor" apparently is left therefore to be gathered definitively from the definition of "solicitation" and the use of "solicit" or "solicitor" in the special context of other sections as they become pertinent.

It should be noted that the definition of "promoter" in § 44.01, by including the word "solicits," italicized above, would seem literally broad enough to include any paid solicitor of contributions "for or on behalf of any other person" or charitable organization, and thus to include all solicitors except wholly voluntary ones. This seems to have been Justice Carter's view as expressed in his dissent in the *Gospel Army* case, 27 Cal. 2d 232, 266. However, other sections indicate that solicitors may be paid as well as voluntary without becoming promoters. See § 44.19 (9). And see note 20. Murdock apparently receives compensation for his services as an officer of the Rescue Army.

[20] In the *Gospel Army* case the record shows that all the solicitors were paid upon a percentage basis. Nevertheless, the court dealt in its opinion with the provisions governing solicitors as well as promoters, thus indicating apparently that in its view the difference was other than that solicitors are voluntary workers and promoters are paid. The ordinance and the state court's opinions, more especially in the *Gospel Army* case, appear to treat the two groups as distinct and not merely overlapping in relation to persons themselves engaged in direct solicitation.

[21] See notes 19 and 20.

moter is forbidden by § 44.19 (9) (a) to cause or permit any person for compensation "to solicit or receive on his behalf or at his instigation, under his direction or control or in his employment, any contribution unless such person shall be registered as a solicitor by the Board." And the next subsection requires the registered solicitor to prove his good moral character and reputation for honesty, to file a $500 bond, and to pay a $1.00 registration fee. § 44.19 (9) (b), (d).

Section 44.19 thus apparently is effective to create two classes of solicitors, namely, registered and unregistered, as well as the distinction between promoters and solicitors; and establishes special and more burdensome conditions for lawful solicitation by registered solicitors, as well as by promoters, than are created for solicitors not required to be registered.

Finally, without detailed elaboration, numerous regulations in addition to or interwoven with those relating to solicitors of both types and to promoters govern the organizations or charities on whose behalf the solicitations are made.[22]

The foregoing summary is perhaps more than sufficient to show the comprehensive nature of the plan and the intricately interlacing relationships of the numerous provisions of Article 4 making up the general scheme in which §§ 44.09 (a), (b) and 44.12 find their context and setting. Some no doubt could be applied independ-

[22] Specific and highly detailed records and reports must be made of contributions received, of expenditures, and of other matters. §§ 44.08, 44.14. Written and corporately authenticated authorizations must be issued. §§ 44.10, 44.11. Indeed compliance with such requirements as those relating to filing the notice of intention under § 44.05 and procuring the information card under § 44.03 for use by persons acting for the charity forces organizational conformity as much as individual. And by departmental regulation, apparently, fifty per cent of all contributions received must be applied to the charitable purpose rather than to expenses of collection or promotion.

ently, perhaps for example § 44.09 (a).[23] But others are interwoven with one or more distinct provisions to specify essential constituent elements. And in many instances the provisions so imported require or suggest still further reference to additional ones. The article is in fact a web of intricately dovetailing references and cross-references.

Thus, with respect to the sections involved here, § 44.12 requires exhibition of the information card provided for in § 44.03. This in turn forces reference to § 44.05, which specifies the conditions for securing the card. And fulfillment of those conditions may compel resort to still other provisions. The same process must be gone through with respect to § 44.09 (b). For while that section differs verbally from § 44.12 in that it specifically requires only the filing of the notice of intention, not issuance or exhibition of the information card, not only is the procedure for filing the notice highly detailed and largely set forth in other sections. It is also highly doubtful, in view of the California Supreme Court's decision, whether persons so complying and filing the notice would be authorized by that act alone to proceed with lawful solicitation under

[23] The subsection is one of the few not referring to other provisions of the article or the code. None of them contains any specification of conditions for securing the board's written permission. Cf. note 5. The California Supreme Court, however, supplied them in the following language: "We conclude, therefore, that if subdivision (a) of section 44.09 is read, as it must be, in light of the purpose and context of the entire ordinance, on the one hand, and the peculiar circumstances attendant upon collections by means of receptacles in public places, on the other hand, that the denial of a permit is warranted only if the information furnished to the board discloses fraud or if the solicitation as planned would interfere with the public convenience and safety." 28 Cal. 2d at 471–472.

It becomes unnecessary, however, to consider the validity of possible independent application of § 44.09 (a), for reasons to be stated. See text *infra* Part IV, following note 43.

§ 44.09 (b), without waiting the specified ten-day period (§ 44.05) and undergoing the investigations prescribed by § 44.03 or perhaps actually procuring the card.[24]

It is necessary, in order to complete the environment of the problem presented by the appeal, to set forth somewhat more fully the manner in which the California Supreme Court dealt with §§ 44.09 (a), 44.09 (b) and 44.12, and related provisions. This, however, may best be deferred at this point, in order to state the legal principles which we think are controlling of our disposition.

III.

The *Gospel Army* case we have dismissed for the technical, nevertheless important, reason that under California law the state Supreme Court's reversal, without more, contemplates further proceedings in the trial court. Consequently that judgment is not final for the purposes of our jurisdiction on appeal, within the meaning of § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a). 331 U. S. 543.

On the other hand, this appeal is not subject to that particular infirmity. The effect of the California Supreme Court's judgment, of course, will be to permit further proceedings by the Municipal Court. But under the rule of *Bandini Co.* v. *Superior Court,* 284 U. S. 8, this prohibition proceeding would be an independent suit, in relation to that criminal prosecution, "and the judgment finally disposing of it," as did the state Supreme Court's judgment, "is a final judgment within the meaning of § 237 (a) of the Judicial Code." 284 U. S. at 14.[25]

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[24] See text *infra* Part IV, *circa* note 50.

[25] The following authorities were cited and relied upon: *Weston* v. *Charleston,* 2 Pet. 449, 464; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S. 30, 31; *Missouri ex rel. St. Louis, B. & M. R. Co.* v. *Taylor,* 266 U. S. 200, 206; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, 494.

The *Bandini* case, like this one, was a prohibition proceeding brought in a California District Court of Appeal. Its object was to determine the jurisdiction of a state Superior Court in an equity cause. That suit had been brought by the state Director of Natural Resources to enjoin alleged unreasonable waste of natural gas, pursuant to the Oil and Gas Conservation Act of California. A preliminary injunction issued in the Superior Court. Thereupon the writ of prohibition was sought to restrain the enforcement of the order, and of the Act, which was attacked under the Fourteenth Amendment on due process and equal protection grounds. The writ was denied, as was hearing by the California Supreme Court. Upon appeal here this Court sustained its jurisdiction and determined the constitutional issues presented upon the face of the statute,[26] affecting the Superior Court's jurisdiction, adversely to the appellants' contentions.

The *Bandini* ruling is well settled.[27] Apparently, however, it has been applied to a proceeding in prohibition relating to a criminal prosecution in but a single case, *Plessy* v. *Ferguson,* 163 U. S. 537, without discussion. On the other hand, a close, indeed it would seem a complete,

[26] Referring to the state court's denial of the writ, the *Bandini* opinion stated: "That judgment, however, merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, with all questions of fact, or with questions of law which would appropriately be raised upon the facts adduced in the trial of the case in the Superior Court, as a court competent to entertain the suit, we are not concerned on this appeal." 284 U. S. at 14. ". . . the District Court of Appeal must be regarded, as its opinion imports, as having determined merely that the statute was valid upon its face so that the Superior Court had jurisdiction to entertain the injunction suit. It is that determination alone that we can now consider." 284 U. S. at 15–16.

[27] See the authorities cited in notes 25 and 28.

analogy is to be found in *Bryant* v. *Zimmerman,* 278 U. S. 63. In that case Bryant had been charged criminally in the courts of New York with violating that state's so-called anti-secret organization statute, and was held in custody for trial pursuant to that charge. He instituted *habeas corpus* proceedings in the state courts, on the ground that "the warrant under which he was arrested and detained was issued without any jurisdiction, in that the statute which he was charged with violating was unconstitutional." 278 U. S. at 65. Upon appeal from the state court's denial of the writ, this Court with one justice dissenting entertained the appeal and held the statute valid.

Although the jurisdictional inquiry, in the state courts and here, was conducted in the separate proceeding on *habeas corpus,* unlike the *Bandini* case it related to a criminal cause, as does this case. And for the purposes of our jurisdiction under § 237 (a) of the Judicial Code, a distinction would seem to be wholly verbal between such an inquiry and its disposition made under the state procedure of *habeas corpus* and a similar one made in a state proceeding for a writ of prohibition.[28] Those procedures, of course, have their historic differences, both in availability and in specific function, at the common law. But when they are utilized, under state authorization, substantially for the identical purpose of questioning the validity of state statutes under the federal constitution, as determinative of the jurisdiction of state courts to proceed with crim-

[28] In *Holmes* v. *Jennison,* 14 Pet. 540, the Court held that an order of a state court of last resort refusing to discharge a prisoner upon *habeas corpus* was a final judgment subject to review. In reaching that conclusion Taney, C. J., relied upon *Weston* v. *Charleston,* 2 Pet. 449, as "decisive." That decision, rendered by Marshall, C. J., held for the first time that the denial of a writ of prohibition was a final judgment. See also *Largent* v. *Texas,* 318 U. S. 418, where the Court cites both *Bandini Co.* v. *Superior Court,* 284 U. S. 8, and *Bryant* v. *Zimmerman,* 278 U. S. 63.

inal prosecutions based on those acts, it would seem difficult to find any substantial difference between them relative to this Court's jurisdiction to review their determinations. This assumes, of course, that the judgment reviewed under one name or the other would be such as finally disposes of the proceeding.

While therefore we are unable to conclude that there is no jurisdiction in this cause, nevertheless compelling reasons exist for not exercising it.

From *Hayburn's Case,* 2 Dall. 409, to *Alma Motor Co.* v. *Timken-Detroit Axle Co.* and the Hatch Act case decided this term,[29] this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U. S. Const., Art. III. The same policy has been reflected continuously not only in decisions but also in rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions.[30] Indeed perhaps the most effective implement for making the policy effective has been the certiorari jurisdiction conferred upon this Court by Congress. E. g., Judicial Code, §§ 237, 240.

The policy, however, has not been limited to jurisdictional determinations. For, in addition, "the Court [has] developed, for its own governance in the cases confessedly

[29] *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129; *United Public Workers* v. *Mitchell,* 330 U. S. 75.

[30] See, *e. g.,* as to appeals from state courts, § 237 (a) of the Judicial Code, 28 U. S. C. § 344 (a), Rule 12 (1) of the Revised Rules of the Supreme Court of the United States; *Honeyman* v. *Hanan,* 300 U. S. 14.

within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." [31] Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.[32]

Some, if not indeed all, of these rules have found "most varied applications." [33] And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty.

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[31] Brandeis, J., with whom Stone, Roberts and Cardozo, JJ., concurred, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, concurring opinion at 346.

[32] *Id.,* at 346–348, and authorities cited. See also *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324–325.

[33] For example, with reference to the rule forbidding decision of properly presented constitutional questions, if the case may be disposed of on another ground: "Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 191; *Light* v. *United States,* 220 U. S. 523, 538. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College* v. *Kentucky,* 211 U. S. 45, 53." 297 U. S. at 347.

Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts, the inferior federal courts, or this Court. Rather it is one of substance,[34] grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions,[35] it is one of the rules basic to the federal system and this Court's appropriate place within that structure.[36]

Indeed in origin and in practical effects, though not in technical function, it is a corollary offshoot of the case and controversy rule. And often the line between apply-

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[34] "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 105. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . ." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 283, 295.

[35] Which has had application in appeals and on writs of error, as well as in cases arising under the certiorari jurisdiction. See *Luther* v. *Borden*, 7 How. 1; *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U. S. 118; *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565; opinion of FRANKFURTER, J., in *Colegrove* v. *Green*, 328 U. S. 549.

[36] Like the policy about political matters, although not going to jurisdiction as that policy does, it is a rule "which cannot be met by verbal fencing about 'jurisdiction.' It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies." Opinion of FRANKFURTER, J., in *Colegrove* v. *Green*, 328 U. S. 549, 552.

ing the policy or the rule is very thin.[37] They work, within their respective and technically distinct areas, to achieve the same practical purposes for the process of constitutional adjudication, and upon closely related considerations.

The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.

All these considerations and perhaps others, transcending specific procedures, have united to form and sustain the policy. Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which

[37] Indeed more than once the policy has been applied in order to avoid the necessity of deciding the "case or controversy" jurisdictional question, when constitutional issues were at stake on the merits, *e. g.*, recently in declaratory judgment proceedings. See *American Federation of Labor* v. *Watson*, 327 U. S. 582; *United Public Workers* v. *Mitchell*, 330 U. S. 75. Compare *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, and *Congress of Industrial Organizations* v. *McAdory*, 325 U. S. 472, which arose under state declaratory judgment acts.

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deferring decision very often entails. On the other hand it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure.

As with the case and controversy limitation, however, the choice has been made long since. Time and experience have given it sanction. They also have verified for both that the choice was wisely made. Any other indeed might have put an end to or seriously impaired the distinctively American institution of judicial review.[38] And on the whole, in spite of inevitable exceptions, the policy has worked not only for finding the appropriate place and function of the judicial institution in our governmental system, but also for the preservation of individual rights.

Most recently both phases of its operation have been exemplified in declaratory judgment proceedings.[39] Despite some seemingly widespread misconceptions,[40] the

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[38] It is not without significance for the policy's validity that the periods when the power has been exercised most readily and broadly have been the ones in which this Court and the institution of judicial review have had their stormiest experiences. See *e. g.*, Brant, Storm Over the Constitution (1936).

[39] See the authorities cited in note 37 *supra*. Cf. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324.

[40] As the cases cited in note 37 illustrate, the procedure has been utilized to bring for decision challenges to an entire array of statutory provisions alleged to violate rights secured by an almost equal array of constitutional provisions. The strategic conception seems to have been that the declaratory judgment suit furnishes a ready vehicle for presenting and securing decision of constitutional matters, solely upon the pleadings, in highly abstract or premature, if not hypo-

general introduction of that procedure in both state and federal spheres has not reversed or modified the policy's general direction or effects.[41]

One aspect of the policy's application, it has been noted, has been by virtue of the presence of other grounds for decision. But when such alternatives are absent, as in this case, application must rest upon considerations relative to the manner in which the constitutional issue itself is shaped and presented.

These cannot be reduced to any precise formula or complete catalogue. But in general, as we have said, they are of the same nature as those which make the case and controversy limitation applicable, differing only in degree. To the more usual considerations of timeliness and maturity, of concreteness, definiteness, certainty, and of adversity of interests affected, are to be added in cases coming from state courts involving state legislation those arising

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thetical states of fact, and *en masse*. Such a notion of course is essentially contradictory of the policy and, if accepted, would go far toward nullifying it.

[41] By dispensing with the necessity of asking for specific relief beyond that afforded by adjudication itself, it is true, the occasions for applying the policy through grounding decision upon failure to satisfy remedial limitations have been avoided. But, as sloughing off those limitations has not, and of course could not, overcome the case and controversy requirement, no more was this intended to discard the corollary policy effective within the limits of conceded jurisdiction.

Indeed the discretionary element characteristic of declaratory jurisdiction, and imported perhaps from equity jurisdiction and practice without the remedial phase, offers a convenient instrument for making the policy effective, quite to the contrary effect of the conception discussed in note 40 above. But that element, for application of the policy, is only one of convenience, not one of necessity. No more is application dependent upon it, essentially, than upon the similar element in other types of suit, as for example in suits for injunctive relief. Cf. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101.

when questions of construction, essentially matters of state law, remain unresolved or highly ambiguous. They include, of course, questions of incorporation by reference and severability, such as this case involves. Necessarily whether decision of the constitutional issue will be made must depend upon the degree to which uncertainty exists in these respects. And this inevitably will vary with particular causes and their varying presentations.

Accordingly the policy's applicability can be determined only by an exercise of judgment relative to the particular presentation, though relative also to the policy generally and to the degree in which the specific factors rendering it applicable are exemplified in the particular case. It is largely a question of enough or not enough, the sort of thing precisionists abhor but constitutional adjudication nevertheless constantly requires. And it is this kind of question that the declaratory judgments procedure has facilitated in presentation, a consequence which dictates the greatest care in seeing that it be not utilized so as to become a means for nullifying the policy.

Much the same thing may be said for the state procedure in prohibition as it has been followed in this case. Indeed, in all but name the two procedures are substantially identical, for the purposes of our jurisdiction and function in review. Here relief is neither sought nor needed beyond adjudication of the jurisdictional issue. The suit seeks only, in substance, a judicial declaration that jurisdiction does not exist in the Municipal Court. But for a variety of reasons the shape in which the underlying constitutional issues have reached this Court presents, we think, insuperable obstacles to any exercise of jurisdiction to determine them.

Those reasons comprise not only obstacles of prematurity and comparative abstractness arising from the nature of the proceeding in prohibition and the manner in which the parties have utilized it for presenting the con-

stitutional questions. They also include related considerations growing out of uncertainties resulting from the volume of legislative provisions possibly involved, their intricate interlacing not only with each other on their face but also in the California Supreme Court's disposition of them, and especially from its treatment of this case by reference in considerable part to the *Gospel Army* case, difficulties all accentuated for us of course by the necessity for dismissal of that cause here. Because the application of the policy must be relative to the factors specifically dictating such action, a statement of our particular reasons follows.

IV.

In the first place, the constitutional issues come to us in highly abstract form. Although raised technically in the separate proceeding in prohibition, they arise substantially as upon demurrer to the charges against Murdock in the criminal proceeding. The record presents only bare allegations that he was charged criminally with violating §§ 44.09 (a), 44.09 (b) and 44.12, and that those sections are unconstitutional, on various assignments, as applied to his alleged solicitations. We are therefore without benefit of the precision which would be afforded by proof of conduct made upon trial. Moreover, we do not have the benefit on this record of even the literal text of the charges.[42] Indeed, the summarized statement of the pleadings leaves us in doubt whether there were only two or, on the other hand, three distinct offenses charged.[43]

[42] It is alleged in the petition for the writ of prohibition that Murdock was charged with having violated §§ 44.09 and 44.12 of the Municipal Code "in that, as it is charged in said complaint, Court [sic] I thereof, said Murdock solicited contributions, and in Court [sic] II thereof, that said Murdock had no permit or Information Card, and failed to show the same to a person solicited by said Murdock. . . ."

[43] See note 3 *supra*.

The pleadings seem to allege that Murdock was charged with violation of three different provisions of Article 4, namely, §§ 44.09 (a), 44.09 (b) and 44.12. Yet they allege equally clearly that there were only two counts. The second rested, as we have said, on § 44.12. But from the state of the pleadings we cannot be sure whether the first was grounded on § 44.09 (a), on § 44.09 (b), or on both and, if the latter, whether conjunctively or alternatively.

The California Supreme Court's decision purported to deal with both. But the opinion did not discuss the anomaly of including two distinct charges in a single count. Nor did it decide whether that count was intended to charge two such offenses independently, one under each subdivision, or only commission of those offenses alternatively, that is, either an offense under § 44.09 (a) or one under § 44.09 (b) in order, possibly, to anticipate contingencies of proof.

We might assume either one construction or the other, of course, and make our disposition accordingly. Perhaps the more tenable assumption would be that Murdock was charged conjunctively under both subdivisions, rather than that he was confronted with an alternative allegation. But the doubt raised concerning this, by conjunction of the charges in a single count, is substantial; the matter is, for present purposes, entirely one of state procedure and state law; and therefore is one for the state court of last resort to resolve. In these circumstances we are unwilling to undertake clarifying the ambiguity. To do so would be directly contrary to the policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty.

The two subdivisions, while complementary in regulating solicitation by receptacles, are entirely distinct not only in the places where the regulations apply, but also in the conditions prescribed to be fulfilled before lawful

solicitation may take place. Those differences are substantial, not merely nominal or technical.[44] With the possibility presented by the record that only one or the other provision may be involved in the final disposition of the criminal proceeding, as a matter of pleading and proof and not simply of the jury's action, it is entirely too speculative whether one sort of regulation or the other actually will be utilized to secure Murdock's conviction for us to express opinion at this stage on the constitutionality of either. For the same reason we are unwilling to determine the validity of both, notwithstanding the California court has held each valid. That decision on our part, consistently with the policy, should await the determination which necessarily will be made in the further proceedings in the Municipal Court, whether Murdock has been charged independently or alternatively under the two subsections in the first count.

Other reasons relating particularly to § 44.09 (b) sustain this conclusion. In the first place, the California court's opinions give us no guide concerning the effect of that section's concluding omnibus clause, requiring compliance "in all other respects . . . with the provisions of this Article." Whether or not that court, treating the section independently as we must do,[45] would regard it as effective to incorporate all or only some of the many provisions of Article 4, and in the latter event how many, are matters upon which we are altogether without light. And those questions, being matters of state law, are essentially for the state court's determination, not ours.

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[44] See note 5 *supra*.

[45] That is, independently of the entire scheme considered as a valid plan of regulation in all its parts, as the California court substantially considered it in the *Gospel Army* case. Dismissal of that appeal, of course, forbids expression by us of any opinion upon the merits of the issues as involved in that presentation, aside from those necessarily incorporated in the decision of this cause.

Moreover they are substantial. As we have shown, the requirements of Article 4 concerning lawful solicitation are many and varied. Presumably, though by no means certainly, the special ones of § 44.19, relating to promoters and registered solicitors, would not become applicable under a general charge made pursuant to § 44.09 (b). But a literal application of the concluding language of § 44.09 (b) would make them so, upon proof of violation. And, in that event, Murdock conceivably could be convicted upon proof of his failure to pay the substantial license fees, give the bonds, or otherwise comply with the more burdensome provisions of § 44.19, even though he had fulfilled the explicit command of § 44.09 (b) for filing the notice of intention as required by § 44.05 and, indeed, all other requirements of Article 4 outside § 44.19.

Whether the charge under § 44.09 (b) comprehends failure to comply with all of the conditions of Article 4 or only some of them, and if the latter which ones, depends on whether the omnibus clause is to be literally applied, disregarded entirely,[46] or possibly construed in some modified way involving neither of these extremes. This Court certainly has no proper function to undertake such a task of interpretation. Apart from invading the state court's function, the problem of extricating the applicable provisions from such a mass, together with matters of severability likely to arise, would be formidable. And when discharged the result might be merely that we had performed it and determined the constitutional issues so presented, only to find that in the further proceedings to be had in the Municipal Court our interpretation had been put aside in favor of another.

[46] Under the familiar but not invariably applied rule of *ejusdem generis*. See, e. g., *Los Angeles* v. *Superior Court*, 2 Cal. 2d 138, 140; *Pasadena University* v. *Los Angeles County*, 190 Cal. 786, 790; *In re Johnson*, 167 Cal. 142, 145.

Moreover that cause hardly can proceed to final decision without clarification of the charge, or making clarification unnecessary. Murdock's rights thus can be assured of protection, even though at the trouble and expense of undergoing another trial. Those inconveniences, concededly substantial, do not outweigh the strong considerations relative to this Court's functions dictating that it should not undertake a task at once so speculative and so foreign to them.

Somewhat less obviously, similar difficulties are presented for dealing with the more specific requirement of § 44.09 (b) for filing the notice of intention and the related one of § 44.12 for procuring and exhibiting the information card.[47] Simply upon the face of the ordinance (Article 4), we would construe these provisions as excluding all reference to the licensing requirements of § 44.19, as well as the regulations relating to dealers in used articles, junk, etc.,[48] as indeed the California Supreme Court's opinion seems to exclude them. In such a view the charges under § 44.09 (b) (without reference to the omnibus concluding clause) and § 44.12 would be restricted to failure to comply with whatever provisions of §§ 44.01–44.18 may be incorporated by reference in those two sections. Presumably also, within that range, would be excluded all requirements applicable only after the act of solicitation, such as those for keeping records and making reports of the receipt and disposition of contributions received, §§ 44.09, 44.14, cf. also § 44.08, and perhaps though not at all certainly (as to the charge under § 44.12)[49] the tendering at the time of solicitation of the receipt required by § 44.15. Possibly therefore a fair construction of the charges under §§ 44.09

[47] See note 5 *supra* and § 44.12 as quoted above in the text, Part I.

[48] See text *supra* Part II.

[49] The receipt requirement apparently is not applicable to solicitations by receptacle under §§ 44.09 (a) and (b). See note 17 *supra*.

(b) and 44.12 would be that they are limited, so far as concerns incorporation of other provisions, to including the licensing requirements of §§ 44.05 and 44.03, themselves extensive and highly detailed, which so far as we can gather from the California court's treatment of them, was the effect of its decision.

Apart, however, from the difficulties created by the necessity of adding construction of the California court's opinions to construction of so many possibly applicable provisions of the ordinance, other problems have arisen from its disposition. In particular, its opinions do not enlighten us concerning the character and effects of the licensing requirements specified in §§ 44.05 and 44.03. With reference to them it said in its *Gospel Army* opinion:

> "The information cards, which are in effect permits to solicit, are issued automatically upon the filing of the required information and the payment of the four cents for each card. The department is given no authority to withhold such cards when these requirements are met, and we cannot assume that it will abuse its authority in order to withhold them. . . . 'If this petitioner had applied for a permit under the requirement [of § 44.05], . . . and been either whimsically or arbitrarily refused such permit, he might then . . . have had recourse to the courts for relief from such unjust and arbitrary action.' " 27 Cal. 2d at 238–239.

So construing the licensing provisions and asserting that they are "designed primarily to secure information that will assist the public in judging the nature and worthiness of the cause . . . and to insure the presentation of such information to prospective donors," the California court concluded: "We find nothing unduly burdensome or un-

reasonable in any of these provisions." 27 Cal. 2d at 237.

Nevertheless, the construction given is, to say the least, ambiguous. For, despite the language indicating that the cards are to be issued "automatically upon the filing of the required information and the payment of the four cents for each card," the opinion expressly asserted that the department "may investigate the statements in the notice of intention." 27 Cal. 2d at 239. And at another point it said: "The board may not disallow a proposed solicitation but it may investigate the statements in the notice of intention and the methods of making or conducting the solicitation; it may inspect the records of the person in charge of the solicitation and the association for whom it is made, and it may give such publicity to its findings as it deems best to reach the general public and persons interested." [50] *Ibid.*

These qualifications make it highly questionable that the court, by using "automatically" in the quoted context, meant to rule that on the mere filing of the required information, without more, solicitation would become lawful under § 44.09 (b) or that the information cards would issue so as to make solicitation legal under § 44.12. Rather, the intended holding would seem to have been that, upon full compliance with the numerous conditions specified for issuance of the card, the board would be without authority "either whimsically or arbitrarily" to withhold it from the applicant; but his failure in any substantial respect to meet those conditions, including perhaps waiting for the ten-day period and the out-

[50] The last quoted matter was followed by the statement: "The association for whom the solicitation is made must maintain an accounting system recording the entry of all donations and disbursements. (§ 44.08.)" This provision relates apparently to the further requirements for filing post-solicitation reports.

come of the authorized investigations, would be good and sufficient cause for the board to exercise its discretion to refuse the card and for prosecution if he should undertake to solicit without it.

That this probably was the court's intended construction appears not only from its apparent unwillingness to dispense with the necessity for meeting any of the conditions specified in the ordinance, but also from the manner in which it disposed of the provisions relating to promoters and to solicitors required to be registered under § 44.19. In this connection it said, also in the *Gospel Army* opinion:

> "The board has no discretion to withhold a license if the applicant's good character and reputation and his financial responsibility are established and the required bond is filed. The board is not free to deny licenses, but must act reasonably in the light of the evidence presented." 27 Cal. 2d at 249.[51]

There is, of course, a very substantial difference between the two possible views of the court's construction of the ordinances, for constitutional as well as other purposes. For in the one conception the provisions would be more

[51] The quoted sentences were preceded by the following: "The requirement that promoters and the solicitors working under them submit proof of their good character and reputation does not discriminate against plaintiff or other religious organizations or censor their religious beliefs, nor does the regulation vest arbitrary power in the administrative board in authorizing it to withhold a license if it is not satisfied that the applicant is of good character and reputation. Such a requirement is common in statutes regulating admission to professions and occupations involving duties of a fiduciary character. . . . The filing of a bond is also a common requirement in the regulation of occupations or activities involving the handling of entrusted funds. . . . The license fee is a reasonable one, covering the expenses of investigations and administration." 27 Cal. 2d 232, 248–249.

nearly akin to a "mere identification" requirement such as the First Amendment has been said not to forbid; in the other, they would comprehend a much broader exercise of administrative discretion than simply receiving and filing identifying information.[52] Obviously it would be one thing to sustain the licensing provisions if they are to be taken as of the "automatic mere identification" type, and quite another if they involve the very considerable degree of discretion upon the part of administrative officials which the clearly applicable provisions of the ordinance seem to require by their terms and indeed by the state court's ruling.

But we express no opinion concerning their validity in either conception. For we do not undertake to resolve

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[52] See *Thomas* v. *Collins,* 323 U. S. 516, 538–539: "How far the State can require previous identification by one who undertakes to exercise the rights secured by the First Amendment has been largely undetermined. It has arisen here chiefly, though only tangentally, in connection with license requirements involving the solicitation of funds, *Cantwell* v. *Connecticut* [310 U. S. 296]; cf. *Schneider* v. *State,* 308 U. S. 147; *Largent* v. *Texas,* 318 U. S. 418, and other activities upon the public streets or in public places, cf. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496, or house-to-house canvassing, cf. *Schneider* v. *State, supra.* In these cases, however, the license requirements were for more than mere identification or previous registration and were held invalid because they vested discretion in the issuing authorities to censor the activity involved. Nevertheless, it was indicated by dictum in *Cantwell* v. *Connecticut,* 310 U. S. 296, 306, that a statute going no further than merely to require previous identification would be sustained in respect to the activities mentioned."

The dictum referred to is the statement: "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell* v. *Connecticut,* 310 U. S. 296, 306.

the doubt which necessarily exists concerning the court's meaning, whether with reference to § 44.09 (b) or § 44.12. On the contrary that doubt only adds to the reasons we have stated, the sum of which in this case goes to preclude the exercise of jurisdiction. That doubt also should be resolved, with the other uncertainties in this cause, before this Court undertakes to pronounce judgment on the constitutional questions. They may be removed in the Municipal Court proceedings yet to take place.

We are not unmindful that our ruling will subject the petitioner Murdock to the burden of undergoing a third trial or that this burden is substantial.[53] Were the uncertainties confronting us in relation to this Court's historic policy less in number, and resolving them not so far from our appropriate function in cases coming from state courts, the inconvenience of undergoing trial another time might justify exercising jurisdiction in this cause. But, consistently with the policy, jurisdiction here should be exerted only when the jurisdictional question presented by the proceeding in prohibition tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or to its interpretation by the state courts.

Our decision of course should be without prejudice to any rights which may arise upon final determination of the Municipal Court proceeding, relative to review in this Court of that determination. With that reservation we think the only course consistent, upon this record, at once with preservation of appellants' rights and with adherence

[53] The Rescue Army, so far as appears, was not a party to the Municipal Court suit. No issue was made here concerning its appearance as a party in the prohibition proceedings in the state courts or on this appeal. Accordingly, we express no opinion in this respect. Cf. *Independent Warehouses* v. *Scheele*, 331 U. S. 70.

to our long-observed policy, is to decline to exercise jurisdiction in this cause.

Accordingly, the appeal is dismissed, without prejudice to the determination in the future of any issues arising under the Federal Constitution from further proceedings in the Municipal Court.

MR. JUSTICE BLACK concurs in the result.

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

It is difficult for me to believe that the opinion of the Supreme Court of California is so ambiguous that the precise constitutional issues in this case have become too blurred for our powers of discernment.

The courts below and the parties involved have all acted on the assumption that the appellant Murdock was charged with having violated §§ 44.09 (a) and 44.12 of the Los Angeles Municipal Code. Now it is true that various other parts of the Code are interconnected with those sections and serve to complicate the picture somewhat. But the constitutional issues thereby raised seem clear to me. Simply stated, they are: (1) Does it violate the constitutional guarantee of freedom of religion to prohibit solicitors of religious charities from using boxes or receptacles in public places except by written permission of city officials? (2) Is that guarantee infringed by a requirement that such solictors display an information card issued by city officials?

Those issues were properly raised below and the courts necessarily passed upon them. The time is thus ripe for this Court to supply the definitive judicial answers. Its failure to do so in this case forces me to register this dissent.

ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA *v.* WOLFE.

CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

No. 32. Argued February 28, 1946.—Reargued November 12, 1946.—Decided June 9, 1947.

1. An Ohio citizen brought an action in a state court in South Dakota against a fraternal benefit society, incorporated in Ohio and licensed to do business in South Dakota, to recover benefits claimed to have arisen under the society's constitution as a result of the death of an insured member who had been a citizen of South Dakota throughout his membership. The society's constitution, which was valid in Ohio, prohibited the bringing of an action on such a claim more than six months after its disallowance by the society. The action was brought after expiration of this time but before the expiration of the period prescribed by South Dakota law for commencing suits on contracts. A statute of South Dakota declared void every stipulation or condition in a contract which limits the time within which a party thereto may enforce his rights by usual legal proceedings in the ordinary tribunals. *Held:* The Federal Constitution requires South Dakota to give full faith and credit to the public acts of Ohio under which the society was incorporated, and the claimant was bound by the six-month limitation upon bringing such an action. Pp. 588–589, 624–625.
2. A claim based on membership rights under the constitution of an incorporated fraternal benefit society, the terms of which are subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation, differs from a claim for benefits under an ordinary contract of accident insurance whether issued by a stock or a mutual insurance company. Pp. 600, 606.
3. It is of primary significance from the legal point of view in this case that the society is a voluntary fraternal association organized and carried on not for profit but solely for the mutual benefit of its members and their beneficiaries, and has a representative form of government which shall make provision for the payment of benefits in accordance with certain statutory requirements. P. 605.
4. Relationships between the members of fraternal benefit societies are contractual in that they are undertaken voluntarily in consideration of the like obligations of others; but, interwoven with their

financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more interdependence than arises from purely business and financial relationships. Pp. 605–606.

5. Membership in a fraternal benefit society is governed by the law of the state of incorporation; control over its terms is vested in the elected representative government of the society as authorized and regulated by that law. P. 606.
6. By virtue of the full faith and credit clause, the people of the United States have imposed upon the general rules governing conflicts of laws respecting statutes of limitations on claims arising out of ordinary contracts another limitation, giving effect to a limitation contained, as in the present case, in the constitution of a fraternal benefit society. P. 607.
7. Fraternal benefit societies exist by virtue of the laws of the states of their incorporation, and the rights and obligations incident to membership in them are as much entitled to full faith and credit as the statutes upon which they depend. P. 609.
8. To permit recovery in this case would fail to give full faith and credit to the terms of membership authorized by Ohio by placing an additional liability on the society beyond that authorized by Ohio or accepted by the society. P. 610.
9. The weight of public policy behind the general statute of South Dakota, which seeks to avoid contractual limitations upon rights to sue on ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be—especially where the State, with full information as to those terms of membership, has permitted such societies to do business and secure members within its borders. P. 624.
10. If a state gives *some* faith and credit to the laws of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, it must give *full* faith and credit to those laws and must recognize the burdens and limitations which are inherent in such memberships. P. 625.

70 S. D. 452, 18 N. W. 2d 755, reversed.

In an action brought in a state court in South Dakota, an Ohio citizen obtained a judgment against a fraternal benefit society incorporated in Ohio for benefits claimed to have arisen under the society's constitution as a result

of the death of an insured member who was a citizen of South Dakota. The Supreme Court of South Dakota affirmed. 70 S. D. 452, 18 N. W. 2d 755. This Court granted certiorari. 326 U. S. 712. *Reversed,* p. 625.

Byron S. Payne and *E. W. Dillon* argued the cause on the original argument, and *Mr. Dillon* on the reargument, for petitioner. With them on the brief was *Samuel Herrick.*

Hubbard F. Fellows argued the cause and filed a brief for respondent.

MR. JUSTICE BURTON delivered the opinion of the Court.

This is an action in a circuit court of the State of South Dakota, brought by an Ohio citizen against a fraternal benefit society incorporated in Ohio, to recover benefits claimed to have arisen under the constitution of that society as a result of the death of an insured member who had been a citizen of South Dakota throughout his membership. The case presents the question whether the full faith and credit clause of the Constitution of the United States [1] required the court of the forum, South Dakota, to give effect to a provision of the constitution of the society prohibiting the bringing of an action on such a claim more than six months after the disallowance of the claim by the Supreme Executive Committee of the society,[2]

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const. Art. IV, § 1. See also, Act of May 26, 1790, 1 Stat. 122; Act of Mar. 27, 1804, 2 Stat. 298; Rev. Stat. §§ 905, 906, 28 U. S. C. §§ 687, 688.

[2] "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from

when that provision was valid under the law of the state of the society's incorporation, Ohio, but when the time prescribed generally by South Dakota for commencing actions on contracts was six years [3] and when another statute of South Dakota declared that—

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." [4]

We hold that, under such circumstances, South Dakota, as the state of the forum, was required, by the Constitution of the United States, to give full faith and credit to the public acts of Ohio under which the fraternal benefit society was incorporated, and that the claimant was bound by the six-month limitation upon bringing suit to recover death benefits based upon membership rights of a decedent under the constitution of the society. This has been the consistent view of this Court.[5]

The record in the present case well illustrates both the practical effect of such a limitation as that contained in the constitution of this society and the need for the application of the full faith and credit clause to membership obligations in fraternal benefit societies.

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the date the claim for said benefits is disallowed by the Supreme Executive Committee." From § 11 of Article IV, "Insurance," of the constitution of The Order of United Commercial Travelers of America, as printed on the back of the original certificate of membership issued to decedent August 19, 1920, and as in effect at the filing of this action June 15, 1934.

[3] § 2298, S. D. Rev. Code, 1919.

[4] § 897, S. D. Rev. Code, 1919.

[5] *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544; *Broderick* v. *Rosner*, 294 U. S. 629; *Sovereign Camp* v. *Bolin*, 305 U. S. 66. See also, *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 207, 210–211.

The petitioner, The Order of United Commercial Travelers of America, was incorporated in 1888, under the general corporation laws of Ohio.[6] By 1920, when the decedent, Ford Shane, of Rapid City, South Dakota, be-

[6] As in effect September 1, 1930, and presumably at the member's death, May 8, 1931, the articles of incorporation contained only the following provisions:

"WITNESSETH: That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

"FIRST. The name of said corporation shall be THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

"SECOND. Said corporation shall be located, and its principal business transacted at Columbus, in Franklin County, Ohio.

"THIRD. The purpose for which said corporation is formed is:

"1st. To unite fraternally all Commercial Travelers, Wholesale Salesmen and such other persons of good moral character as are now or may hereafter become eligible to membership, under the provisions of the Constitution of the Order.

"2nd. To give all moral and material aid in its power to its members and those dependent upon them. Also to assist the widows and orphans of deceased members.

"3rd. To establish funds to indemnify its members for disability or death resulting from accidental means.

"4th. To secure just and equitable favors for Commercial Travelers and Wholesale Salesmen as a class.

"5th. To elevate the moral and social standing of its members.

"6th. Said corporation shall be a secret Order.

"7th. To establish a Widows' and Orphans' Reserve Fund."

This society is strikingly similar in form to the "fraternal beneficiary association," incorporated in Massachusetts in 1877 and described in the leading case on this subject, *Royal Arcanum* v. *Green*, 237 U. S. 531. As to that association it was said by the Supreme Court of Massachusetts that:

"The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries." *Reynolds* v. *Royal Arcanum*, 192 Mass. 150, 155, 78 N. E. 129, 131.

came a member, this fraternal benefit society was in active operation in many states. Then, and at his death in 1931, it was regulated in detail by the General Code of Ohio. That Code included public acts of Ohio on such subjects as the following: § 9462, Fraternal benefit society defined; [7] § 9463, Lodge system; § 9464, Representative form of government, including restrictions on amendments to its constitution; § 9465, Exemption from general insurance laws of the State; § 9466, Benefits; § 9467, To whom benefits shall be paid, stating limitations on the degrees of family relationship permitted to exist between a member and those whom he may designate to receive benefits as a result of his death; § 9468, Age limits for admission to membership; § 9469, Certificate shall constitute agreement; [8] § 9469–1, Exception as to commercial trav-

[7] "SEC. 9462. . . . Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 [G. C. § 9466] hereof, is hereby declared to be a fraternal benefit society." Ohio Gen. Code, 1931.

[8] "SEC. 9469. . . . Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, of, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes,

elers; [9] § 9470, Investment, disbursement and application of funds; § 9481, Laws of society shall be binding on members and beneficiaries, and the society may provide, as here, that no subordinate body, officers or members may waive any of the provisions of the laws and constitution of the society.[10] These public acts have created and regulated the society and the rights and obligations of its members. They are reflected in its articles of incorporation, constitution and by-laws. They make possible uniformity of rights and obligations among all members throughout the country, provided full faith and credit are given also to the constitution and by-laws of the society insofar as they are valid under the law of the state of incorporation. If full faith and credit are not given to these provisions, the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal.

The principal office of this society has been continuously in Columbus, Ohio. The society has established subordinate councils in many states and, at all times involved in this case, has been licensed to do business in South

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additions or amendments had been made prior to and were in force at the time of the application for membership." Ohio Gen. Code, 1931.

[9] "SEC. 9469–1. . . . The provisions of section ninety-four hundred and sixty-nine of the General Code, requiring the certificate to specify the maximum amount of benefit provided thereby and the conditions governing the payment thereof, shall not apply to the certificates of a fraternal beneficiary association organized under the laws of Ohio, whose membership consists of commercial travelers and which does not obligate itself to pay stipulated amounts of benefits in case of natural death." Ohio Gen. Code, 1931.

[10] "SEC. 9481. . . . The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." Ohio Gen. Code, 1931.

Dakota as a foreign fraternal benefit society.[11] In accordance with the requirements for maintaining such license in good standing, the society has kept on file, with the Commissioner of Insurance of South Dakota, a copy of the society's constitution, including § 11 of Article IV, here

[11] S. D. L., 1919, c. 232, § 16, authorized the issuance of such a license—

"upon filing with the Commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officers; a power of attorney to the Commissioner [to accept service of process] . . . ; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the Commissioner, duly verified by an examination made by the supervising insurance official of its home State or other State satisfactory to the Commissioner of Insurance of this State; a certificate from the proper official in its home State, province or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts; and upon furnishing the Commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the State, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this State until the first day of the succeeding March, and such license shall, upon compliance with the provisions of this Act, be renewed annually, but in all cases to terminate on the first day of the succeeding March; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this State, shall have the qualifications required of domestic societies organized under this Act, upon a valuation by any one of the standards authorized in Section 23a of this Act, and have its assets invested as required by the laws of the State, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the Commissioner Two ($2.00) Dollars. When the Commissioner refuses to license any society, or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reason, to the officers of the society, upon request, and the action

in controversy, limiting the time for bringing suits to recover claims for benefits based upon that Article. The state of the forum thus has been continuously in a position to revoke or refuse to renew the society's license to do business in that State if it had good reason to do so. There is no evidence that South Dakota has attempted or suggested such action. The favorable, rather than hostile, attitude of South Dakota towards such societies is evidenced by its own authorization of their incorporation in that State on terms identical, word for word, with those prescribed in Ohio.[12]

The decedent, on July 31, 1920, applied for membership in the society through Rapid City Council No. 516, in Rapid City, South Dakota. He was 37 years old, a manager and salesman selling "packing products" on the road, in good physical condition and employed in an occupation of precisely the type contemplated for membership in this society.[13] He named his wife as his beneficiary in case of

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of the Commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the State, ..."

See also, §§ 31.2124–31.2126, 31.2139, S. D. Code of 1939. The State of Ohio has similar provisions in its Code. § 9477, Ohio Gen. Code, 1931.

[12] "An Act Providing for the Regulation and Control of All Fraternal Benefit Societies," approved Mar. 11, 1919, S. D. L., 1919, c. 232, pp. 240–253. For example, § 1 defines them as follows:

"Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Section 5 hereof, is hereby declared to be a Fraternal Benefit Society."

See also, c. 31.21, "Fraternal Benefit Societies," S. D. Code of 1939, and cf. with Ohio definition in note 6, *supra*.

[13] "Sec. 2. Any white male citizen of the United States or British possessions in North America of good moral character and good general health, not under eighteen (18) and not over sixty (60) years of age,

his death from accidental means. On August 19, 1920, he was accepted by the Supreme Council as an insured member of the society under "Class A." The certificate, No. 169655, evidencing this acceptance was executed at Columbus, Ohio, by the Supreme Counselor and Supreme Secretary. In 1922, following a brief suspension, he applied for reinstatement in what was then Black Hills Council No. 516 in Rapid City, South Dakota, and, on December 21, 1922, was reinstated as an insured member of the society under "Class A." In his application for this renewal, he referred to himself as a traveling salesman, selling meat to dealers, and named his mother, Elizabeth Shane of Mt. Vernon, South Dakota, as his beneficiary.[14]

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who has been actively and actually engaged for a term of not less than six months immediately preceding the date of his application as a commercial traveler, city salesman, wholesale house salesman, sales manager or merchandise broker, selling goods at wholesale or selling office, store, factory, railroad, mill or municipal equipment, for a manufacturer or wholesale dealer, or one who has had at least six months experience in either of the occupations named herein, and is thus engaged at the date of filing the application, and who is in good mental and physical condition may become a member of this Order if found acceptable." Art. II, constitution of the society, 1922.

[14] The certificate, No. 169655, then issued to him, and which is the primary basis for the respondent's claim, is as follows:

"INCORPORATED UNDER THE GENERAL LAWS OF THE STATE OF OHIO.

CLASS A

INSURANCE CERTIFICATE

THE ORDER OF
UNITED COMMERCIAL TRAVELERS
OF AMERICA

COLUMBUS, OHIO

"An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements

Thereafter, he remained in good standing and it is upon his membership, evidenced by this certificate, also executed in Ohio, that this action depends. On May 8, 1931, he visited a physician's office in Rapid City, South Dakota, to be examined for stricture. The doctor applied a local anesthetic preliminary to introducing an instrument known as a "sound" for exploratory purposes. The local anesthetic was a drug known as "butyn." The record shows that butyn commonly was used by physicians for such a purpose; that it was properly administered in the usual and proper amount and was of the usual and proper strength; but that the decedent, unknown to anyone, was subject to a

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contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

"This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

"In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 21st day of December A. D. 1922.

"This certificate supersedes all insurance certificates issued of a prior date bearing this number.

s/ Frank J. Rosser
Supreme Counselor.
s/ Walter D. Murphy
Supreme Secretary."

SEAL

rare idiosyncrasy, as a result of the presence of which he suffered convulsions immediately following the administration of the anesthetic and died within two minutes.

In accordance with the procedure prescribed in the constitution of the society, the decedent's beneficiary promptly mailed to the society a notice of her son's death. On June 8, 1931, the Supreme Executive Committee, in Columbus, Ohio, reviewed and disallowed her claim on its merits and mailed to her notice of such action. On June 16, she filed a complaint against the society in a circuit court for the State of South Dakota to recover death benefits, amounting to $6,300, claimed under Article IV of the constitution of the society. The case was removed to the United States District Court for South Dakota because of diversity of citizenship. On September 2 it was tried, without a jury, and, on December 15, 1931, judgment was rendered for the mother with findings of fact and conclusions of law dealing with the merits of the case. This judgment, on February 27, 1933, was reversed, on its merits, by the United States Circuit Court of Appeals for the Eighth Circuit and judgment for costs was entered against Elizabeth Shane. 64 F. 2d 55.[15] Upon remand

[15] The Circuit Court of Appeals evidently relied, in part, on Article IV, § 7, of the constitution of the society which stated "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss" and said:

"There were no accidental means, but simply an unexpected or accidental result. The administration of the drug did not cause the idiosyncrasy, and, if the bodily injury which resulted in death was produced by the idiosyncrasy as a cause or means, then the administration of the drug was not the sole cause, and there would be no liability under the policy." 64 F. 2d 55, 59.

Relating to a provision in the same section that "This Order shall not be liable to any person for any benefits for any death, . . . resulting from . . . medical, mechanical or surgical treatment (except

of the case to it, the District Court, on April 18, 1933, ordered "that the Judgment of the United States Circuit Court of Appeals in this matter be made the Judgment of this Court, and that all costs of this Court relating to such Mandate and Judgment, be taxed and allowed the defendant." (Unreported.) Thus, within less than two years, the case had been completely presented and heard by the District Court and the Circuit Court of Appeals and disposed of, on its merits, in favor of the society, with full recognition of the diversity of citizenship of the parties and in compliance with the time limits prescribed by the constitution of the society.

The present proceeding, however, resulted from the fact that, pursuant to stipulation of the parties, the District Court, on January 18, 1934, dismissed the case without prejudice to the filing of another suit. On June 15, 1934, the decedent's mother assigned her claim to Edward C. Wolfe, the present respondent, a citizen of Ohio, as trustee, to enforce collection of the claim. On the same day, the present action was filed in a circuit court of the State of South Dakota. An answer was entered and a stipulation was made to use the testimony which had been taken in the District Court in the previous case. There the case rested for six years. On October 19, 1940, an amended answer was filed raising, among others, the defense that this second action was in violation of the following Section of the constitution of the society:

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where the surgical treatment is made necessary by the accident), the intentional taking of medicine or drugs"; the Circuit Court of Appeals said:

"We think the administering of the drug must be placed in the category of medical or surgical treatment.

. . . . . .

"If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act." *Id.* at 59–60.

"ARTICLE IV. INSURANCE.

. . . . .

Waivers.

"SEC. 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee.

"No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be hereafter enacted."

It is not disputed that such provision has been in such constitution since before the decedent's first application for membership in the society, and that it was printed in full on the back of the certificate of membership originally issued to the decedent. It further was alleged that this provision was valid and binding upon the members of the society by and under the laws of Ohio; that the highest court of that State had held that a fraternal benefit society, by its constitution and by-laws, could limit the time within which suit must be brought to recover for benefits promised to members; and that to deny the binding effect of that limitation on the plaintiff in such suit would be a violation of the full faith and credit clause of the Constitution of the United States (Art. IV, § 1), and a violation of the society's rights thereunder. We decide that issue here in favor of the society. No claim is made here that the society is barred from this defense by any waiver purporting to have been made on its behalf in connection with the dismissal of the earlier action without prejudice to filing another. See *Riddlesbarger* v. *Hartford Ins. Co.*,

7 Wall. 386. In this view of the case, it is not necessary to consider the other defenses.

In 1942, the case was presented before a judge of a circuit court of the State of South Dakota. Upon the death of that judge before a decision in the case, it was heard, in 1943, by another judge of that court, largely upon the record made, in 1931, in the United States District Court. The state court, on April 4, 1944, entered judgment in favor of the claimant, respondent herein. In 1945, the Supreme Court of the State of South Dakota, by a divided court, affirmed that judgment. 70 S. D. 452, 18 N. W. 2d 755. Because of the constitutional issue presented and its relation to previous decisions of this Court, we granted certiorari. 326 U. S. 712. The case was argued here February 28, 1946. Later it was restored to the docket, assigned for reargument before a full bench and reargued here November 12, 1946.

This is a clear-cut case of a claim based solely upon membership rights and obligations contained in the constitution of an incorporated fraternal benefit society, the terms of which are subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation. There is no evidence in the records of the three trials, no suggestion in the opinions of the lower courts, and no claim in the arguments here that the decedent was not a bona fide active member of the society, or that the society was acting otherwise than as a fraternal benefit society. This case, therefore, is to be distinguished from a claim for death benefits under an ordinary contract of accident insurance, whether issued by a stock or a mutual insurance company.

We rely upon the character of the membership obligation sued upon. There is substantial evidence to support a contention that the contract of membership, including all insurance rights, was made in Ohio and that many

acts in connection with the contract were required to be performed in Ohio and were so performed. However, we do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance. We rely, rather, upon its character as something created, regulated and subject to change through a fraternal and representative form of intra-corporate government, dependent for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal benefit societies.

Although the respondent, suing as an Ohio citizen, has eliminated the South Dakota citizenship of the original beneficiary as a jurisdictional factor in this case, we do not hold that, for that reason, he may not urge the courts to consider the continuous South Dakota residence and citizenship of the decedent and of the named beneficiary in determining whether the public policy of South Dakota should yield to the full faith and credit clause of the Constitution of the United States in giving recognition to the charter rights and obligations of the society as an Ohio corporation.

In order, however, to appreciate the nature of the obligation here relied upon, it is essential to see how completely its terms are interwoven with the enabling legislation authorizing the corporate charter and with the constitution and by-laws of the society, as well as with the member's application for and his certificate of membership in such society.

The enabling legislation, corporate charter and certificate of membership have been described. The application for membership contributes nothing further to the issue except to emphasize the integration which it demonstrates between the member and the articles of incorporation, constitution and by-laws of his society. There was no application for insurance separate from the applica-

tion for membership. Benefits derived from membership flowed solely from the decedent's membership status.

There remain to be considered the constitution and by-laws of the society. These set forth the main body of the member's rights and obligations, including those of a fraternal and procedural nature as well as those relating to financial benefits and liabilities. The principal part of the record consists of printed copies of the charter, constitution and by-laws of the society, one as generally effective September 1, 1922, and the other as effective September 1, 1930. A comparison of these copies shows that many changes were made in the rights and obligations of members during the decedent's membership in the society.[16]

The 1930 constitution, in pamphlet form, filled 90 closely printed pages. Its subject matter is outlined in the margin.[17] It is obvious how vital these terms, both in detail and as a whole, were to each member. The by-laws filled six pages. They consisted of 29 paragraphs

[16] Typical of these changes were those relating to the distribution, on a changed percentage basis, of funds raised by calls to meet insurance and other needs; changes in the classification of employments to be treated as hazardous enough to require the lowering of rates of disability benefits to be paid to members employed in them; and a new provision expressly recognizing the rights of uninsured members to continue as members of the society, although disqualified physically from taking advantage of insurance benefits. There also was a change in the procedure governing future amendments.

[17] The 1930 constitution dealt with the following subjects and it is in them, as amended from time to time, that there can be found the rights and obligations of the members:

Article I. Name, Objects, Provision for Subordinate Councils, Grand Councils and The Supreme Council.

Article II. Subordinate Councils, Membership, Withdrawals, Transfer Cards, Delinquency, Suspensions, Reinstatement, Uninsured Membership, Officers and Elections, Duties of Officers, Vacancies in Office, Honorary Titles, Meetings and Quorum, Special Sessions, Reports, Per Capita Tax to Council having control and jurisdiction over the

dealing with the conduct of meetings of the Subordinate (or local) Councils, Grand (or regional) Councils and the Supreme (national or international) Council. Under such a constitution it is impossible to separate the mem-

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Subordinate Council, and Representation of Subordinate Councils in the Grand Council.

Article III. Funds, Provision for Widows' and Orphans' Fund, Assessment Fund, Distribution of Assessment Fund, Death Fund, Disability Fund, General Expense Fund and Reserve Funds. The Assessment Fund is created by assessments on insured members, in good standing, to provide a basis for meeting assessment calls. When calls are made upon such members, the proceeds are apportioned 30% to the Death Fund, 40% to the Disability Fund, 5% to the Reserve Funds and 25% to the General Expense Fund.

Article IV. Insurance. Members in good standing are subject to regular quarterly calls of $3 per insured member and the Supreme Counselor has the right to make as many calls, in an amount not to exceed $3 each, as may be required to pay in full all valid claims, together with expenses incurred in maintaining the society and conducting its business. Based on their physical condition, members become insured members of Class A or Class B. Those providing the poorer risk are put in Class B and are entitled to benefits of but one-half the amount of those provided for Class A members. The benefits are in the nature of indemnities against the result of bodily injuries "effected through external, violent and accidental means, . . . which shall be occasioned by the said accident alone and independent of all other causes." There are many limitations upon this liability and, in case of certain changes in the occupation or physical condition of a member, his right to benefits may be reduced or canceled. There are double indemnities for injuries resulting from accidents on passenger trains, etc., and the coverage generally is related to risks normally encountered by commercial travelers. Specific exemptions are made of injuries resulting from engaging in certain hazardous sports or from being under the influence of liquor, etc. Those who may be named as beneficiaries are limited to specified degrees of family relationship. (The form of application makes express reference to the limitations as to beneficiaries contained in the statutes of Ohio.) Provision is made for notices and proofs of claims, for surgical examinations, etc. There is a strict prohibition in § 11 (quoted *supra*) against the waiver of provisions of the constitution and, in the same Section, there appears the six-month limitation,

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ber's insurance rights and obligations from his other rights and obligations. While the statute authorizing the incorporation of fraternal benefit societies calls for "a lodge system with ritualistic form of work" and this is a natural

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here in controversy, upon the time within which to bring suits to recover benefits after a claim has been disallowed by the Supreme Executive Committee.

Article V. Grand Councils, Charters for Subordinate Councils, Per Capita Tax payable to Grand Councils and detailed provisions for the operation of Grand Councils.

Article VI. Supreme Council, Charters for Grand Councils, Officers and Elections and detailed provisions for the conduct of the business of the Supreme Council, including the establishment of the Supreme Executive Committee. This committee is to consist of seven members, including the Supreme Counselor, Supreme Secretary, Supreme Treasurer and four specially elected members. It has large powers over the business and activities of the society. Among these provisions are those of examining insurance claims, deciding upon their validity and adjusting them.

Article VII. Prohibition of the use of malt or spirituous liquors in connection with meetings of the society.

Article VIII. Memorial Day in honor of the society's first Supreme Secretary.

Article IX. Special duty of every member to report the name of any member who is an extra hazardous, physical or moral risk.

Article X. Prohibition against donations of funds of the society.

Articles XI, XII and XIII. Trials, Penalties and Appeals relating to violations of the Constitution, By-Laws and Rules, and the divulging of secrets of the society or conduct unbecoming a gentleman.

"Article XIV. Amendments. Section 1. Proposed amendments to this Constitution, By-Laws and Articles of Incorporation shall be submitted in writing and filed with the Supreme Secretary of the Order at least six (6) months before the convening of the annual session of the Supreme Council.

"The Supreme Secretary of the Order shall, at least four (4) months before the convening of such annual session, forward to all Grand and Subordinate Councils a copy of the proposed amendments.

"Sec. 2. No amendment to the Constitution, By-Laws or Articles of Incorporation shall be adopted unless it receives the affirmative vote of at least two-thirds (2–3) [2/3] of the members of the Supreme

expression of a close community of interest among members of a fraternal benefit society, yet it is not the formality of any ritual that is of primary significance from the legal point of view in this case. The more critical factors are that the society is a voluntary fraternal association "organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a . . . representative form of government, and which shall make provision for the payment of benefits" in accordance with certain statutory requirements.[18] Historically, many groups of people have been drawn together naturally into fraternal organizations for social and economic reasons. Some of these have developed into those forms of fraternal benefit societies now officially recognized by many states. The relationships between the members of such societies are contractual in that they are voluntarily undertaken in consideration of the like obligations of others. However, interwoven with their financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises

Council present, entitled to vote, at the session when such amendment is voted upon.

"SEC. 3. All amendments to this Constitution, By-Laws and Articles of Incorporation shall take effect on the first day of September following the session of the Supreme Council at which they were adopted, unless the date for becoming effective is otherwise specified by the Supreme Council.

"SEC. 4. All recommendations or resolutions adopted by the Supreme Council which adds [add] to or conflict with this Constitution or By-Laws shall be presented to the Supreme Council at its next annual session as an amendment to the Constitution or By-Laws and shall not become effective until such amendments have been approved by a two-thirds vote of the members present entitled to vote." (Section 4 was added between 1922 and 1931.)

[18] See note 7, *supra.*

from purely business and financial relationships. This creates—

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, ... The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." [19]

The relationship thus established between a member and his fraternal benefit society differs from the ordinary contractual relationship between a policyholder and a separately owned corporate or "stock" insurance company. It differs also from that between an insured member of the usual business form of a mutual insurance company and that company. The fact of membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship. As long as he remains a member, the terms of his membership, including obligations and benefits relating to the insurance funds of the society, are subject to change without his individual consent. The control over those terms is vested by him and his fellow members in the elected representative government of their society as authorized and regulated by the law of Ohio. Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio. It provides the unifying control over the rights and obligations of its members. *Sovereign Camp* v. *Bolin,* 305 U. S. 66, 75, discussed *infra.* It is this dependence of membership rights upon the public acts of the domiciliary state, supported by the requirement that

[19] *Modern Woodmen* v. *Mixer,* 267 U. S. 544, 551.

full faith and credit shall be given in each state to those public acts, that has been recognized by this Court in the unbroken line of decisions reviewed in this opinion.

The decisions passing upon this comparatively narrow issue are to be distinguished from those which deal only with the well-established principle of conflict of laws that "If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose." Restatement, Conflict of Laws § 603 (1934). It is to that general principle that such early cases as *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, and *M'Elmoyle* v. *Cohen,* 13 Pet. 312, have reference. The decisions here reviewed are to be distinguished, likewise, from those supporting the converse general principle that "If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose." Restatement, Conflict of Laws § 604 (1934). Neither of these general statements is here questioned. An obvious need for modification of the latter statement, however, has led many states to place a limitation upon it through the adoption of the so-called "borrowing statutes" of limitations. The result is that today "Statutes frequently provide that an action may not be maintained if it has been barred by the statute of limitations at the place where the action accrued or, in some cases, at the domicil of the defendant." *Id.* § 604, comment *b.* These numerous "borrowing statutes" demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the general statute of limitations of the state of the forum. The full faith and credit clause applied, as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum. See *Broderick* v. *Rosner,* 294 U. S. 629, 643, and *Milwaukee*

County v. *White Co.*, 296 U. S. 268, 276–277, discussed *infra.*

Even without the compelling force of statutory or constitutional provisions, the courts have recognized other restrictions on the law of the forum. For example, it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.[20] Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the Fourteenth Amendment under appropriate circumstances. See *Home Ins. Co.* v. *Dick*, 281 U. S. 397, and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, mentioned again *infra.*

The instant case presents additional facts which distinguish it from the cases governed by the foregoing general rules. The principal distinguishing feature of this case is the membership of the decedent in the Ohio fraternal benefit society, which South Dakota made available to him through the license issued to it to do business in South Dakota. Even conceding, for purposes of argu-

[20] "The policy of these statutes [of limitation] is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims." *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386, 390; approved, *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 298.

See also, *Appel* v. *Cooper Ins. Co.*, 76 Ohio St. 52, 80 N. E. 955; *Bartley* v. *National Business Men's Assn.*, 109 Ohio St. 585, 143 N. E. 386; *Young* v. *Order of United Commercial Travelers*, 142 Neb. 566, 7 N. W. 2d 81; *Burlew* v. *Fidelity & Casualty Co. of N. Y.*, 276 Ky. 132, 122 S. W. 2d 990; see note, 121 A. L. R. 758; 29 Am. Jur. 1039.

ment, that the decedent's membership contract was entered into in South Dakota, rather than where it was accepted at the society's home office in Ohio, it is the character of that fraternal benefit membership, created and defined by the laws of Ohio and fostered by the fraternal benefit laws of South Dakota, that is at issue. Conceding further that, as interpreted in this case by the Supreme Court of South Dakota, the provision of § 897 of the South Dakota Code (quoted near the beginning of this opinion), generally outlawing contractual time limits on the enforcement of contractual rights by legal proceedings, is an attempt to make void the time limit included in § 11 of Article IV of the constitution of this Ohio fraternal benefit society, we then are brought face to face with the full faith and credit clause of the Constitution of the United States. It is here that we reach the line of decisions of this Court, extending from *Royal Arcanum* v. *Green,* 237 U. S. 531, to *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, 207–208, 210–211, discussed *infra.* These decisions are directly in point. Without questioning this Court's recognition of the common law principle of conflict of laws as to the control by each state over the application of its own statutes of limitations, this line of decisions demonstrates this Court's simultaneous recognition of the necessary scope of the full faith and credit clause in this field. These cases unwaveringly safeguard, in each state, the effectiveness of the public acts of every other state as expressed in the rights and obligations of members of fraternal benefit societies. Such societies exist by virtue of such state legislation, and the rights and obligations incident to membership therein are as much entitled to full faith and credit as the statutes upon which they depend.

The respondent's claim to benefits is based upon Item (12) of § 4 of Article IV of this constitution which specifies

the death benefits derived from the membership of "Class A" members. The prohibition limiting the time for suing on this claim, which is relied upon as the defense of the society, appears as § 11 of the same Article IV. Section 11 deals with the decedent's membership relationship to the society no less than does § 4. The limitation, resulting from § 4, on the amount of the benefit to be paid to beneficiaries and the limitation, resulting from § 11, on the time when litigation may be brought by beneficiaries, are of comparable character. To permit recovery here would be to permit recovery on a special and unauthorized type of membership more favorable to decedent than was available to other members. This would fail to give full faith and credit to the terms of membership authorized by Ohio by placing an additional liability on the society beyond that authorized by Ohio or accepted by the society.

Underlying the defense of the society is the requirement that § 11 be valid under the law of Ohio as the State of incorporation. Such validity was admitted by the Supreme Court of South Dakota in its opinion below. 70 S. D. 452, 18 N. W. 2d 755, 756. "The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable." *Appel* v. *Cooper Ins. Co.*, 76 Ohio St. 52 (Syllabus, No. 1, by the court), 80 N. E. 955. The court there enforced a clause in a fire insurance policy providing that no action for recovery of any claim shall be sustainable in any court unless commenced within six months after the fire itself, even though such actions were prohibited during most of the first three of those six months. In *Bartley* v. *National Business Men's Assn.*, 109 Ohio St. 585, 143 N. E. 386, the Supreme Court of Ohio approved the *Appel* case and applied it to a two-year

contractual limitation for suing an Ohio mutual protective association on a claim for accidental death. See also: *Modern Woodmen* v. *Myers,* 99 Ohio St. 87, 124 N. E. 48, upholding a strict adherence to limitations stated in the by-laws of fraternal benefit societies; *Portage County Mutual Fire Ins. Co.* v. *West,* 6 Ohio St. 599, emphasizing the reasonableness of short periods for commencing suits on claims against mutual companies; *Young* v. *Order of United Commercial Travelers,* 142 Neb. 566, 7 N. W. 2d 81, recognizing the validity in Ohio of the precise provision of the constitution of the society here at issue, and sustaining its effectiveness in Nebraska by force of the full faith and credit clause of the Constitution of the United States; and *Roberts* v. *Modern Woodmen,* 133 Mo. App. 207, 113 S. W. 726, sustaining, in Missouri, a one-year limitation in the insurance contract of an Illinois fraternal benefit society, in the face of a contrary local policy as to Missouri contracts limiting the time within which suits may be instituted. See also, *Riddlesbarger* v. *Hartford Ins. Co.,* 7 Wall. 386.

Starting with the recognized validity under the law of Ohio, of Article IV, § 11 of the constitution of the petitioning society, that society has a complete defense to the present action unless such § 11 is not enforcible in the courts of South Dakota because of a contrary public policy of that State. We examine first the claim that such a contrary policy exists, and then show why, on the principles established by this Court, the full faith and credit clause of the Constitution of the United States requires the courts of South Dakota to give effect to the public acts of Ohio as expressed in such § 11.

The general statutes of limitations which have been in effect in South Dakota throughout the period involved in this case have prescribed limits varying from 20 years

to one year according to the subject of the action.[21] "An action upon a contract, obligation or liability, express or implied," was required to be commenced within six years.[22] On the other hand the State required the insertion in every health or accident policy issued in the State, a standard contractual provision limiting to two years the time for bringing an action upon it.[23] Throughout this period, the South Dakota statutes, moreover, have expressed no hostility toward domestic or foreign fraternal benefit societies. In fact, they have provided for the incorporation, licensing and supervision of such societies in terms closely comparable to those of the statutes of Ohio.[24]

Both the alleged prohibition by South Dakota of such a contractual limitation as is contained in § 11 and the public policy of South Dakota against such limitations depend entirely upon its statute directed generally against contractual limitations upon rights to sue on contracts

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[21] §§ 2294–2305, S. D. Rev. Code, 1919; § 33.0232, S. D. Code of 1939.

[22] § 2298, S. D. Rev. Code, 1919; § 33.0232 (4), S. D. Code of 1939.

[23] "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy." § 3 (14), c. 229, S. D. L., 1919, at p. 235.

See also, § 31.1702 (14), S. D. Code of 1939. This section is indicative of a state policy approving the shortening of the general statute as applied to accident policies, but it does not apply directly to or affect transactions of fraternal benefit societies because they are excluded from the general insurance statutes and are placed under the licensing provisions quoted in note 10, *supra*. The petitioner's constitution, filed under that requirement, fully disclosed its provision on this subject. § 12 (3), c. 229, S. D. L., 1919; § 31.1708 (3), S. D. Code of 1939.

[24] Notes 11 and 12, *supra*.

which is quoted, *supra,* from § 897 of the Revised Code of South Dakota, 1919.[25]

The public policy so declared is not directed specifically against fraternal benefit societies or their insurance membership requirements. In this very case, however, the Supreme Court of South Dakota, in its decision below, expressly held that this statute applies to and renders void in South Dakota § 11 of Article IV of this society's constitution. We thus are confronted with an inescapable issue as to the unconstitutionality of an attempt, through this statute, to declare void in South Dakota a provision of the constitution of an incorporated fraternal benefit society which comes within the authorization of a public act of the State of Ohio and is valid under the laws of that State. This is not a new issue in this Court. It falls squarely within a line of decisions consistently upholding the applicability of the full faith and credit clause in support of comparable provisions in the constitution of such a society.

In *Royal Arcanum* v. *Green,* 237 U. S. 531, Mr. Chief Justice White, writing on behalf of a unanimous Court, pointed out that the full faith and credit clause there required the state of the forum (New York) to give effect to a law of the state of incorporation (Massachusetts) pursuant to which a fraternal benefit society had amended its constitution so as to increase the assessment rate upon the complaining members, although the trial court had found that their contract of membership was entered into, made and completed in the State of New York, and that under the law of that State, the member would not be bound by

[25] The present counterpart of that statute appears in § 10.0705 of the South Dakota Code of 1939:

"10.0705. *Restraint of legal proceedings; void.* Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

such increase. 206 N. Y. 591, 597, 100 N. E. 411, 412. In terms which have not been overruled or modified by it in later decisions, this Court there explained why the full faith and credit clause requires controlling effect to be given to the law of the state of incorporation in interpreting and determining the enforcibility of the rights and obligations of members contained in the constitution and by-laws of such societies. It said:

> ". . . , as the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long since been recognized. *Gaines* v. *Supreme Council of the Royal Arcanum,* 140 Fed. Rep. 978; *Royal Arcanum* v. *Brashears,* 89 Maryland, 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an

> assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many States in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the State under which it was granted as the test and measure to be applied." *Id.* at 542–543.

In *Modern Woodmen* v. *Mixer,* 267 U. S. 544, this Court unanimously followed the same reasoning and Mr. Justice Holmes, in language previously quoted *supra,* emphasized the "complex and abiding relation" of a membership in a fraternal benefit society. He said, "as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Id.* at 551. In that case, the Court held that the full faith and credit clause required the state of the forum (Nebraska) to give effect to the law of the state of incorporation (Illinois) pursuant to which a by-law of the fraternal benefit society had been enacted requiring that the continued absence of any member, although unheard from for ten years, should not give his beneficiary the right to recover death benefits until the full term of the member's expectancy of life had expired. This was so held in the face of a rule of law in the state of the forum that seven years of unexplained absence was sufficient to establish death for purposes of such a recovery. This Court stated that neither the public policy of the forum nor the opinion of the Supreme Court of that State that the by-law was

unreasonable, nor the fact that the membership contract had been made in South Dakota, nor the fact that the by-law itself had been adopted several years after the membership relation had commenced, could affect this result. This Court said:

> "We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State." *Id.* at 551.

In *Broderick* v. *Rosner,* 294 U. S. 629, this Court, with Mr. Justice Cardozo noting dissent, applied this principle to a suit brought in a New Jersey court against certain citizens of New Jersey to recover unpaid assessments levied upon them as stockholders in a bank incorporated under the laws of New York. A New Jersey statute sought to prohibit, in the courts of New Jersey, proceedings for the enforcement of any stockholder's statutory personal liability imposed by the laws of another state, except in suits for equitable accounting, to which the corporation, its legal representatives, and all of its creditors and stockholders were to be necessary parties. Practically, this amounted to an attempt to bar such suits from the New Jersey courts. This Court, however, said "It is sufficient to decide that, since the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged public policy of New Jersey could be controlling, the full faith and credit clause requires that this suit be entertained [without compliance with the special New Jersey statute]." *Id.* at 647.

Mr. Justice Brandeis, in stating the reasoning of the Court in the *Broderick* case, said:

> ". . . the full faith and credit clause does not require the enforcement of every right which has ripened into

a judgment of another State or has been conferred by its statutes. See *Bradford Electric Light Co.* v. *Clapper,* 286 U. S. 145, 160; *Alaska Packers Assn.* v. *Industrial Accident Comm'n, ante,* p. 532, at p. 546. But the room left for the play of conflicting policies is a narrow one. . . . For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.

"Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so,' as was said in *Converse* v. *Hamilton,* 224 U. S. 243, 260, 'that no other State properly can be said to have any public policy thereon. . . .' . . . In respect to the determination of liability for an assessment, the New Jersey stockholders submitted themselves to the jurisdiction of New York. For 'the act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.' *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 551." [26] *Id.* at 642–644.

[26] Citing also for comparison, *Royal Arcanum* v. *Green,* 237 U. S. 531; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *McDermott* v. *Woodhouse,* 87 N. J. Eq. 615, 618, 619, 101 A. 375, 376; and for reference, *Canada Southern R. Co.* v. *Gebhard,* 109 U. S. 527, 537–538; *Hawkins* v. *Glenn,* 131 U. S. 319, 329; *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U. S. 221, 229–230; *Harrigan* v. *Bergdoll,* 270 U. S. 560, 564.

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, Mr. Justice Stone, speaking for the Court, said:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Id.* at 276–277.

In *Sovereign Camp* v. *Bolin*, 305 U. S. 66, this Court unanimously approved the foregoing principles and authorities and applied them to a case that goes even beyond the issue presented by the instant case. In that case, Bolin joined a Missouri lodge of a fraternal benefit society incorporated in Nebraska. His certificate of membership was delivered to him in Missouri, and he paid his dues and assessments in Missouri. He was over 43 when he joined the society in June, 1896. At that time, one of its by-laws provided that a member joining at an age greater than 43 was entitled to life membership without payment of further dues or assessments after his certificate had been outstanding 20 years. On his certificate were endorsed the words "Payments to cease after 20 years," and it stated that, if in good standing, he would be entitled to participate in the beneficial fund up to $1,000 payable to his beneficiaries and to $100 for placing a monument at his grave. He paid his dues and assessments for the required 20 years but ceased doing so in July, 1916. Upon his death, his beneficiaries sued in a state court of Missouri to recover on his certificate. They were met by the defense that, in *Trapp* v. *Sovereign Camp of the Woodmen of the World*, 102 Neb. 562, 168 N. W. 191, the Supreme Court of Nebraska, in 1918, in a representa-

tive suit binding all members, had held that the by-law of the society, which had purported to authorize the "payments to cease" certificates, was *ultra vires* and void. In the suit by Bolin's beneficiaries, the Supreme Court of Missouri then held that from 1889 to 1897, including the time when Bolin joined the society, there had been no Missouri statute providing for the registration and filing of reports in Missouri by foreign fraternal benefit societies and that there had been no provision exempting them from the operation of the general insurance laws of Missouri. The Supreme Court of Missouri, accordingly, applied what it considered to be the Missouri law and public policy. On this basis, it disregarded the special status of the claim as one derived from the decedent's membership in a Nebraska fraternal benefit society and disregarded the Nebraska law, as interpreted by the Supreme Court of Nebraska, which had held the decedent's purported exemption from payments after 1916 to be *ultra vires* and void. The Missouri court treated his membership as a Missouri contract, subject to the general insurance laws of Missouri, interpreted his certificate as an ordinary Missouri contract, not *ultra vires* under the law of Missouri, and held the society liable upon it. This Court, however, reversed that judgment on the ground that, under the full faith and credit clause, the Missouri courts were required to accept the Nebraska law as to the validity of the corporate by-law.

Mr. Justice Roberts, writing for the Court said:

> "We hold that the judgment denied full faith and credit to the public acts, records, and judicial proceedings of the State of Nebraska.
>
> ". . . The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex

and abiding relation and the rights of membership are governed by the law of the State of incorporation. Another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.

. . . . .

"The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of *ultra vires* contracts was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the courts of its domicile.

. . . . .

"Under our uniform holdings the court below failed to give full faith and credit to the petitioner's charter embodied in the statutes of Nebraska as interpreted by its highest court." *Id.* at 75 (citing *Modern Woodmen* v. *Mixer, supra,* and *Royal Arcanum* v. *Green, supra*), 78, 79.

This pronouncement as to the uniform holdings of this Court has not been repudiated or modified. In the present case, the decisions relied upon by the court below, in reaching a contrary result, deal with related but distinguishable situations.

In *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201, this Court, in a unanimous opinion written by Mr. Chief Justice Stone, held that the full faith and credit clause does not apply to an action brought in the courts of Georgia

to collect assessments against an alleged member of an insolvent mutual insurance company, according to the terms of his contract of membership, unless such membership first be proved. The Court, however, recognized that corporate procedure in conformity with the statutes of the state of incorporation is entitled to full faith and credit so far as the necessity and amount of the assessment of stockholders' liability is concerned, and said at pp. 207–208: "The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested," citing *Royal Arcanum* v. *Green,* 237 U. S. 531; *Modern Woodmen* v. *Mixer,* 267 U. S. 544. And further:

> "Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted application of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject." *Id.* at 210–211.

These recent references to the principle which is involved in the instant case constitute a significant recognition of its consistency with the decisions of this Court in related but distinguishable situations. The *Pink* case appropriately emphasized the distinction between, on the one hand, a sound local public policy which closely scrutinizes the proof of the entry into a certain relationship and, on the other hand, a local public policy which, in the face of the full faith and credit clause, would seek to eliminate important terms from that relationship after it has been entered into.

Contemporaneously with this development of the policy of this Court, applying the full faith and credit clause in support of membership obligations in fraternal benefit societies, it has considered the same clause in several related situations. For example, it has applied it in requiring the Minnesota courts to recognize the obligation of members of the safety fund department of a Connecticut life insurance company to meet assessments levied upon them pursuant to a mutual assessment plan valid under the laws of Connecticut. *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662. This was a unanimous opinion written by Mr. Justice J. R. Lamar. In another unanimous opinion in *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146, at p. 150, Mr. Justice Holmes said, "The powers given by the Connecticut charter are entitled to the same credit elsewhere as the judgment of the Connecticut court. *Supreme Council of the Royal Arcanum* v. *Green,* 237 U. S. 531, 542." See also, *John Hancock Ins. Co.* v. *Yates,* 299 U. S. 178, 182–183.

Without reliance upon the full faith and credit clause, a somewhat similar result has been recognized in the protective effect of the Fourteenth Amendment of the Constitution of the United States, prohibiting the deprivation of any person of his property without due process of law. A like policy underlies § 10 of Article I of the Constitution, prohibiting a state from passing any law impairing the obligation of contracts. Accordingly, in *Home Ins. Co.* v. *Dick,* 281 U. S. 397, in an opinion by Mr. Justice Brandeis, this Court relied upon the Fourteenth Amendment in dealing with ordinary insurance policies. It upheld unanimously the effectiveness of a contractual one-year limitation upon the right to sue for recovery of a loss under a marine fire insurance policy, where such limitation was good in Mexico (in which country the insurance was written and was to be performed), as against a two-year general statute of limitations of the state of

the forum (Texas). In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, in an opinion by Mr. Justice Roberts, the Court again relied upon the Fourteenth Amendment. There it upheld unanimously a 15-month contractual limitation upon the right to sue upon a fidelity bond. This limitation was valid in Tennessee, where such bond was entered into, and it was here upheld against the local policy of the state of the forum (Mississippi).

In a related but readily distinguishable series of cases dealing with conflicting claims arising under Workmen's Compensation Acts, emphasis has been placed upon the rule stated by Mr. Justice Stone, for a unanimous Court, in *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532, 547. He there said:

> ". . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

In *Pacific Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, again speaking for the Court, he added at p. 502:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

See also, *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, in which, as Chief Justice, he upheld the controlling effect of the full faith and credit clause as against the law of the forum.

The language quoted from the *Pacific Ins. Co.* case, *supra,* also was quoted with approval in *Williams* v. *North Carolina,* 317 U. S. 287, at p. 296. In the latter case, on the basis of the full faith and credit clause, this Court gave effect to the law of the domicil in upholding the validity of a divorce, as against the law of the forum.

We find no conflict between the position taken in the instant case and that taken in the foregoing cases or in *Griffin* v. *McCoach,* 313 U. S. 498, *Hoopeston Co.* v. *Cullen,* 318 U. S. 313, or in other decisions of this Court upon which reliance has been placed to support an opposite conclusion.

Accepting the view, expressed in these related cases, that this Court should not give what Mr. Justice Stone called a mere "automatic effect to the full faith and credit clause," [27] this Court consistently has upheld, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation. The weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be. This is especially obvious where the state of the forum, with full information as to those terms of membership, has permitted such societies to do business and secure members within its borders. There would be little sound public policy in permitting the courts of South Dakota to recognize an action to collect

[27] *Alaska Packers Assn.* v. *Comm'n, supra,* at p. 547.

the full benefits to be derived from a membership in the petitioner society, while, at the same time, nullifying other integral terms of that same membership which limit certain rights of beneficiaries to enforce collection of such benefits. It is of the essence of the full faith and credit clause that, if a state gives *some* faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, then it must give *full* faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships. In this case, the state of the forum has licensed the society to do business within its borders. It is concerned as much with the validity and fairness of the obligations to be enforced by assessments against its citizens who become members of the society as it is with the benefits to be claimed by those who become its beneficiaries. In this case, the full faith and credit clause, therefore, requires that effect be given to the six-month limit, prescribed by the society and authorized by Ohio, upon the right to commence this action. Such limit expired before this action was commenced and the judgment of the Supreme Court of South Dakota in favor of the respondent accordingly is

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE join, dissenting.

The Order of United Commercial Travelers is a corporation chartered under the laws of Ohio with power to do a fraternal insurance business. It sells contracts of insurance in Ohio. South Dakota has licensed the corporation to sell fraternal insurance policies in that state. Under this permission, the corporation has an office, called a local council, in Black Hills, South Dakota, vested with

power to administer "the business and fraternal affairs of the Order."

The insured, a citizen and resident of South Dakota, applied to the Black Hills office for membership and an insurance policy. After the application had been accepted and an insurance certificate signed at the petitioner's home office in Ohio, it was "forwarded by the said Defendant corporation to South Dakota for delivery to the insured." From then until his death in South Dakota, the insured paid his premiums to the corporation's Black Hills office. During all that period his beneficiary lived in that state. This action was brought in a court of that state on behalf of the beneficiary after the corporation had refused to pay the claim.

The association denied liability because this suit had not been commenced within six months after the association had disallowed the beneficiary's claim. This is required by the corporation's constitution which is incorporated by reference into its contracts of insurance. And in a series of cases, cited in the Court's opinion, the Supreme Court of Ohio has held that suits brought in Ohio courts on mutual, stock company, or fraternal insurance contracts, may be barred by contractual arrangements between the parties which require that suit be brought within a shorter period than that provided by the Ohio limitations statutes.

But the South Dakota Supreme Court has held that a statute of that state which provides that "every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void," S. D. Code § 10.0705 (1939), renders the limitation provision in this contract unenforceable in her courts. This Court today reverses the South Dakota decision on the ground that its refusal to enforce the private contract is a denial of full faith and credit to the "public Acts, Records, and judicial Proceedings" of Ohio. U. S. Const., Art. IV, § 1.

First. More than one hundred years ago this Court said that to require a state to apply the "limitation laws" of another state rather than its own would reduce it "to a state of vassalage," presenting the anomaly "of a sovereign state governed by the laws of another sovereign." *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 466–467. A few years later the Court was asked to hold that the full faith and credit clause barred a state from applying its own statute of limitations in a suit brought on a cause of action which had arisen in another state. On that question the Court did not "entertain a doubt"; the holding was that it could not "be even plausibly inferred" that the state in which the suit was brought was denied that power by the full faith and credit clause. *M'Elmoyle* v. *Cohen,* 13 Pet. 312, 324, 328. While the case then under consideration involved a suit on a judgment rendered in another state, the broad ruling was that, so far as the full faith and credit clause is concerned, a state has power to apply its own statute of limitations in every kind of action and without regard to where the cause of action arose.

The constitutional force of the *M'Elmoyle* refusal to require a forum state to give full faith and credit to a foreign state's statute of limitations is not weakened in the slightest by the fact that some states have seen fit to adopt "borrowing statutes." See *Cope* v. *Anderson, ante,* p. 461, at note 3. For other states, notably South Dakota here, have adopted statutes with purposes quite opposite to that of borrowing statutes. And under the *M'Elmoyle* rule, whichever limitations policy a forum state chooses to follow—to borrow or to refuse to borrow—it is free, so far as the full faith and credit clause is concerned, to do so.

The plain effect of today's decision is to overrule the *M'Elmoyle* case. And it does so, despite the fact that the holding of that case has never before been cited with disapproval; in fact, that holding has been repeatedly

approved and reaffirmed throughout the years since it was decided.[1] The Court distinguishes the *M'Elmoyle* rule, and in fact relies generally for its decision upon the line of decisions in which *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, is the leading case. But the statute of limitations was not in issue in the *Mixer* case, the case on which it relied, or the cases which have since relied on it. The *M'Elmoyle* case was not even cited in the Court's *Mixer* opinion; nor does anything said in it detract from the rule of the *M'Elmoyle* case that states can, despite the full faith and credit clause, apply their own statutes of limitation.[2] Yet the Court now treats the *Mixer* case as controlling, and holds that the full faith and credit

[1] *Townsend* v. *Jemison*, 9 How. 407, 410; *Bank of Alabama* v. *Dalton*, 9 How. 522, 528; *Bacon* v. *Howard*, 20 How. 22, 25; *Christmas* v. *Russell*, 5 Wall. 290, 300; *Amy* v. *Dubuque*, 98 U. S. 470, 471; *Campbell* v. *Holt*, 115 U. S. 620, 626; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. See also *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304; *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693; *Bank of United States* v. *Donnally*, 8 Pet. 361; *M'Cluny* v. *Silliman*, 3 Pet. 270.

[2] The Court also refers to *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, and *Home Ins. Co.* v. *Dick*, 281 U. S. 397. The Court does not rest its decision on the due process clause. But the decisions in those cases went on the due process clause, and, far from supporting the holdings here, are actually inconsistent with it. If they are to be followed they stand for the propositions that a state which has no interest at all, or only a minor interest, in the transaction sued on cannot, because of the mere accident of supplying the judicial forum, apply its own statute of limitations so as to defeat the terms of a contract valid in the jurisdiction where the obligation was initiated, negotiated, and completed. The two cases cast considerable doubt on Ohio's power to have applied its limitation statute had this suit been filed there; conversely, they provide rather persuasive argument to support a contention that South Dakota's statute should control liability here in view of that state's considerable interest, even beyond that of providing the forum of this action.

clause deprives South Dakota of power to apply its own statute of limitations.[3]

But more than that, the "state of vassalage" to which the Court's decision here reduces South Dakota is not even in subordination to the laws of another state. The Court's opinion means that South Dakota must yield to a "law" adopted by the members of an Ohio-created private fraternal insurance association. That "law," appearing only in the private association's constitution, provides in the same kind of language that legislatures ordinarily use in their statutes of limitation that "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date of the claim for said benefits is disallowed by the Supreme Executive Committee."

The nearest that this private association's "law" comes to being a law of Ohio is that Ohio permits but does not require it. Because the private association's constitution was incorporated by reference in the policy contract, including the constitution's "statute of limitations," the Court now holds that this corporate "statute of limitations" prohibits application of South Dakota's statute of limitations. Thus the Court's holding is that an Ohio

[3] The Court takes the view that it is well established that a contract provision limiting the time within which suit can be brought may override a state's statute of limitations providing a longer period. For this proposition it cites *Riddlesbarger* v. *Hartford Ins. Co.,* 7 Wall. 386. That case came from a Federal Circuit Court in Missouri where the sole problem posed or decided was whether under Missouri law or general federal law a contract limitation violated the policy of Missouri expressed,in its statute of limitations. But see *Guaranty Trust Co.* v. *York,* 326 U. S. 99. There was no full faith and credit question, due process question, or any other constitutional question. *M'Elmoyle* v. *Cohen, supra,* was not cited in the *Riddlesbarger* case. Nor was it relevant because no foreign law was put forward which might require Missouri to give full faith and credit to it.

private corporation's laws have a higher constitutional standing than an Ohio law or judgment would have—unless, as seems to be true, *M'Elmoyle* v. *Cohen, supra,* and subsequent cases approving it are now being overruled. It would be quite a radical departure from this Court's previous authorities to hold that the full faith and credit clause bars a government from applying its own statutes of limitations to suits brought in its courts, a power which, this Court said in its *M'Elmoyle* decision, governments have exercised since remote antiquity. *Id.* at 327. It is a far greater departure to hold that a state's limitation statute must take second place to the limitations rules adopted by a privately operated corporation.

It should come as quite a surprise to Ohio that its state policy can supplant South Dakota's statute of limitations, since Ohio's highest Court follows the *M'Elmoyle* rule that "Statutes of limitation relate to the remedy, and are, and must be, governed by the law of the forum; for it is conceded, that a court which has power to say when its doors shall be opened, has also power to say when they shall be closed." *Kerper* v. *Wood,* 48 Ohio St. 613, 622, 29 N. E. 501, 502. And the principle there announced was followed by the Ohio Supreme Court as late as 1943. *Payne* v. *Kirchwehm,* 141 Ohio St. 384, 48 N. E. 2d 224; *cf. Cope* v. *Anderson, ante,* p. 461.

Second. Leaving aside the *sui generis* features of a forum state's power over limitations of actions in its courts, the present holding violates other established rules concerning a state's power to govern its own local affairs and to protect from overreaching contracts persons in whom the state has a legitimate interest. See *Griffin* v. *McCoach,* 313 U. S. 498; *Pink* v. *A. A. A. Highway Express,* 314 U. S. 201. I had considered it well settled that if an insurance company does business at all in a state, its contracts are "subject to such valid regulations as the

State may choose to adopt." See *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 495; *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, 202; *Hancock Mutual Life Ins. Co.* v. *Warren*, 181 U. S. 73, 75. This conception of broad state power has not been limited to particular kinds of laws or particular kinds of contracts of special kinds of insurance companies. Thus in regard to a mutual insurance company, the Court has held the terms of a policy governed by the law of Missouri where the contract was made in the face of a contract stipulation that they were to be governed by the laws of New York, the mutual company's domicil. *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389. For this Court concluded from inferences it found in the Missouri Court's opinion that compliance with Missouri law "was a condition upon the right of insurance companies to do business in the State." *Id.* at 395. It further held that Missouri had the same continuing power to regulate the business contracts of a foreign corporation permitted to do business there as it had over the contracts of domestic corporations. *Id.* at 400–401. And when a foreign building and loan association which did business with its members only [4] sought to avoid Mississippi usury laws by specifying that a loan contract with a Mississippi member was made in New York where the interest charged was not usurious, this Court held that Mississippi law governed and voided the contract. *National Mutual Bldg. & Loan Assn.* v. *Brahan*, 193 U. S. 635. The Court approved the conclusion of the Supreme Court of Mississippi that the association, by qualifying to do business in Mississippi, "had become 'localized' in the State, had accepted the laws of the State

[4] "The purpose of the Association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares." *National Mutual Bldg. & Loan Assn.* v. *Brahan*, 193 U. S. 635, 636.

as a condition of doing business there, and could not, nor could [the Mississippi member] 'abrogate by attempted contract stipulations' those laws. See *Hancock Mutual Life Ins. Co.* v. *Warren,* 181 U. S. 73." *Id.* at 650. Because the contract was thus controlled by Mississippi rather than New York law, the Court held that "there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York." *Id.* at 647.

The Court's opinion in the present case is apparently inconsistent with the foregoing cases which have established that state courts have a continuing authority to execute the public policy of the state by refusing to enforce contract provisions of foreign corporations permitted by the state to do business there—even though those corporations do business with members only. Today's opinion does imply, however, that South Dakota officials could have excluded this corporation from doing business in the state or could have revoked its license upon discovery of the foreign corporation's violation of the laws of the state. I cannot believe that the full faith and credit clause stays the hands of the state courts as instruments of state power in private litigation any more than it could forestall state authorities from revoking the association's license for persisting in making unlawful contracts.

Third. Another handle of South Dakota's power over this corporation derives, not from the corporation's acceptance of South Dakota law as a continuing condition of doing business, but from the number and importance of the incidents involved in the making and the performance of the specific contract here which occurred in South Dakota. Unless the Court's decision overrules [5] the long

[5] The Court purports not to overrule these cases for it states: ". . . [W]e do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance."

line of cases cited in the margin [6] this insurance contract was "made" and to be performed in South Dakota, and its validity is governed by the law of that state. Thus in *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 150, Mississippi was required to enforce an insurance contract, unlawful in that state, although both the parties did business there, and although the suit on the contract was brought there, because the contract was valid in Tennessee, the state where the contract was held to have been made and which had the major connection with the whole transaction. For, said the Court, Mississippi "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made." *Id.* at 149.

Before today, contentions that the full faith and credit clause overcomes the power of a state over a contract made and operative there have been flatly rejected by this Court. Thus in *American Fire Ins. Co.* v. *King Lbr. & Mfg. Co.*, 250 U. S. 2, an insurance company was authorized by Pennsylvania, the state of its incorporation, to write fire insurance on property outside that state. It was not licensed to do business by Florida, but accepted insurance applications through independent brokers there. Under the law of Pennsylvania where the applications were accepted and the policies written, brokers were apparently not authorized to waive contract

[6] *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; *Osborn* v. *Ozlin*, 310 U. S. 53; *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335, 339; *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234, 246–248; *Whitfield* v. *Aetna Life Ins. Co., supra*, 495; *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman, supra; Chattanooga National Bldg. & Loan Assn.* v. *Denson*, 189 U. S. 408; *National Bldg. & Loan Assn.* v. *Brahan, supra; Wall* v. *Equitable Life Assur. Soc.*, 32 F. 273, affirmed *sub nom. Equitable Life Society* v. *Clements*, 140 U. S. 226.

provisions. But under Florida law the brokers were deemed agents of the Pennsylvania company with power to bind it by waivers. In answer to the contention that the Florida ruling denied full faith and credit to the law of Pennsylvania, this Court said that the case does not

> ". . . present an attempt of the Florida law to intrude itself into . . . Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that State to underwrite policies on property outside of the State and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary—no law of Pennsylvania would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania . . . ." *Id.* at 10.

Fourth. In interpreting the full faith and credit clause this Court has repeatedly insisted that it would weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. See *Pink* v. *A. A. A. Highway Express, supra,* 210–211, and cases there cited; *Magnolia Petroleum Company* v. *Hunt,* 320 U. S. 430, 436–437. I have recited the many bases for South Dakota's legitimate interest. What is the interest of Ohio to which the Court holds South Dakota must give full faith and credit?

It may be that the Court's view is that Ohio has an interest in securing uniformity of rights and obligations among all the policyholder-members throughout the country. For, says the Court, "If full faith and credit are not given . . . , the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal."

It is true that in situations involving the liability of stockholders for assessment obligations imposed by a corporate charter or the laws of a chartering state, the assessment obligation has been held to be governed by the laws of the chartering state. *Converse* v. *Hamilton,* 224 U. S. 243; *Broderick* v. *Rosner,* 294 U. S. 629. And assessments against fraternal as well as mutual insurance policyholders based on ownership rights and obligations which their insurance policies, like stock holdings, represent, have been similarly held to be controlled by the law of the state of the corporation's domicil. *Royal Arcanum* v. *Green,* 237 U. S. 531; *Hartford Life Ins. Co.* v. *Barber,* 245 U. S. 146; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662. For insofar as a mutual or fraternal insurance policyholder assumes the assessment obligation which a stockholder may bear in other companies, he underwrites the risk that the corporation of which he is an owner might become insolvent. And that insolvency, particularly of an insurance company, would occur and generally become a responsibility of the chartering state where the principal business is conducted. The contingency of insolvency has been thought to give the chartering state greater and more direct interest in the extra-territorial collection of assessments against stockholders of corporations, than a state has in the day-to-day business transactions in which a corporation chartered by it engages in other states.[7]

[7] This contrast is dramatized by the consequences to Ohio's interest in the injury which would flow from South Dakota's disregard for this contract limitation which violates South Dakota's public policy. It is certainly a tenuous thread which would link South Dakota's refusal to enforce this and similar limitations to the undue depletion of the corporate funds. For it is unlikely that in calculating rates and risks, actuaries took into account the chance that the company might escape paying just claims because of company-imposed limitations on the time for bringing suit. On the other hand recovery of insurance claims often saves insurance beneficiaries from becoming public charges of the state of their residence.

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This line of distinction has been clearly marked by the contrary result this Court has reached in cases concerning day-to-day business contracts made by foreign non-fraternal mutual insurance and membership loan companies with their policyholders and member-borrowers. In *New York Life Ins. Co.* v. *Cravens, supra,* at 400, it was urged that the fact that the mutual insurance company there was " 'the administrator of a fund collected from the policy holders in different States and countries for their benefit,' " demonstrated "the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the State where the insurance company is doing business." This contention was emphatically rejected. And in *National Mutual Bldg. & Loan Assn.* v. *Brahan, supra,* 636, 650, this Court, placing considerable reliance upon its previous *Craven* decision, held that contracts of a membership loan association whose controlling and central purpose, like the distinguishing "feature" relied upon by the Court here, was "to make loans only to its members, and for . . . accumulating a fund to be returned to its members," were, despite the full faith and credit clause, subject to the law of a state in which the association was doing business as a foreign corporation.

It seems apparent from these authorities that Ohio's interest in uniform administration of a corporation's contract obligations for the funds of a company created under its laws is not entitled to full faith and credit merely because of the communal interest of policyholder-members in that fund. And the fact, so heavily stressed by the Court, that the corporation was incorporated under the laws of Ohio so that its continued existence depends upon that law is plainly insufficient basis for a contention that, therefore, Ohio's interest demands full faith and credit for this contract provision.

Actually, it is not Ohio's interest in the uniform administration of the company's funds to which the Court gives full faith and credit. For otherwise, I should think, the opinion would cite and distinguish these cases which establish that this interest is not one entitled to full faith and credit. It is the limitations "law" of the corporate constitution enacted to protect its own interest, not the statutes of Ohio, which are held to bar this suit because it was not filed within six months. Thus it seems manifest that the Court is giving full faith and credit to the "laws" and the interest of the Ohio corporation. And the Court does this on the theory that the fraternal corporation's constitution which governs the terms of its contracts is "subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation." Apparently, it is felt that the individual South Dakota policyholder-member can protect himself from overreaching contracts within the framework of this "representative" intracorporate government which is subject to whatever regulation Ohio chooses to impose. Until today I had never conceived of the Federal Constitution as requiring the forty-eight states to give full faith and credit to the laws of private corporations on the theory that a policyholder-member's ability to protect himself through intra-corporate politics makes state protection of him unnecessary and unconstitutional. It is a naive assumption that a policyholder-member of a fraternal corporation like this does not need protection from his state. Moreover, if valid, this assumption would apply with equal logic to immunize these fraternal corporations from the laws of their domicils.

The conclusion reached by the Court that fraternal insurance companies are entitled to unique constitutional protection is not justified by the language of the Constitution nor by the nature of their enterprise. And our

previous decisions concerning fraternal insurance companies do not support the conclusion which the Court draws from the superficial distinguishing characteristics which these companies possess.

As I have pointed out, those cases which hold that assessments against fraternal policyholders in their capacity as stockholders are governed by the law of the company's domicil, have no relation to a fraternal company's obligation to a beneficiary of an insurance contract. Moreover, in *Sovereign Camp W. O. W.* v. *Bolin,* 305 U. S. 66, heavily relied on by the Court, the fraternal association was freed from liability in a state in which it was not authorized to do business because a judgment of the highest court of the state which had chartered the association had declared, in a class suit to which the claimant had been, in effect, a party, that the policy sued on had been issued *ultra vires.* Thus the *Bolin* case is merely a familiar example of enforcement of *res judicata* under the full faith and credit clause. A judgment of any state, whether chartering state or not, would be entitled to the same respect. Here, of course, there is no judgment to which the claimant was a party which is entitled to full faith and credit. And the power of the Ohio corporation, so far as Ohio law is concerned, to make a contract consistent with South Dakota policy is unquestioned.

The other case relied on heavily by this Court is *Modern Woodmen of America* v. *Mixer, supra.* In that case Mixer, the beneficiary, lived in Nebraska. While the record was not wholly clear, the insured had apparently previously lived in South Dakota, and the certificate seems to have been "issued" there. A by-law of the Woodmen, an Illinois association, provided that its certificate should insure against death but that "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate."

Nebraska, where Mixer brought the suit, but in which state the contract had not been made, had a rule of evidence that a presumption of death arises from seven years unexplained absence. Apparently considering the by-law "unreasonable," the Supreme Court of Nebraska enforced its long-continued absence rule of evidence and held the association liable. The Supreme Court of Illinois, where the association was chartered, had held the by-law reasonable in that it merely showed a purpose of the association to limit its insurance to death rather than to extend it to long-continued absences. *Steen* v. *Modern Woodmen of America,* 296 Ill. 104, 129 N. E. 546. It was on this record that this Court reversed the Nebraska court's decision in the *Mixer* case.

This reversal can be justified on the facts of the *Mixer* case, which are clearly different from the facts in the case before us. There was no conflict in *Mixer* between the policy of the state where the contract was made, and Illinois, the state of the association's domicil. For the contract apparently had been made in a third state, South Dakota, consistently with the laws of that state. Nor does it appear from the record of that case that the association had been licensed to do business so as to accept either the law of the state where the contract was made, or that of Nebraska where the suit was brought. Finally, as I have already indicated, no statute of limitations was involved in the *Mixer* case.

But it is said that language of the *Mixer* case means that the obligations of a fraternal insurance corporation are to be governed by the law of its domicil. If this language means that such an association is privileged to live above the law of the state where it does business, makes contracts, and is sued, I think that language should be repudiated. The purported differences between fraternal insurance companies and other reciprocal, co-opera-

tive and mutual insurers, are too fragmentary and inconsequential to justify any Constitutional difference in treatment. *Cf. Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313.

Neither in the *Mixer* case nor in the present one does the Court attempt to demonstrate, and I seriously question that a demonstration is possible, that the insurance business of a fraternal company is conducted differently in any important way from that of a mutual, reciprocal, or joint stock company. The insurance phase of this company is set apart from the fraternal phase after election to membership, even though payment of assessments levied for insurance purposes is made compulsory. The provisions of its constitution show that insurance terms and conditions are precisely like those of non-fraternal companies. Insurance funds are administered on a business basis, and they cannot be used for fraternal purposes. In short, the insurance program and activities reveal that this is an insurance company, run like other insurance companies. The only non-paper difference is that insurance is sold only to members of the fraternity.

Nor is it apparent to me that an individual policyholder-member in a remote community exercises any significant influence on the technical insurance aspects of a fraternal company's business. Certainly, he can no more control the policy contract provisions than could a mutual policyholder or a member of a membership loan association. And the individual member would share as much and no more in the fraternal company's gains from overreaching contracts as would participants in these indistinguishable associations.

That fraternal-order insurance businesses such as petitioner's are of a magnitude to move each state to regulate them so as to protect its citizens can hardly be doubted. The best information obtainable shows that in 1944 frater-

nal life insurance businesses in the United States had aggregate assets of almost $1,500,000,000; income of $255,600,000; $6,794,300,000 insurance in force; and 7,582,000 outstanding certificates. During 1944 they spent $43,300,000 for agents and management.[8] There is, thus, every reason for giving the same force and effect to state regulation of fraternal insurance companies as is given regulation of all other insurance businesses.

Fifth. I fear that it may be significant that the Court has conspicuously refrained from stating in unmistakable terms that its new doctrine applies only to fraternal insurance companies. If, as the Court holds, the interest of Ohio or of its corporate creature does outweigh the interest of every state in which that creature does business, I see no sound basis in the facts or in the authorities cited by the Court for declining to apply this formula to almost every type of business corporation created in one state and doing business in another.

The effect of such a doctrine on the rights of states to govern themselves is graphically demonstrated by the insurance business. The five largest legal reserve life insurance companies in the United States, with total assets of approximately $15,000,000,000, have their home offices in or near New York and Connecticut. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 541. The result of the Court's opinion, if later carried to its logical conclusion, would be that the policy obligations of all of these companies, in whatever state assumed, would be governed by New York or Connecticut law or that of nearby states, and that all of the other states would be deprived of power to pass legislation believed by them to be necessary to protect their own citizens against un-

[8] Statistical Abstract of the United States, Dept. of Commerce, Bureau of the Census (1946) 442.

conscionable contracts. By permitting its insurance corporations, particularly mutual companies, to make contracts barring an insured's access to state courts, New York, for example, could thus render all the other states helpless to provide a judicial haven for their own wronged citizens.

Such a doctrine is not only novel; it is revolutionary. I think the doctrine violates the very Constitution that it is our duty to interpret. For the Court today, in part, nullifies a great purpose of the original Constitution, as later expressed in the Tenth Amendment, to leave the several states free to govern themselves in their domestic affairs. Hereafter, if today's doctrine should be carried to its logical end, the state in which the most powerful corporations are concentrated, or those corporations themselves, might well be able to pass laws which would govern contracts made by the people in all of the other states.

I would affirm this judgment.

WILLIAMS ET AL. *v.* AUSTRIAN ET AL., TRUSTEES.

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

No. 850. Argued April 10, 11, 1947.—Decided June 16, 1947.

Trustees in a reorganization proceeding under Chapter X of the Bankruptcy Act, as amended by the Chandler Act of 1938, 52 Stat. 840, who have been authorized by the reorganization court to sue officers and directors of the debtor corporation and affiliated interests alleging misappropriation of corporate assets (discovered in an investigation under § 167) and seeking an accounting and other relief, may bring such suit in another federal district court, even in the absence of diversity of citizenship or other usual grounds of federal jurisdiction. Pp. 646–662.

(a) The phrase "proceedings under this Act," as used in § 2, does not relate solely to summary proceedings, but includes plenary

suits as well. *Lathrop* v. *Drake,* 91 U. S. 516, followed. *Bardes* v. *Hawarden Bank,* 178 U. S. 524, and *Schumacher* v. *Beeler,* 293 U. S. 367, distinguished. Pp. 646–662.

(b) Section 23 was adopted as a limitation on the plenary jurisdiction conferred upon all district courts by § 2. Pp. 648–654.

(c) Section 102 of Chapter X, making § 23 inapplicable in proceedings under that Chapter, removes this limitation and gives all federal district courts jurisdiction under § 2 over plenary suits brought by a Chapter X trustee, even though diversity of citizenship or other usual ground for federal jurisdiction is lacking. Pp. 654–659, 661–662.

(d) Such jurisdiction is not confined to the reorganization court but applies to all other district courts as well. Pp. 659–661.

159 F. 2d 67, affirmed.

A District Court in New York dismissed for want of jurisdiction a suit brought by trustees appointed by a District Court in Virginia in a reorganization proceeding under Chapter X of the Bankruptcy Act. 67 F. Supp. 223. The Circuit Court of Appeals reversed. 159 F. 2d 67. This Court granted certiorari. 330 U. S. 813. *Affirmed,* p. 662.

Milton Pollack argued the cause for petitioners. With him on the brief were *Emery H. Sykes, Horace R. Lamb, Lewis L. Delafield, John F. Dooling, Jr.* and *William Piel, Jr.*

Carl J. Austrian argued the cause for respondents. With him on the brief were *Saul J. Lance* and *Isadore H. Cohen.*

Acting Solicitor General Washington, Roger S. Foster, Robert S. Rubin and *Arnold R. Ginsburg* filed a brief for the Securities and Exchange Commission, as *amicus curiae,* urging affirmance.

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

Section 2 (a) of the Bankruptcy Act [1] confers upon all bankruptcy courts "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . ." The exception has reference to § 23 (b), which requires that "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act." [2] Congress, however, in the Chandler Act of 1938 declared the inapplicability of § 23 in reorganization proceedings under Chapter X; and it is upon the signifi-

[1] The Chandler Act of 1938, 52 Stat. 840, generally revised the Bankruptcy Act of 1898, 30 Stat. 544, as amended. Section 2 in its original form was substantially as set out in the text except that jurisdiction was conferred "in bankruptcy proceedings," instead of "in proceedings under this Act." The change in language was made in 1938.

[2] Section 23 in full provides as follows: "JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted,

cance of this action to the jurisdiction of the federal courts that this case turns.[3]

Respondents were appointed trustees for the Central States Electric Corporation, a Virginia Corporation in reorganization in the District Court of the United States for the Eastern District of Virginia. Following an investigation under § 167 [4] of the Act, respondents were authorized to institute suit against petitioners, who are past and present officers and directors of the debtor and others having connection therewith. This suit was then filed against petitioners in the District Court of the United States for the Southern District of New York, alleging a conspiracy to misappropriate corporate assets and asking an accounting and other relief. There was no allegation of diversity and jurisdiction was rested upon "the Constitution of the United States (Article I, Section 8, Clause 4, and Article III, Section 2), the Act of Congress relating to Bankruptcies (U. S. Code Title 11), and . . .

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unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

Section 23 (a), as originally enacted, related to the circuit courts, which were abolished in 1911 by § 289 of the Judicial Code. 36 Stat. 1167. Formal amendment to § 23 (a) was made in 1926. 44 Stat. 664.

[3] Chapter X, containing the reorganization provisions, superseded § 77B. Section 102 of Chapter X provides: "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter."

[4] The investigation was made pursuant to the decision in *Committee for Holders* v. *Kent,* 143 F. 2d 684 (1944).

the provisions of Section 24 (1), (19) of the Judicial Code . . . ."

The District Court dismissed for lack of jurisdiction;[5] but the Circuit Court of Appeals reversed, holding that since the governing provisions of § 23, to which the "except" clause of § 2 (a) (7) refers, were suspended in Chapter X proceedings, jurisdiction to hear this plenary suit could be rested upon the general language of § 2. Other alleged grounds for jurisdiction were not considered. 159 F. 2d 67 (1946).

1. Petitioners construe "proceedings under this Act," within which the jurisdictional grant contained in § 2 is confined, as extending only to matters proper for summary disposition,[6] and interpret the suspension of § 23 in Chapter X cases, without providing a substitute therefor, as removing from the Act an affirmative grant to federal courts of jurisdiction to hear plenary suits, rather than as an action aimed at expanding that jurisdiction.[7] But these views rest, in the main, upon what we think is an erroneous appraisal of the history of §§ 2 and 23.

Section 2 is substantially identical with § 1 of the Bankruptcy Act of 1867,[8] *Babbitt* v. *Dutcher,* 216 U. S. 102,

[5] Petitioners also based their motion to dismiss on the applicable statute of limitations; but the District Court indicated that if there had been jurisdiction to proceed, the motion to dismiss would otherwise have been denied, because of factual issues which first required determination.

[6] "Proceedings under this chapter," referred to in §§ 101 and 102 of Chapter X, is similarly construed.

[7] According to this view there would, in Chapter X cases, be no provisions in the Bankruptcy Act conferring jurisdiction upon federal courts to hear plenary suits other than in §§ 60, 67, and 70. A reorganization trustee would be left, where he could, to take advantage of the ordinary grounds for federal jurisdiction.

[8] 14 Stat. 517. Section 1 gave the bankruptcy courts original jurisdiction "in all matters and proceedings in bankruptcy" which extended "to all cases and controversies arising between the bankrupt and any

107 (1910); and cases dealing with that Act, while recognizing that certain suits brought by bankruptcy assignees should proceed in plenary, rather than summary, fashion, held that § 1 gave jurisdiction to the bankruptcy courts to proceed in both ways.[9] And although certain aspects of a bankruptcy proceeding could be handled only by the court in which the adjudication was had, § 1 conferred upon all bankuptcy courts jurisdiction to hear plenary suits brought by bankruptcy assignees against adverse claimants or against debtors of the bankrupt.[10]

Lathrop v. *Drake,* 91 U. S. 516 (1875), viewed the jurisdiction of the district courts in this manner and, we think, contrary to the statements later made in *Bardes* v. *Hawarden Bank,* 178 U. S. 524 (1900), and *Schumacher* v. *Beeler,* 293 U. S. 367 (1934), upon which petitioners rely, considered the jurisdiction of the district courts over plenary suits to rest upon § 1 of the 1867 Act.[11]

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creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt . . . ."

[9] *Sherman* v. *Bingham,* 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle,* 10 Fed. Cas. 579, No. 5,533 (1872). The requirement of plenary proceedings, though not expressly appearing in the Act, was well recognized. *Marshall* v. *Knox,* 16 Wall. 551 (1872); *Smith* v. *Mason,* 14 Wall. 419 (1871).

[10] *Sherman* v. *Bingham,* 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle,* 10 Fed. Cas. 579, No. 5,533 (1872).

[11] The references to the Act contained in the discussion of the jurisdiction of the district courts obviously referred to § 1; and *Sherman* v. *Bingham,* 21 Fed. Cas. 1270, No. 12,762 (1872), which expressly based upon § 1 the jurisdiction of the district courts to hear plenary suits, was cited with unreserved approval. The pertinent passage in the *Lathrop* case is as follows:

"The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned. . . . Each court within its own district may exercise the

Section 2 of the Bankruptcy Act of 1898 substantially repeated the broad grant of jurisdiction contained in § 1 of the 1867 Act. The bankruptcy courts were given "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . ." [12] But § 2 (7), while granting to all bankruptcy courts jurisdiction to collect and to hear contro-

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powers conferred; but those powers extend to all matters of bankruptcy, without limitation. . . . But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy." 91 U. S. 516, 517–18.

[12] Section 2 created the courts of bankruptcy and invested them "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . . ."

versies relating to the estate of the bankrupt, appended the words "except as herein otherwise provided." The exception had reference to § 23,[13] which, in the clause applicable to the district courts, provided that, unless by the consent of the defendant, suits by the bankruptcy trustee should be brought only in the courts where the bankrupt might have brought them if bankruptcy proceedings had not been instituted. In sharp contrast to the broad language of § 2 (7) and to the practice under the 1867 Act,[14] § 23, in the interest of litigants and witnesses, deliberately directed to the state courts most of a bankruptcy trustee's plenary suits.[15]

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[13] *First Nat. Bank* v. *Title and Trust Co.*, 198 U. S. 280, 289 (1905); *Bryan* v. *Bernheimer*, 181 U. S. 188, 194 (1901); *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 535 (1900). Section 23 (b), as originally enacted, provided: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

[14] "A construction of the statute of 1898 which would deprive the federal courts of jurisdiction of the suits in question [trustee's suit to recover property] would make the act of 1898 unprecedented among bankrupt acts." *In re Hammond*, 98 F. 845, 853 (1899).

[15] When S. 1035, which eventually became the Act of 1898, reached the House, the judiciary committee recommended striking out all after the enacting clause and substituting the committee's own bill. Section 23 of the House version, 31 Cong. Rec. 1781 (1898), survived both debate and conference action and became § 23 of the Act of 1898. In reviewing the bill preliminary to debate, the chairman of the House judiciary committee explained:

"The jurisdiction of State courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with.

"Suits by the trustee shall only be brought in the courts where the bankrupt might have brought them except for the misfortune of his bankruptcy, unless by the consent of the proposed defendant.

"Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States

Some lower federal courts, however, immediately held that § 23 did not apply to suits brought to recover certain transfers of the bankrupt's property and, relying upon § 2, upheld the jurisdiction of federal courts.[16] *Bardes* v. *Hawarden Bank, supra,* checked this trend and gave full scope to the language of § 23. Suits to recover fraudulent transfers, like other plenary suits, were to be tried in the state courts. It was in the *Bardes* case unnecessary to explore the scope of § 2; for whatever the grant of jurisdiction there made, the interpretation given § 23 would have required the result reached. In any event, the construction of § 2, standing alone and without regard for the influence of § 23, as being confined to summary matters rested to a great extent upon a reading of *Lathrop* v. *Drake, supra,* with which, as has been indicated, we cannot agree.

Congressional reaction to the *Bardes* case was almost immediate. Wishing to allow the trustee to resort to federal courts in recovering fraudulent transfers and preferences, Congress in 1903 created exceptions to § 23 in favor of suits brought under §§ 60 (b) and 67 (e);[17] and, being doubly cautious, Congress also inserted in §§ 60 (b) and 67 (e) clauses giving any bankruptcy court jurisdiction to hear plenary suits brought under those sections.[18] It was explained at the time by the House judiciary committee

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courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses, and attorneys. Such will not be the effect under this bill. It is proper that such should not be the case, speaking generally, in behalf of the administration of justice." 31 Cong. Rec. 1785 (1898).

[16] *In re Woodbury,* 98 F. 833 (1900); *In re Hammond,* 98 F. 845 (1899); *Louisville Trust Co.* v. *Marx,* 98 F. 456 (1899).

[17] 32 Stat. 798–9.

[18] *Id.* at 799–800. Congress likewise amended § 70 (e), but by an oversight the exceptions made to § 23 were not correspondingly extended. The omission was corrected in 1910. 36 Stat. 840. See H. Rep. No. 511, 61st Cong., 2d Sess. 6 (1910).

that § 2 (7) would probably have been ample basis for the jurisdiction of the bankruptcy courts, and that it was only to remove all doubt that §§ 60 (b) and 67 (e) had also been amended.[19]

Where §§ 60 (b), 67 (e), and 70 (e) were not involved, the *Bardes* rule continued to be applied where plenary proceedings were required, as in cases relating to property ad-

[19] "Section 9: Under the law of 1867, the Federal and State courts had concurrent jurisdiction of suits to recover property fraudulently or preferentially transferred. *Bardes* v. *Bank of Hawarden* (Ia.), 178 U. S., 524, has so construed section 23 b, of the law as to deny such jurisdiction to the district courts, save with the consent of the proposed defendant. In commercial centers this amounts to a denial of justice, the calendars of the State courts being years behindhand; while, growing out of *Bardes* v. *Bank*, have come decisions which have crippled the administration of the law to a marked degree. (See in re *Ward* (Mass.), 5 Am. B. R., 215; *Mueller* v. *Nugent* (Ky.), 105 Fed., 581; this latter, however, recently reversed by the Supreme Court.) There is a very general demand for a return to the policy of the law of 1867. *Were it not for section 23 b, section 2 (7), would probably confer ample jurisdiction on the district courts.* The change in section 23, b, proposed by the bill simply excepts from the operation of it all suits which can, under the specific words of the law, be brought to recover property, and this merely by referring to the three sections under which alone such suits can be brought. *To remove all doubt*, also, sections 13 and 16 of the bill confer concurrent jurisdiction of all such suits on the State courts and the Federal district courts, by adding appropriate words to each of the three sections section 60 b, section 67 e, and section 70 e." H. Rep. No. 1698, 57th Cong., 1st Sess. 7 (1902). (Italics added.)

Substantially the same explanation was given on the floor of the House by Representative George W. Ray, chairman of the judiciary committee. 35 Cong. Rec. 6941, 6942 (1902).

Representative Ray, we note, was second ranking member of the judiciary committee at the time of the passage of the 1898 Act. It was that committee which drafted §§ 2 and 23 in substantially the form appearing in the 1898 Act. See note 15, *supra*. Representative Ray was also a member of the House conference committee, and it was in conference that the Act of 1898 was finally drafted and the serious differences between the House and Senate were resolved.

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versely held [20] and suits upon choses in action belonging to the bankrupt's estate.[21] Left for summary disposition under § 2 were those proceedings in which the controversy related to property in the possession or constructive possession of the court or to property held by those asserting no truly adverse claim.[22]

From its inception, § 23 contained a clause seemingly mitigating the rigors of the jurisdictional requirements imposed. A trustee, "unless by consent of the proposed defendant," could bring suit only in courts where the bankrupt could have sued. Subsequent to the *Bardes* case some lower federal courts held that, even with the consent of a defendant, some independent ground for federal jurisdiction must be present.[23] The conflict was resolved in *Schumacher* v. *Beeler, supra.* It was held that in § 23 Congress had exercised its bankruptcy powers to confer upon federal courts jurisdiction conditioned upon a defendant's consent [24] and that, given consent, no independ-

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[20] *Harris* v. *First Nat. Bank,* 216 U. S. 382 (1910).

[21] *Kelley* v. *Gill,* 245 U. S. 116 (1917); *In re Roman,* 23 F. 2d 556 (1928); *Lynch* v. *Bronson,* 177 F. 605 (1910).

[22] *Whitney* v. *Wenman,* 198 U. S. 539 (1905); *Mueller* v. *Nugent,* 184 U. S. 1 (1902); *Bryan* v. *Bernheimer,* 181 U. S. 188 (1901); *White* v. *Schloerb,* 178 U. S. 542 (1900). "But in no case where it lacked possession, could the bankruptcy court . . . adjudicate in a summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit." *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 433–34 (1924).

[23] *Matthew* v. *Coppin,* 32 F. 2d 100, 101 (1929); see *Stiefel* v. *14th Street Realty Corp.,* 48 F. 2d 1041, 1043 (1931); *Coyle* v. *Duncan Spangler Coal Co.,* 288 F. 897, 901 (1923); *Piano Co.* v. *First Wisconsin Trust Co.,* 283 F. 904, 906 (1922); *De Friece* v. *Bryant,* 232 F. 233, 236 (1916); *McEldowney* v. *Card,* 193 F. 475, 479 (1911). Contra: *Beeler* v. *Schumacher,* 71 F. 2d 831 (1934); *Toledo Fence & Post Co.* v. *Lyons,* 290 F. 637, 645 (1923).

[24] "The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such

ent ground for federal jurisdiction was required. The case turned upon the meaning of the consent clause in § 23. The remarks offered concerning § 2 were unnecessary and, in any event, were based upon the similar statements made in *Bardes* v. *Hawarden Bank, supra.*

The *Beeler* decision, like that in the *Bardes* case, does not direct a conclusion that § 2, in the absence of § 23, confers only a summary jurisdiction; for it was because of the limitations of § 23 that plenary suits had been excluded from the otherwise broad scope of § 2.[25] Cases construing the latter in the presence of the overriding prohibitions of

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suits and could prescribe the conditions upon which the federal courts should have jurisdiction. . . . Exercising that power, the Congress prescribed in § 23b the condition of consent on the part of the defendant sued by the trustee." *Schumacher* v. *Beeler,* 293 U. S. 367, 374 (1934).

[25] The cases decided under the 1867 Act and referred to in notes 10–11, *supra,* recognized the broad scope of language similar to that of § 2; and cases arising under the 1898 Act and decided before *Bardes* v. *Hawarden Bank,* 178 U. S. 524 (1900), based upon § 2 the jurisdiction of the federal courts to entertain plenary suits to recover property adversely held. See note 16, *supra.*

Later cases have recognized the overriding consequence of § 23. "Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided.' But § 23–b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened." *Kelley* v. *Gill,* 245 U. S. 116, 119 (1917). "There is plainly a controversy in relation to the estate of a bankrupt, and subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, 'except as herein otherwise provided.'" *Lynch* v. *Bronson,* 160 F. 139, 140 (1908). See also *Lowenstein* v. *Reikes,* 54 F. 2d 481, 485 (1931) (dissenting opinion), and the analysis of the interplay of §§ 2 and 23 in Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy,* 20 Iowa L. Rev. 565 (1935), which was written after the *Beeler* decision.

§ 23 are not persuasive in a situation where, for the first time, § 23 has been declared inoperative.

2. To accept petitioner's reading of § 2 would produce consequences affording peculiar explanations for the express elimination of § 23 in Chapter X cases. For one thing, there would be destroyed the consent basis for federal jurisdiction of plenary suits brought by a trustee; [26] and, for another, diversity jurisdiction would depend upon the citizenship of the trustee rather than upon that of the debtor. The latter is a formal change of no obvious value, and the former puts a greater limitation upon the jurisdiction of a Chapter X court than has been placed upon an equity receivership, 77B, or ordinary bankruptcy court, a result in obvious contrast to discernible trends in reorganization law.

The committee reports and Congressional debates do not elaborate upon the decision to eliminate § 23,[27] and the hearings reveal only that § 23 was one of several sections which the National Bankruptcy Conference desired to eliminate, and which might be held applicable if not expressly deleted.[28] However, the action occurred in the

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[26] *Schumacher* v. *Beeler,* 293 U. S. 367 (1934). See p. 652 and note 24, *supra.* In *Tilton* v. *Model Taxi Corp.,* 112 F. 2d 86 (1940), a 77B case, the jurisdiction of the district court to entertain a plenary suit was based upon consent.

[27] The Senate report said in regard to the committee's suggested amendments to § 102: "The proposed amendment amplifies the provision with reference to applicability so as to leave no doubt that the provisions of chapters I to VII are alone to be deemed applicable, except where inconsistent or in conflict with the provisions of the chapter." S. Rep. No. 1916, 75th Cong., 3d Sess. 6 (1938).

The amendments to § 102 were agreed to without comment on the floor of the Senate, and were similarly accepted by the House. 83 Cong. Rec. 8697, 9103, 9107, 9110 (1938).

[28] The recommendation was made by Mr. John Gerdes. See Hearings before Subcommittee of the Committee on the Judiciary, U. S. Senate, on H. R. 8046, 75th Cong., 2d Sess. 77 (1938). Mr. Gerdes

process of developing a workable reorganization technique and should be viewed in that context. While an equity receivership court had dependent jurisdiction, regardless of diversity or other independent grounds for federal jurisdiction, to hear plenary suits related to the estate of the

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did not at this time explain the reasons for the suggested suspension of § 23. He stated as follows:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

A representative of the Association of the Bar of the City of New York also listed § 23 among those sections which "have no applicability to a reorganization procedure." *Id.* at 37. And the spokesman for the Philadelphia Court Plan Committee suggested amending § 23 to give ordinary bankruptcy courts more effective powers to deal with fraudulently transferred or concealed assets. *Id.* at 26.

debtor,[29] under § 77B, which made reorganization of non-railroad corporations a part of the bankruptcy scheme, it was believed in some quarters that § 23 would have its traditional effect upon the jurisdiction of federal courts to hear plenary suits, even though the reorganization court was given the "powers" of an equity receivership court.[30] Other commentators, thinking that § 77B should not provide a less efficient procedure than the equity receivership, considered § 23 inapplicable to 77B cases and regarded the reorganization courts as having jurisdiction to hear plenary suits.[31] The controversy had not been settled when congressional committees were considering the bill which became the Chandler Act of 1938, and such a background for the suspension of § 23 in Chapter X cases obviously raises no inference of a desire to restrict, rather than to expand, the jurisdiction of the federal courts.

To interpret the elimination of § 23 in Chapter X cases as restricting the access of the trustee to the federal courts would not be in harmony with other provisions contemporaneously written into Chapter X and defining anew the position and functions of the reorganization trustee. The appointment of a disinterested trustee was made mandatory in appropriate cases,[32] his qualifications were pre-

[29] *White* v. *Ewing*, 159 U. S. 36 (1895); see *Riehle* v. *Margolies*, 279 U. S. 218, 223 (1929).

[30] Finletter, Principles of Corporate Reorganization 185–87 (1937).

[31] 2 Gerdes, Corporate Reorganizations 1465 (1936). The courts had not been squarely faced with the problem at the time Congress was considering the 1938 revision of the Bankruptcy Act. *Matter of United Sportwear Co.*, 28 Am. B. R. (N. S.) 456 (1935), had suggested that § 23 was applicable, while the contrary intimation is evident in *Thomas* v. *Winslow*, 11 F. Supp. 839 (1935). See also Note, 49 Harv. L. Rev. 797 (1936).

[32] § 156. The requirement of a disinterested trustee was one of the major substantive additions which Chapter X made to § 77B. S. Rep. No. 1916, 75th Cong., 3d Sess. 19 (1938).

scribed,[33] and upon him were devolved functions aimed at eliminating the abuses of previous reorganization schemes.[34] It was his duty to prepare the reorganization plan,[35] and there were conferred upon him investigative powers and duties [36] which not only contemplated the discovery of wrongs done the debtor by its former management, but also insured the "prosecution of all causes of action" which might "add to the assets of corporations in reorganization." [37] These provisions were "of paramount importance in the revision of section 77B." [38] and are hardly indicative of a congressional desire to restrict the trustee's choice of a forum in which to litigate plenary suits. On the contrary, the conclusion more in accord with the purposes of Chapter X and with the pivotal position in which the trustee was placed [39] is that Congress

[33] §§ 156 and 158.

[34] The important defects of 77B reorganizations and the remedy provided in Chapter X are analyzed in S. Rep. No. 2084, 75th Cong., 3d Sess. 1–3 (1938).

[35] §§ 167 (6) and 169.

[36] Section 167 in part provides: "The trustee upon his appointment and qualification—

"(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

"(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

"(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate . . . ."

[37] S. Rep. No. 1916, 75th Cong., 3d Sess. 29 (1938).

[38] *Ibid.*

[39] "These functions of the independent trustee appointed in the larger cases are difficult to overemphasize. . . . Investors must be afforded a 'focal point' for organization." H. Rep. No. 1409, 75th Cong., 1st Sess. 43 (1937).

intended by the elimination of § 23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking.

The decision of the Circuit Court of Appeals is in entire harmony with the foregoing considerations. The language of § 2, in its ordinary sense and no longer limited by § 23, easily comprehends the present type of suit; and so to hold directly and effectively subserves Congressional desires as revealed in the plain policy of Chapter X and in the express elimination of § 23, which has, since its enactment in 1898, been viewed as a sharp restriction upon the jurisdiction theretofore exercised by bankruptcy courts and as a strong preference for state courts.[40] Since all reorganization courts are the objects of the jurisdiction conferred by § 2,[41] the District Court for the Southern District of New York has jurisdiction to hear the present suit, which is brought by reorganization trustees and which charges misappropriation of the assets of a Chapter X debtor.[42] "This seems to be the only logical conclusion to

[40] "The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy." *Bush* v. *Elliott*, 202 U. S. 477, 479–80 (1906). And see pp. 649 and 650, notes 14–15, *supra*.

[41] Section 1 (10) defines the courts of bankruptcy as follows: " 'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia"; *Babbitt* v. *Dutcher*, 216 U. S. 102 (1910). And see § 2 (a) (20) of the Bankruptcy Act.

[42] Our conclusion is not changed by the language of § 23 (a), which as drawn in 1898, 30 Stat. 544, 552, was designed to grant a limited

be derived from the fact that § 23 has no application under Chapter X." [43]

3. Respondents in the alternative argue that the equity receivership powers conferred by § 115 [44] include jurisdiction to hear plenary suits and that all reorganization courts may exercise the jurisdiction so conferred. Petitioners would, in any event, confine the effects of § 115 to the reorganization court in which the reorganization petition has been approved. We need not pass on these contentions; for, assuming that § 115 is jurisdictional [45]

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jurisdiction to circuit courts over "controversies at law and in equity," as distinguished from "proceedings in bankruptcy," and which seems only to have recognized the rule existing under the 1867 Act that certain bankruptcy matters were the exclusive concern of the bankruptcy court. If "proceedings" as used in § 23 (a) denoted those instances in which summary jurisdiction was proper, to find that "proceedings" in § 2 has no such precise meaning simply exemplifies the variety of ways in which "proceedings" has been employed in the bankruptcy statute. Section 11 (e) authorizes trustees to institute "proceedings in behalf of the estate upon any claim" and refers to "any proceeding, judicial or otherwise." And §§ 60 (b), 67 (e) and 70 (e) speak of "proceedings" in connection with plenary. In Chapter X itself, §§ 101 and 102 refer to "proceedings under this chapter." This term must extend to plenary suits, for otherwise § 23, which deals only with plenary suits, would not be suspended at all. Significant too is that "bankruptcy proceedings" in § 2 was in 1938 changed to "proceedings under this Act" in order that the jurisdiction granted by § 2 would extend to "proceedings" under the new debtor relief chapters, including Chapter X.

[43] 6 Collier on Bankruptcy 673 (14th ed. 1947.)

[44] Section 115 provides: "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

[45] The similar "powers" provision in § 77B has been viewed as non-jurisdictional. *In re Standard Gas & Electric Co.*, 119 F. 2d 658,

and that it extends only to the primary court, jurisdiction in the present case may still be rested upon § 2. That section, in the absence of § 23, supports the jurisdiction of all district courts to hear plenary suits brought by a reorganization trustee, a result consistent with the aims of Chapter X and with the elimination of a section which is itself applicable to all district courts. Congress could have carved out of § 23 only a narrow exception in favor of the court in which the reorganization proceedings are pending and thereby left unchanged the jurisdiction of other courts over a trustee's plenary suits. Limited exceptions are familiar in the history of § 23. But Congress went further and eliminated § 23 entirely in Chapter X proceedings. Because of the countrywide ramifications of corporate debtors placed in Chapter X reorganization, it is as usual as not for the trustee to resort to foreign jurisdictions for the disposition of plenary suits. Allowing the primary court to hear these suits will not change this situation, if it is true that the process of a reorganization court does not run nationwide in plenary cases.[46]

662 (1941); see *In re Prima Co.*, 98 F. 2d 952, 958 (1938). These cases were decided after the passage of the Chandler Act and considered § 23 fully applicable in pending 77B proceedings. In *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86 (1940), § 23 was considered applicable in § 77B proceedings so as to permit jurisdiction of the district court to be based upon a defendant's consent. And see *Thompson* v. *Terminal Shares*, 104 F. 2d 1 (1939), for a treatment of a similar provision contained in § 77. On the other hand, § 115 has been interpreted as jurisdictional. *In re Cuyahoga Finance Co.*, 136 F. 2d 18 (1943); see *Warder* v. *Brady*, 115 F. 2d 89, 93–94 (1940). Other courts have thought the suspension of § 23 in Chapter X cases would give the reorganization court jurisdiction to hear plenary suits. See *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942); *Tilton* v. *Model Taxi Corp.*, *supra* at 88.

[46] It has been so held. *In re Standard Gas & Electric Co.*, 119 F. 2d 658 (1941); *Bovay* v. *H. M. Byllesby & Co.*, 88 F. 2d 990 (1937); *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. 2d 363 (1936); *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942).

Congressional policy would receive only limited recognition if the suspension of § 23 is interpreted as allowing the trustee access to only the appointing court and as restricting his access to all other district courts.[47]

4. Our holding is, of course, that Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts. Section 2 of the 1898 Act contained the broad language borrowed from § 1 of the Act of 1867. But the exception to § 2 (a) (7) acknowledged the overriding limitations of § 23, which was the embodiment of Congressional policy to exclude from the bankruptcy courts many of the trustee's plenary suits. That same meaningful section was expressly eliminated in 1938 in the process of perfecting a chapter of the Bankruptcy Act dealing with the distinctive and special proceedings in corporate reorganizations. *Cf. Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, 676 (1935). This negation of long-standing policy should be given effect consistent with the aims of Chapter X and should not be hedged by judge-made principles not in accord with those aims. Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and pur-

[47] The Chapter X cases cited in note 45, *supra*, did not reach the question of whether courts other than the primary court would have jurisdiction to hear plenary suits where the latter had jurisdiction of such a suit but could not exercise it because of personal service or venue difficulties. Nor did Mr. Gerdes, who construed the suspension of § 23 as establishing, by way of § 115, the jurisdiction of the reorganization court to hear plenary suits. Gerdes, *Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21 (1938). But it was his opinion even under § 77B, where the applicability of § 23 was left in doubt, that all reorganization courts, not just the domiciliary court, had jurisdiction to hear plenary suits brought by the trustee, even though the usual grounds for federal jurisdiction were lacking. 2 Gerdes, Corporate Reorganizations 1480, 1513–14, 1525–26 (1936).

pose. The failure to provide appropriate fanfare for the suspension of § 23 in Chapter X cases, and for the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken. Judicial drives to limit the jurisdiction of federal courts should not lead to decision falling short of complete effectuation of statutory scheme. With the limitations of § 23 suspended, § 2 confers jurisdiction upon all reorganization courts to hear plenary suits brought by a Chapter X trustee.

5. Petitioners insist that certain consequences, which they term undesirable, will flow from this decision. It is said, for example, that the state courts will automatically be deprived of jurisdiction to hear a trustee's plenary suits. But whether or not this and other suggested consequences will follow we leave for consideration in cases presenting such issues for decision.

The decision of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON joins, dissenting.

On the surface this appears to be merely a bankruptcy case raising technical questions of federal jurisdiction. But the answers to these questions have far-reaching import. They involve the distribution of judicial power as between United States and State courts, and thus concern federal-state relations generally. More immediately, inasmuch as the allowable scope of the business of the federal courts is in controversy, a proper disposition of the case bears upon the quality of the work of those courts and of this Court in particular.

The Court makes a shift in the distribution of judicial power between State and federal courts which has prevailed for half a century. Such a break with the past is

not required by what Congress has written nor by any inference drawn from disclosed Congressional policies. On the contrary, I believe that the result reached is repelled by every consideration relevant to the proper construction of the statutory materials by which the jurisdiction of the federal courts is to be determined.

In 1867 Congress granted jurisdiction to the then lower federal courts over suits on claims owing to one whose estate was administered in bankruptcy, though the claims were based wholly on local law and were devoid of any federal aspect which would give a federal court jurisdiction were the creditor not in bankruptcy. This was another one of those enactments of the Reconstruction period when the influences toward expansion of federal jurisdiction were at flood-tide. As part of the recession from this Reconstruction tendency Congress, in the Bankruptcy Act of 1898, withdrew from the federal courts suits that rested solely on local law even though they involved claims asserted on behalf of one whose estate was being administered in the bankruptcy court. By a tenuous process of implication the Court now concludes that Congress, through the Chandler Act of 1938, enlarged federal jurisdiction in one aspect of the bankruptcy law, though neither the terms of the legislation, nor its context, nor its legislative history, nor considerations of policy heretofore suggested, call for such construction, while the history and structure of the legislation, its judicial interpretation, regard for congruity in finding meaning, and the larger claims of the federal judicial system, support a different reading of the statute. The large assumptions of the decision are that by indirection and without manifested design Congress reversed its prevailing policy of limiting federal jurisdiction and preserving a proper balance between federal and State courts; that Congress deviated from a principle of our federalism especially respected in recent times, according to which claims arising under State

law shall be tried under local trial procedure in the local courts; that Congress has departed from a settled policy of fifty years uniformly applicable in bankruptcy proceedings and which now continues as to all other proceedings in bankruptcy, although this established policy of leaving local claims to the State courts does not at all interfere with those aims for effective reorganization through use of the bankruptcy power which gave rise to Chapter X.

1. The facts in this case are not in dispute. The Central States Electric Corporation filed in the District Court for the Eastern District of Virginia a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. With the consent of the reorganization court, respondents, as trustees, brought this suit in the District Court for the Southern District of New York on behalf of the Corporation for an accounting and damages against its officers and directors for alleged fraud and mismanagement. The District Court found want of jurisdiction, but was reversed by the Circuit Court of Appeals for the Second Circuit. 159 F. 2d 67. This Court now affirms the Circuit Court of Appeals and holds that a Chapter X trustee may bring this plenary suit *in personam* in a federal district court not the reorganization court, although neither diversity of citizenship nor other ground of federal jurisdiction exists.

No doubt Congress could authorize such a suit. See *Schumacher* v. *Beeler,* 293 U. S. 367, 374. Nor is there any doubt that Congress has not conferred upon the district courts the power to entertain such a suit by an ordinary bankruptcy trustee. Section 23 of the Bankruptcy Act specifically limits plenary jurisdiction to a few enumerated cases (of which this is not one), or where defendant consents. The Court finds, however, that Congress, by making § 23 inapplicable to Chapter X proceedings, opened all the federal courts to plenary suits by a Chapter X trustee. To determine the significance of the inap-

plicability of § 23 to Chapter X proceedings it is necessary to consider the affiliations between the Bankruptcy Act of 1898 and the Chandler Act. That in turn makes it necessary to examine the Act of 1898 in relation to its predecessor, the Act of 1867. These three enactments—the Bankruptcy Act of 1867, the Bankruptcy Act of 1898, and the Bankruptcy Act of 1938—are an interrelated process of legislation. The role of § 23 cannot be properly assessed merely by a textual reading, or by ascertaining its presence or absence in these three Acts. It must be placed in the context of the history of the Act of 1867 and of the Act of 1898, and the relation of that history to the aims of the Chandler Act.

2. To understand the full import of the Act of 1867, so far as now relevant, it will bear repetition that it reflected the expansionist trend in federal jurisdiction after the Civil War. Statute after statute gave to the federal courts jurisdiction over cases which had previously been left entirely to State tribunals, and this Court gave a broad construction to such statutes. The Bankruptcy Act of 1867 gave to all district and circuit courts concurrent jurisdiction over suits "by the assignee in bankruptcy against any person claiming an adverse interest" in the estate. Section 2 of the Act of March 2, 1867, 14 Stat. 517, 518. This provision was construed in *Lathrop* v. *Drake,* 91 U. S. 516. Mr. Justice Bradley, with characteristic clarity, distinguished between "jurisdiction as a court of bankruptcy over the proceedings in bankruptcy . . . [and] jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." 91 U. S. at 517. But the terms of the Act were read to confer the latter jurisdiction on the lower federal courts. It is worth noting that Mr. Justice Bradley was a well-known exponent of expansive

federal jurisdiction. See, *e. g.,* his dissenting opinion in *Murdock* v. *Memphis,* 20 Wall. 590, 639.

3. The business which this broad construction of the Act of 1867 brought to the federal courts, together with that from other sources, led to the overburdening of their dockets, and inevitably of the dockets of this Court, and gave rise to the various movements for their relief. The history of the federal courts is to a considerable measure a history of the rise and fall of the scope of the jurisdiction given to them by Congress. Not to take account of these underlying factors in the construction of judiciary acts is to leave out the meaning in the interstices of the words of enactments. The Act of 1898 explicitly reveals the important shift in emphasis that had taken place within thirty years in the distribution between State and federal courts of the judicial power at the disposal of Congress. By 1898 the expansionist trend in federal jurisdiction had receded. The movement was toward a curtailment for an overburdened judiciary. The new Bankruptcy Act also showed the recession.

The Act of 1898 was not an amendment of the Act of 1867. The latter had been repealed by the Act of June 7, 1878, 20 Stat. 99, and for twenty years there was no federal bankruptcy Act. Accordingly, the 1898 Act is not to be read as a modification of an existing system. It established a scheme of bankruptcy administration where there was none. Its framers, of course, drew on history. They borrowed heavily from the Act of 1867. But a comparison of the jurisdictional sections of the 1898 Act with those of its predecessor reveals the great change in the attitude of Congress regarding the withdrawal of essentially local litigation from the State courts.

4. The shift in jurisdictional direction was duly respected when the Act of 1898 first came here for construction. Speaking for a unanimous Court, Mr. Justice Gray pointed out the marked structural differences be-

tween the Act of 1898 and that of 1867. The latter granted summary jurisdiction to the district court in § 1; plenary jurisdiction was conferred by § 2 on district and circuit courts concurrently of "suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant . . . ." The Act of 1898 took over § 1 of the Act of 1867, and discarded § 2. Section 2 of the Act of 1898, derived from § 1 of the 1867 Act, confers only summary jurisdiction. Plenary jurisdiction was not conferred by the Act of 1898 on either the district or circuit courts except to the very limited extent granted by § 23.

Such was the construction of the Act of 1898 made almost contemporaneously with its enactment. *Bardes* v. *Hawarden Bank,* 178 U. S. 524. This construction was reaffirmed thirty-four years later by a unanimous Court, speaking through Mr. Chief Justice Hughes. *Schumacher* v. *Beeler, supra.*

5. This recognition of the drastic difference between the two Acts was not drawn merely from the inert words of the statutes. The words expressed the great differences of outlook, to which reference has been made, in regard to the transfer to the federal courts of what is essentially State litigation. This Court found the accent of the Act of 1867 to be on enforcement through "national tribunals." The matter was put quite plainly by Mr. Justice Bradley. "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise." *Lathrop* v. *Drake, supra,* at 518.

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The outlook of the Act of 1898 as to proceedings not in bankruptcy "properly so called," *Bardes* v. *Hawarden Bank,* 178 U. S. 524, 533, was precisely the opposite. The emphasis was not on uniform enforcement through "national tribunals." Concern was with "the greater economy and convenience of litigants and witnesses" by leaving the determination of what intrinsically are merely local questions to the "local courts of the State." *Bardes* v. *Hawarden Bank, supra,* at 538. The Court again referred to this purpose of the 1898 Act when it gave full reconsideration to the legislation in *Schumacher* v. *Beeler, supra,* at 374. Emphasis was placed on the importance of ready accessibility to litigants afforded by local courts as against the inconvenience often entailed in bringing suitors to the federal courts, particularly in Western States. By reference to an earlier decision in which that consideration was treated as a controlling factor, the Court indicated a guiding principle in deciding questions of doubtful jurisdiction. See *Shoshone Mining Company* v. *Rutter,* 177 U. S. 505, 511, 513, cited in *Bardes* v. *Hawarden Bank,* at 538.

6. But we are now told that the *Bardes* and *Schumacher* cases misconstrued the Act of 1898 and its relation to that of 1867. The opinions of Mr. Justice Gray and Mr. Chief Justice Hughes were, according to this view, the products of misreading of judicial history and of a faulty analysis of the Act of 1898. Indeed, the foundation of the decision of the court below and of the argument at the bar of this Court is the claim that the construction placed upon the jurisdictional Act of 1898 by the *Bardes* and *Schumacher* cases was erroneous and to be rejected without compunction because, after all, merely the expression of erroneous *dicta.* Whether the discussion of the whole structure of an Act in order to find meaning for a particular part more immediately in litigation constitutes *dicta,* in the technical sense, is a nice exercise in legal

dialectics. The fact of the matter is that it was rationally relevant to the problem calling for adjudication in the *Bardes* cases to consider comprehensively the relation of the Act of 1898 to that of 1867. The view that was taken had the strength that comes not only from a unanimous Court but one contemporaneous with the legislation under scrutiny. And when the construction so placed upon an Act is reaffirmed thirty-four years later by a Court particularly strong in Justices who had had extensive experience in commercial law, it seems pretty late in the day to suggest that such weighty constructions by this Court are now to be found wrong.[1] The court below was driven to this drastic undertaking. For if § 2 of the Act of 1898 is the source solely of summary proceedings in bankruptcy, and jurisdiction for plenary suits, to a limited extent, was granted solely by § 23, the elimination of § 23 for purposes of Chapter X cannot serve to put into § 2 a plenary jurisdiction which was never there.

7. To reexamine the ground covered in the *Bardes* and *Schumacher* cases would, as it seems to me, be a work of supererogation. And so I will content myself with some observations pertinent to a proper view of the Act of 1898 as an entirety. The different features of an organic statute

[1] In view of his extensive commercial experience on matters of bankruptcy, any observation by Mr. Justice Brandeis carries great weight. But neither in *Kelley* v. *Gill,* 245 U. S. 116, nor elsewhere, did he state that § 2 of the Bankruptcy Act was a grant of plenary jurisdiction to all the courts and that § 23 merely operated as a curtailment of such grant. What is significant is that when, in *Schumacher* v. *Beeler, supra,* upon a full dress consideration of the problem, a contrary analysis was made, Mr. Justice Brandeis joined in it.

In another bankruptcy case, this Court said: "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance." *Maynard* v. *Elliott,* 283 U. S. 273, 277.

are not discrete parts. They cast light upon each other and illumine the whole. The Act of 1898 was read as it was by this Court because it established a comprehensive bankruptcy scheme. Sections 2 and 23 were read in combination, for they drew a sharp line between "proceedings in bankruptcy" and plenary "suits at law or in equity." For fifty years it has been the policy of Congress that a bankruptcy trustee bringing an action like that before us should sue in a State court. (This, of course, includes a federal court sitting in the State where there is diversity of citizenship. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Guaranty Trust Company* v. *York,* 326 U. S. 99.) Howsoever any section of the Act of 1898 might have been read had it existed by itself, on a view of the Act as an entirety it was settled that summary proceedings may be brought in any federal court, whereas plenary suits at law and in equity, distinguished as such from proceedings in bankruptcy, can be brought only where they could have been brought between the bankrupt and the opposing party had there been no bankruptcy. Section 2 had an intrinsically limited scope in its setting with § 23. The scope continues so limited and does not automatically expand because § 23 is *pro tanto* eliminated.

This jurisdictional differentiation was not a matter of Congressional whim or judicial technicality. It was easy for this Court to discern that the object of Congress "may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses." *Bardes* v. *Hawarden Bank, supra,* at 538; *Schumacher* v. *Beeler, supra,* at 374. Congress saw good reason for not infringing on the ordinary jurisdiction of State courts where a suit is not really part of the bankruptcy proceedings. It chose to leave such litigation to the appropriate local practice and local rules

concerning jury trial in the local court, and at the same time to relieve thereby an overworked federal judiciary.

8. These important considerations touching the interplay of State and federal courts as well as the effective administration of justice in the federal courts have not lost force with time. Congress has continued to recognize their validity. As to bankruptcy trustees generally, the Act of 1938 continues to require that local suits like the present be brought in local courts. And in preparing for the Judiciary Committee of the House of Representatives an analysis of a predecessor bill introduced by Mr. Chandler, the National Bankruptcy Conference indicated that the considerations relevant to a proper distribution of business as between State and federal courts which underlay the restrictive policy of the Act of 1898 were more than ever applicable:

> "In *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, Mr. Justice Brandeis declared obiter that Congress had power to confer on a bankruptcy court jurisdiction to adjudicate the rights of trustees to property not in possession of the bankruptcy court, either actually or constructively, but adversely held by a third person; but that Congress had not as yet exercised that power, or conferred such jurisdiction under any of the provisions of the Bankruptcy Act.
>
> "The proceedings of Congress prior to the enactment of the Bankruptcy Law of 1898 show that the exercise of that power was deliberately withheld, because of the fear of flooding the federal courts with a large volume of new litigation. That motive is even stronger today [1936] than it was in 1898, and for that reason we do not consider it wise to enlarge the jurisdiction at this time; except as indicated to include receivers and so-called 'debtor proceedings.' " (Analysis of H. R. 12889, 74th Cong., 2d Sess., Committee Print p. 134.)

The indicated exceptions do not touch the jurisdiction here asserted. Yet the Court now concludes that as to Chapter X trustees Congress implied an exception so as to allow the trustee to sue in any federal district court in the country. If this be so, I see no escape from the conclusion that not only have the federal courts jurisdiction but the State courts no longer have it. Consideration of so destructive a consequence ought not to be postponed as though it were not immediately relevant to the proper construction of the legislation before us. If such suits are "bankruptcy proceedings"[2] within the jurisdictional grant of § 2—for it is necessary to find in some language an explicit grant of jurisdiction, and only § 2 is invoked—how can the bankruptcy aspect of the proceeding evaporate when it comes to "matters and proceedings in bankruptcy" as to which "The jurisdiction vested in the courts of the United States . . . shall be exclusive of the courts of the several States"? Rev. Stat. § 711, Judicial Code, § 256, 28 U. S. C. § 371. No support can be found for this shifting attribution of meaning to the same concept in the history of proceedings under the Act of 1867. To be sure, it was held under that Act that the State courts were not deprived of jurisdiction of such plenary suits. But that was so for the conclusive reason that the provision making federal jurisdiction exclusive in bankruptcy proceedings came into the law much later than the Act of 1867. Federal exclusiveness as to bankruptcy proceedings formally so-called was brought in by § 711 of the Revised Statutes of 1874. During the few years within which the Bankruptcy Act of 1867 coexisted with the requirement of exclusiveness of jurisdiction in the federal courts, the occasion did not arise for applying the provision excluding the State courts. But this Court was well aware of the problem and carefully put

[2] The Act of 1938 substituted "proceedings under this Act."

it to one side. See *Claflin* v. *Houseman,* 93 U. S. 130, 133, and *Wilson* v. *Goodrich,* 154 U. S. 640. Intrinsically, that question now presses for decision. If plenary suits are "bankruptcy proceedings" within § 2 of the Act of 1898, as the Court holds, how do they cease to be "proceedings in bankruptcy" as to which the federal courts have jurisdiction "exclusive" of the jurisdiction of the several States? [3] Only a forced disharmony can avoid the grievous consequences of a construction equally forced as to the relations between §§ 2 and 23 of the Act of 1898.

9. The Court finds a reversal in the policy of contraction of federal jurisdiction which began with the end of the Reconstruction era, found expression in cases culminating in *Gully* v. *First National Bank,* 299 U. S. 109, and undoubtedly furnished the momentum for the radical reversal of historic policy initiated by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. The Court extends the jurisdiction of the federal courts and, I cannot escape concluding, withdraws it from the State courts. It resolves whatever ambiguity may be found in § 102 of Chapter X by interpolating an exception which effects a break with the past and creates difficulties for the future. One would naturally expect that such an innovation in a matter of vital concern to the scope of federal jurisdiction, with its resulting effect upon the relations between the State and federal courts, would be explicitly stated and not depend for discovery upon intricate exegesis. One would suppose that some indication at least of Congressional awareness of the problem could be found. Diligence of counsel has not unearthed the remotest hint that such shift in jurisdiction was contemplated or that the need for it was asserted. Our own investigation has been equally fruitless. There is nothing in Chapter X, in its terms,

[3] Note that with regard to the exceptions to § 23 Congress deemed it necessary to confer jurisdiction on the State courts explicitly. See §§ 60 (b), 67 (e), and 70 (e) (3).

its antecedents, its history, its advocacy, that gives the remotest hint of a purpose calling for a different policy for reorganization trustees in this respect from other trustees in bankruptcy, or any intimation that the district courts, other than the particular reorganization court, would play a special role as to plenary suits in reorganization proceedings. Nor do the purposes of the Chandler Act bear upon this aspect of jurisdiction. Chapter X provided new facilities for reorganization of bankrupt estates and extended the scope of reorganizations. But it is hardly relevant to the purpose of easier and more comprehensive methods of reorganization to establish a claim through the federal courts rather than the State courts when the basis of recovery is State law, calling for application of State law and procedure. The Court draws support for its conclusion from the fact that other powers are conferred upon the Chapter X trustee which were not possessed by other bankruptcy trustees. But the powers to which attention is called are all explicitly conferred and are not derived by roundabout inference. And unlike the extension of jurisdiction here claimed, the additional powers conferred on the trustee all bear directly upon the very process of reorganization and the purposes for which Chapter X was designed.

The result has been spun largely out of words in the Act of 1898 by disregarding the controlling facts of its history and its long judicial and practical construction. The other source from which the argument is spun is the provision making § 23 inapplicable to proceedings under Chapter X. As we have seen, our decisions ruled that § 23 was not an exception to § 2 but an emphasis of the limited scope of § 2, together with a grant, of little importance, of consent jurisdiction.[4] If § 2 did not grant

[4] If the provisions rendering § 23 inapplicable to Chapter X proceedings also withdrew jurisdiction by consent, it is not an important

jurisdiction to the district courts over a plenary suit like the one before us, merely eliminating § 23 could add no new head of jurisdiction to § 2. And yet the Court finds that the purpose of making § 23 inapplicable to Chapter X was to throw all the federal courts open to plenary suits in Chapter X proceedings, although, as we have seen, not a clear expression either of such purpose, or an assessment of its consequences, is to be found in all the literature on this subject prior to this litigation. If a perfectly reasonable explanation can be given to the elimination of § 23 from Chapter X proceedings, we ought not lightly to attribute to Congress a radical change affecting the jurisdiction of the federal courts, without even an indirect mention of the need or desirability for such a change in the thousands of pages of legislative hearings, debates, and reports on the various bills leading up to the Chandler Act.

10. There is an adequate explanation for the provision making § 23 inapplicable that amply accounts for it, without using it as a springboard for a wholly unforeseen result out of harmony with established jurisdictional considerations.

The provision to make § 23 inapplicable did not appear in the earlier drafts of Chapter X and was not in the bill as it came from the House. It came into the Act through amendments proposed before the Judiciary Committee of the Senate by the National Bankruptcy Conference through its spokesman, Mr. John Gerdes. His statement is all we have by way of legislative history for

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matter. In resolving what is at best a jurisdictional ambiguity a result which closes the doors of the federal courts to consenting parties is of minor consequence compared with opening wide the door to a jurisdiction theretofore barred to the federal courts, when Congress manifested no consciousness of such a new grant of jurisdiction.

the amendment.[5] It will be noted that Mr. Gerdes intimated nothing regarding the need for extending federal jurisdiction, nothing of the desirability of grant-

[5] See hearings before a subcommittee of the Senate Committee on the Judiciary, on H. R. 8046, 75th Cong., 2d Sess., p. 77:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

Another amendment, proposed to the Committee by Mr. Heuston, representing the Special Committee on Bankruptcy of the Association of the Bar of the City of New York, would have made inapplicable to Chapter X some thirty sections of the Act, among them § 23. "The proposed amendment excludes from a reorganization procedure all sections now expressly excluded by section 77B, subdivision (k), as well as many additional sections which have no applicability to a reorganization procedure." The statement makes no reference to plenary suits. "The sections excluded by the proposed amendment, include

ing plenary jurisdiction to all federal courts, nothing to the effect that a Chapter X trustee needed such greater freedom, nothing to indicate that the plan of that Chapter required a different rule as to ordinary plenary suits from that which was reaffirmed as to suits by other bankruptcy trustees. Yet the court below seemed to find in his statement warrant for its result. And it sought to reenforce its conclusion by appeal to an article by Mr. Gerdes elucidating the Chandler Act after its passage. Gerdes, Corporate Reorganizations: Changes Effected by Chapter X of the Reorganization Act, 52 Harv. L. Rev. 1, 21.

The Circuit Court of Appeals, it seems to me, finds in Mr. Gerdes' observations what he did not put into them. Nowhere is there the remotest suggestion that in this roundabout and undisclosed way he sought to throw all litigation by or against a reorganization trustee into federal courts, other than the reorganization court, because the federal courts might be a more convenient forum. He was concerned with various provisions, of which § 23 was one, which either were intrinsically in conflict with the new provisions of Chapter X or might be deemed to be in conflict with them. He used the terms "inconsistent" and "not applicable" interchangeably. He was concerned with removing all limitations in the existing Bankruptcy Act that were inconsistent with provisions in Chapter X, limitations which might impair the new scheme for bankruptcy reorganization. While Mr. Gerdes was not explicit as to possible inconsistency between § 23 and Chapter X, a controversy which had arisen in regard to § 23 prior to

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those which would permit ancillary receiverships, the appointment of receivers before the approval of the petition . . . the bankruptcy provisions relating to priorities, etc." Hearings on H. R. 8046, before a subcommittee of the Senate Judiciary Committee, 75th Cong., 2d Sess., p. 37.

the Chandler Act, and with which he was thoroughly familiar, fully explains why Mr. Gerdes deemed it desirable that § 23 be made inapplicable to Chapter X.

The matter in controversy was this. Section 77B (a) granted the reorganization court the power possessed by an equity court with regard to equity receiverships. The question arose whether a 77B trustee could bring a plenary suit in the reorganization court without regard to diversity citizenship, as could an equity receiver in his home court. *White* v. *Ewing,* 159 U. S. 36. That the reorganization court had such jurisdiction and that § 23 was no bar, was Mr. Gerdes' view. But other bankruptcy specialists and some lower federal courts were of opinion that § 23 precluded such suits. Compare 2 Gerdes, Corporate Reorganizations, 1478, with Finletter, Principles of Corporate Reorganization, 186–87; and see *In re Standard Gas & Electric Co.,* 119 F. 2d 658; *Tilton* v. *Model Taxi Corp.,* 112 F. 2d 86; *In re Prima Co.,* 98 F. 2d 952.

To remove doubt as to this effect of § 23, namely its possible limitation upon the power of the reorganization trustee to sue in his home court, is the full purpose and scope of its elimination from Chapter X. It was not to give the reorganization trustee roving authority for plenary suits in all federal courts that § 23 was made inapplicable. It was a desire to remove the danger that § 23 might be deemed to deprive a reorganization trustee of the power which he ought to have in his reorganization court, that was implicit in the short statement of Mr. Gerdes on behalf of the National Bankruptcy Conference. It is this purpose that prevailed and it is this purpose that should be enforced, and not a radical departure upsetting the distribution of jurisdiction between State and federal courts, for which there is not a vestige of a claim by anybody in the history that led up to the legislation. The article of Mr. Gerdes to which the court below refers seems to leave no doubt as to the limited purpose of making

§ 23 inapplicable. "The bankruptcy provision restricting plenary jurisdiction," he wrote, "has been expressly excluded from application so that the equity receivership jurisdiction over plenary actions which are ancillary to the main proceedings is still available, even though the controversy involves less than $3,000 and even though there is no diversity of citizenship." 52 Harv. L. Rev. 1, 21.[6] Section 23 was eliminated, then, to make clear that when in § 115 of the Act of 1938 Congress gave to the reorganization court equity powers like those which had been conferred in § 77B (a), it authorized the trustee-receiver to bring plenary suits in his home court. Such also is the view of another important witness in the hearings on the Chandler Bill, see Weinstein, The Bankruptcy Law of 1938, pp. 63–64, 193–94. Compare the analysis of the Chandler Act in 11 U. S. C. A. xxx.

This construction gives scope to the provision making § 23 inapplicable in Chapter X proceedings. It is consistent with the policy of the whole Bankruptcy Act, and gives effect to the grant of equity powers to the reorganization court. On the other hand, nothing in the policy of the Chandler Act, in its language, in its history, or in any other factor relevant to its construction, justifies a

[6] The discussion in bankruptcy literature of the effect of the provision eliminating § 23 is not only meager but ambiguous. Conflicting arguments can be drawn by giving variant meanings to language susceptible of them, but this only serves to indicate that on such tenuous materials ought not to be based a reversal of jurisdictional policy of far-reaching import.

It is worthy of note that Mr. Gerdes in his article cites as the effect of the elimination of § 23 only the clarification of the jurisdiction of the reorganization court itself over plenary suits. He does not note any expansion of the jurisdiction of the other district courts although, under § 77B, when § 23 was not made expressly inapplicable, it had been his view that other district courts would have plenary jurisdiction as ancillary to the receivership jurisdiction of the reorganization court. See 2 Gerdes, Corporate Reorganization, 1480, 1513–14.

finding that Congress, by implication and indirection, without comment or discussion, changed the meaning which this Court had given to its legislation for fifty years, and expanded a federal jurisdiction which is already overburdened and which Congress has tended to contract; that it upset the relation between federal and State courts which demands that, even in bankruptcy, claims created by State law be litigated in local courts, applying local law under local rules of procedure and trial practice, "to the greater economy and convenience of litigants and witnesses."

11. This decision overturns the analysis which has guided the Court in construing the distribution of jurisdiction between the federal and State courts which Congress devised by the Bankruptcy Act of 1898, and attributes to the Act of 1938 a big change in this distribution, although there is not a glimmer of a hint in its entire legislative history that Congress was aware that it was doing so. Important shifts in jurisdiction ought to be the product of something more persuasive than what is made to appear as a fit of Congressional absent-mindedness. It ought not to be deemed natural that Congress took from the State courts long-established jurisdiction and transferred it to the federal courts, when there is nothing to indicate that Congress wanted to do so or knew that it was doing it.

When Congress has not, by plain language, extended the jurisdiction of the district courts which are the feeders of the Circuit Courts of Appeals and of this Court, an unexpressed purpose to swell the dockets of the federal judiciary ought not to be attributed to Congress by considering in isolation the desirability of allowing a particular class of litigation to be brought in a federal court. Any advantage of giving jurisdiction to the federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in State law.

And in considering the advantages of absorption by the federal courts of jurisdiction theretofore vested in the State courts, it should be our special concern to be mindful that the district courts are part of a single judicial system. Increase in the scope of the business of the district courts inevitably reflects itself in the business of the Circuit Courts of Appeals and of this Court. It is a truism, but vital to keep in mind, that increase in the quantity of the Court's business affects the quality of its work.[7]

Where Congress has clearly enlarged the jurisdiction of the district courts, it cannot be withheld no matter what the effect upon the dockets. But where Congress has not manifested its purpose with clarity—more particularly, where such purpose is derived by way of elaborate argu-

[7] If the Court works under too much pressure, because of the excessive volume of its business, the process of study and reflection indispensable for wise judgment is bound to suffer. Before he became its head, but speaking from close acquaintance with the work of the Court, Chief Justice Taft gave warning that if this Court's business "is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have . . . ." Taft, *Attacks on the Courts and Legal Procedure* (1916) 5 Ky. L. J. No. 2, p. 18. As is well known, it was largely through the leadership of Chief Justice Taft that the Judiciary Act of February 13, 1925, 43 Stat. 936, was passed to enable the Court to keep its business within manageable limits by cutting off the flow of litigation at its various sources. The total number of petitions for certiorari is the most significant index of the Court's business. In the 1927 Term, the first Term during which the influence of the Act of 1925 was fully operative, the total number of such petitions was 587. In the 1946 Term, through June 9, 1947, 1,144 such petitions were considered. Since most of the petitions come from the lower federal courts, any enlargement of their jurisdiction is inevitably reflected in attempts to review those courts here. If it be suggested that the volume of business that will flow from the new head of jurisdiction established by this decision is in itself not likely to be very heavy, it is pertinent to say that it is true of the Court's business also that many a mickle makes a muckle.

mentation—resolution of jurisdictional doubts properly takes into account the strong policy of Congress, expressed through a series of judiciary acts, not to cast burdens upon the federal courts which interfere with the effective discharge of their functions. See, for instance, *American Security & Trust Co.* v. *District of Columbia,* 224 U. S. 491, and *Phillips* v. *United States,* 312 U. S. 246, 250–51. These are considerations that will seem far afield to the issues of this case only if its decision is not related to the workings of the federal judiciary in the light of its history.

INTERSTATE NATURAL GAS CO., INC. *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 733. Argued May 2, 1947.—Decided June 16, 1947.

A natural gas company subject to the Natural Gas Act of 1938, 52 Stat. 821, produces some gas and purchases some gas, which it mingles and conducts through a system of field, branch and main lines (all within a single state) into its main trunk line, whence it is sold to interstate pipeline companies for transportation, resale and ultimate consumption in other states. The entire movement from the wells to the purchasing companies, through their compression pumps and across the state lines is a continuous process without interruption for storage, processing or any other purpose. *Held:* The Federal Power Commission has jurisdiction under § 1 (b) of the Natural Gas Act to regulate such sales. Pp. 686–693.

(a) Such sales are "in interstate commerce" within the meaning of § 1 (b) of the Natural Gas Act. Pp. 687–689.

(b) They are not within the clause of § 1 (b) which excepts "the production or gathering" of natural gas from the Commission's regulatory jurisdiction. Pp. 689–693.

156 F. 2d 949, affirmed.

The Federal Power Commission issued an order under § 5 (a) of the Natural Gas Act of 1938, 52 Stat. 821, requiring petitioner to effect substantial rate reductions in certain of its sales of natural gas and to file new schedules of rates and charges. 3 F. P. C. 416. The Circuit Court of Appeals denied a review. 156 F. 2d 949. This Court granted certiorari limited to the question of the Commission's jurisdiction. 330 U. S. 852. *Affirmed*, p. 693.

William A. Dougherty argued the cause for petitioner. With him on the brief were *Henry P. Dart, Jr.* and *James Lawrence White.*

By special leave of Court, *James D. Smullen,* Assistant Attorney General, argued the cause for the State of Texas et al., as *amici curiae,* urging reversal. With him on the brief was *Price Daniel,* Attorney General.

Charles E. McGee argued the cause for the Federal Power Commission, respondent. With him on the brief were *Acting Solicitor General Washington* and *Louis W. McKernan.*

Briefs of *amici curiae* were filed in support of petitioners by *Mac Q. Williamson,* Attorney General, for the State of Oklahoma; and *Donald C. McCreery, Wesley E. Disney, Charles I. Francis, Russell B. Brown, L. Dan Jones, Forrest M. Darrough, Hiram M. Dow, Walace Hawkins, Harold L. Kennedy, L. G. Owen* and *William Henry Rector* for the Independent Natural Gas Association of America et al.

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

This case originated in proceedings before the Federal Power Commission initiated pursuant to § 5 (a) of the

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Natural Gas Act of 1938.[1] After overruling objections to its jurisdiction, the Commission entered an order requiring the petitioner to effect substantial rate reductions in certain of its sales of natural gas and to file new schedules of rates and charges.[2] Petitioner, in seeking review of the order in the Circuit Court of Appeals, denied the jurisdiction of the Commission to set rates for the sales in issue in this case and asserted that the rates so established were confiscatory. That Court, one judge dissenting, denied the petition for review.[3] We granted certiorari limited to the question of the Commission's jurisdiction.

Petitioner owns and operates 110 natural gas wells and owns or controls over 56,000 acres in the Monroe field of northern Louisiana. Petitioner's main pipe line transports gas southward from the Monroe field through a part of Mississippi and back into Louisiana, where at Baton Rouge sales are made to various distributing companies and industrial consumers. Petitioner concedes that with respect to these operations it is a natural gas company within the meaning of § 2 (6)[4] of the Act and that the Commission has jurisdiction to regulate the rates of sales connected therewith.

The issue of this case involves the jurisdiction of the Federal Power Commission to regulate sales made in the field by petitioner to three pipe-line companies, each of which transports the gas so purchased to markets in States other than Louisiana.[5] Gas produced from petitioner's

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[1] 52 Stat. 821, 15 U. S. C. § 717 *et seq.*; 56 Stat. 83.

[2] 3 F. P. C. 416.

[3] 156 F. 2d 949 (1946).

[4] Section 2 (6) provides: "'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[5] The three companies include the Mississippi River Fuel Corporation, Southern Natural Gas Company, and the United Gas Pipe Line Company to which gas is sold for the account of the Memphis Natural Gas Company.

wells flows into petitioner's system of field pipe lines, moving first into branch lines, then into trunk lines, and finally into the main trunk lines from which delivery is made to the three purchasing companies. During the course of this movement petitioner purchases gas from other producers in the field which gas is introduced into petitioner's system at designated points and is there commingled with the gas moving from petitioner's own wells. By far the larger part of the gas so purchased by petitioner has been gathered from various wells of the selling companies before delivery to petitioner is made.[6] The gas moves through petitioner's system at well pressure. Shortly after the sales in question are completed, the gas is directed through the compressor stations of the purchasing companies and is there subjected to increased pressure in order that it may be moved to markets as far distant as Illinois. The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and across the state lines is a continuous process without interruption for storage, processing or for any other purpose.[7] All the gas sold in these transactions is destined for ultimate public consumption in States other than Louisiana.

It appears that petitioner supplies only a part of the gas purchased by the three pipe-line companies in the Monroe

[6] Petitioner produced and purchased a total of 51,659,799 Mcf of gas in the Monroe field during 1941. Of this total, petitioner produced from its own wells 28,819,814 Mcf. Of the 22,839,985 Mcf purchased, 95% was gathered by the producers before delivery to petitioner; the remaining 5% was purchased by petitioner directly at the well heads. Petitioner sold 21,863,278 Mcf to the three purchasing companies in the transactions in question.

[7] Gas in the Monroe field is "dry" gas and consequently is not subjected to any extraction processing. Before moving into the compressor pumps the gas is run through a series of "scrubbers" which remove dirt and foreign particles. This is accomplished, however, without interruption in the movement.

field.[8] Counsel for petitioner conceded before the Commission that the prices charged the three pipe-line companies were, by agreement, identical with those being charged by other producers in the field. The Commission found that petitioner was an affiliate of one of the three purchasing companies. It was the conclusion of the Commission that the rates charged by petitioner in these sales were "unjust, unreasonable and unlawful" and ordered rate reductions amounting to $596,320 per year as applied to the volume of gas sold in the test year of 1941.

Petitioner has at no time contended that regulation of its sales to the three purchasing companies is beyond the constitutional powers of Congress. Petitioner has vigorously asserted, however, that Congress did not exercise its full powers in the Natural Gas Act and that in § 1 (b) of the Act the jurisdiction of the Federal Power Commission is so limited as to preclude valid regulation of the sales by that agency. Section 1 (b) provides:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

It is not denied that the transactions in question were sales of natural gas for resale for ultimate public consumption.

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[8] The transactions in question supply the Mississippi Fuel Corp. with 22% of its requirements, 24% of the requirements of the Memphis Natural Gas Co., and 16.61% of the requirements of Southern Natural Gas Co.

Petitioner has raised two issues: First, it is contended, the sales are not "in interstate commerce." Second, the sales are a part of "production or gathering" and hence not within the Commission's power of regulation.

We have no doubt that the sales are in interstate commerce. Indeed, petitioner did not contest that position before the Commission, but, so far as the record reveals, raised the issue for the first time in its petition for rehearing in the Circuit Court of Appeals.[9] The Federal Power Commission found that the gas sold to the three pipe-line companies moves ". . . in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor station of the respective purchaser, and thence through said compressor stations into the pipe line of said respective purchaser and thus into and through states other than Louisiana . . . , all without interruption, and said gas is so destined from the moment of its production." The Commission further found that "The gas transported and sold by Interstate to these three pipe line companies continues its flow in interstate commerce and, as an established course of business well known to Interstate, is destined for resale for ultimate public consumption in . . . markets outside Louisiana."

Under the circumstances described by the Commission, it is clear that the sales in question were quite as much in interstate commerce as they would have been had the

[9] In its complaint filed in the District Court for the Eastern District of Louisiana invoking the equity powers of the Court to restrain the Louisiana Public Service Commission from conducting an investigation into petitioner's rates and charges, petitioner specifically asserted that the sales in question are in interstate commerce and thus beyond the jurisdiction of the state commission. The District Court granted the requested relief. *Interstate Natural Gas Co.* v. *Public Service Commission,* 33 F. Supp. 50; 34 F. Supp. 980 (1940).

pipes of the petitioner crossed the state line before reaching the points of sale.[10] Thus in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), a sale of electrical energy at the state line was held to be in interstate commerce. Commenting on that case, this Court in *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U. S. 61, 69 (1943) stated: "We see no distinction between a sale at or before reaching the state line." There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase "in interstate commerce" than that which theretofore had been given to it in the opinions of this Court.[11] Section 2 (7) of the Act defines "interstate commerce" as ". . . commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, ..." Clearly the sales in question were a part of commerce being carried on between points in Louisiana and points in other States. There is nothing in that language to suggest that Congress intended that sales consummated before the gas crosses a state line should not be regarded as being "in" such commerce.

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[10] *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189 (1925); *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1922); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921). And see *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 503–504 (1942); *Currin* v. *Wallace*, 306 U. S. 1, 10 (1939); *Peoples Natural Gas Co.* v. *Public Service Comm'n*, 270 U. S. 550, 554 (1926); *Illinois Central R. Co.* v. *Railroad Comm'n*, 236 U. S. 157, 163 (1915). Cf. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346 (1939).

[11] *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508 (1942); *Peoples Natural Gas Co.* v. *Federal Power Comm'n*, 75 U. S. App. D. C. 235, 127 F. 2d 153 (1942). Cf. *Jersey Central Power & Light Co.* v. *Federal Power Comm'n*, 319 U. S. 61, 70–71 (1943).

Nor are we impressed with the suggestion that the interstate movement of the gas should be regarded as beginning when the gas, theretofore moving through petitioner's pipe line system at well pressure, is subjected to increased pressure in the compressor stations of the purchasing companies in order that the gas may be moved to the distant markets. Long before the gas reaches the compressor pumps it has been committed to its interstate journey which follows without interruption or deviation. Under such circumstances, the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin.[12]

The Company contends, however, that regardless of whether the sales in question are in interstate commerce, those transactions fall within the clause of § 1 (b) specifically excepting from the Commission's jurisdiction regulation of ". . . the production or gathering of natural gas." In evaluating that contention we should not lose sight of the objectives sought to be accomplished by Congress in passing the Natural Gas Act.

In a series of decisions announced prior to the passage of the Act, this Court had held that, although Congress had not acted, the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States.[13] Petitioner, relying in part upon the principles established by those cases, has successfully avoided regulation by the Louisiana

[12] Cf. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co., supra* at 504–505; *State Tax Comm'n* v. *Interstate Natural Gas Co.*, 284 U. S. 41, 44 (1931).

[13] *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298 (1924); *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927); *State Corp. Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561 (1934).

Public Service Commission.[14] As was stated in the House Committee report, the "basic purpose" of Congress in passing the Natural Gas Act was "to occupy this field in which the Supreme Court has held that the States may not act." [15] In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: "The bill takes no authority from State commissions, and is so drawn as to complement and in no manner usurp State regulatory authority . . . ." [16] Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern.[17] It was the intention of Congress to give the States full freedom in these matters. Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.[18] But such conflict must be clearly shown. Ex-

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[14] See note 9, *supra*.

[15] H. R. Rep. No. 709, 75th Cong., 1st Sess., 2.

[16] *Ibid.*

[17] *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 602–603 (1945).

[18] The Federal Power Commission has not asserted jurisdiction over all sales taking place in the natural gas fields even though in

ceptions to the primary grant of jurisdiction in the section are to be strictly construed. It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected.[19]

There is nothing in the record to indicate that the regulation in question is in any way inconsistent with the exercise by Louisiana of the powers over production and gathering of natural gas reserved to it by Congress in § 1 (b) of the Act. The State in a series of enactments has made elaborate provision for the conservation of its natural gas resources and has established various rules and regulations relating to the production and gathering process.[20] Most of those provisions, presumably, are applicable to petitioner's field operations.[21] The record is devoid of any suggestion that Louisiana has ever opposed the jurisdiction of the Federal Power Commission in this case or has ever urged that federal regulation of the sales in question would interfere with the exercise by the State of its regulatory functions.[22] We do not suggest that the

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interstate commerce for resale for ultimate public consumption. *In the Matter of Columbian Fuel Corp.*, 2 F. P. C. 200; *In the Matter of Billings Co.*, 2 F. P. C. 288. We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases.

[19] Cf. *Colorado Interstate Gas Co.* v. *Federal Power Comm'n, supra* at 603; *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 607–612 (1944).

[20] La. Gen. Stat. §§ 4766–4826.2.

[21] The record contains testimony by counsel for petitioner to the effect that these provisions apply to petitioner and that petitioner's operations have conformed with their requirements.

[22] Counsel for the Louisiana Public Service Commission and for two Louisiana municipalities participated in the proceedings before the Federal Power Commission.

jurisdiction of the Commission in any case is to be determined by the resistance or lack of resistance on the part of the State to federal regulation. But in evaluating the Company's contention that the State's powers have been invaded, we regard it a matter of some significance that although the State has freely exercised its regulatory powers over the production and gathering of natural gas, there is no evidence of any conflict, present or threatened, in the performing of those functions by the State with the exercise of the jurisdiction of the Federal Power Commission in this case.

It is not contended that the Commission is precluded from regulating the sales in question by reason of the exception from the Commission's jurisdiction relating to the production of natural gas. Petitioner asserts, however, that the sales to the three pipe-line companies are a part of the gathering process and consequently not within the Commission's power of regulation. This basic contention has given rise to a great many subsidiary questions such as whether the sales were made from petitioner's "gathering" lines or from petitioner's "transmission" lines and whether the gathering process continued to the points of sale or was, as the Commission found, completed at some point prior to surrender of custody and passage of title. We have found it unnecessary to resolve those issues. The gas moved by petitioner to the points of sale consisted of gas produced from petitioner's wells commingled with that produced and gathered by other companies and introduced into petitioner's pipe-line system during the course of the movement. By the time the sales are consummated, nothing further in the gathering process remains to be done. We have held that these sales are in interstate commerce. It cannot be doubted that their regulation is predominately a matter of national, as contrasted to local concern. All the gas sold in these transactions is destined

for consumption in States other than Louisiana. Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer.[23] It was to avoid such situations that the Natural Gas Act was passed.

For reasons stated above, we have concluded that the Federal Power Commission in this case has not exceeded the jurisdiction conferred upon it by Congress in § 1 (b) of the Natural Gas Act.

Affirmed.

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[23] A number of cases in this Court have held that the reasonableness of cost items such as that incurred by a purchasing pipe-line company in acquiring gas for transportation may be inquired into during the course of subsequent regulation when buyer and seller are affiliated corporations and there is evidence that the sales were not made at arm's length. The Commission found affiliation to exist between petitioner and only one of the three purchasing companies, the Mississippi River Fuel Corporation. There was a finding of "close contractual and operating arrangements" between petitioner and another of the purchasing companies. *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300 (1937); *Columbus Gas & Fuel Co.* v. *Public Utilities Comm'n*, 292 U. S. 398 (1934); *Dayton Power & Light Co.* v. *Public Utilities Comm'n*, 292 U. S. 290 (1934); *Western Distributing Co.* v. *Public Service Comm'n*, 285 U. S. 119 (1932); *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133 (1930); *United Fuel Gas Co.* v. *Railroad Comm'n*, 278 U. S. 300 (1929).

McWILLIAMS *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 945. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.*

Argued May 8, 1947.—Decided June 16, 1947.

1. In order to establish tax losses, a husband who managed the separate estate of his wife, as well as his own, ordered his broker to sell certain stock for the account of one of the two and to buy the same number of shares of the same stock for the other, at as nearly the same price as possible. The sales were made to, and the purchases from, unknown strangers through a stock exchange, and the buying spouse received stock certificates different from those which the other had sold. *Held:* Deductions in their separate income tax returns for losses on such sales are forbidden by § 24 (b) of the Internal Revenue Code, as losses from "sales or exchanges of property, directly or indirectly . . . Between members of a family." Pp. 695–703.
2. The purpose of § 24 (b) was to put an end to the right of taxpayers to choose, by intra-family transfers and other designated devices, their own time for realizing tax losses on investments which, for most practical purposes, are continued uninterrupted—regardless of the manner in which the transfers are accomplished. Pp. 700–701.
3. The words "directly or indirectly" in § 24 (b) preclude a construction which would limit the prohibition to direct intra-family transfers or to those in which the units of fungible property sold by one spouse and those bought by the other are identical. Pp. 702–703.

158 F. 2d 637, affirmed.

The Tax Court expunged deficiency assessments for losses realized from indirect intra-family transfers of stocks. 5 T. C. 623. The Circuit Court of Appeals reversed. 158 F. 2d 637. This Court granted certiorari. 330 U. S. 814. *Affirmed,* p. 703.

John A. Hadden argued the cause for petitioners. With him on the brief was *John S. Beard, Jr.*

*Together with No. 946, *Estate of McWilliams et al.* v. *Commissioner of Internal Revenue,* and No. 947, *McWilliams* v. *Commissioner of Internal Revenue,* also on certiorari to the same Court.

Arnold Raum argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Morton K. Rothschild.*

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

The facts of these cases are not in dispute. John P. McWilliams, petitioner in No. 945, had for a number of years managed the large independent estate of his wife, petitioner in No. 947, as well as his own. On several occasions in 1940 and 1941 he ordered his broker to sell certain stock for the account of one of the two and to buy the same number of shares of the same stock for the other, at as nearly the same price as possible. He told the broker that his purpose was to establish tax losses. On each occasion the sale and purchase were promptly negotiated through the Stock Exchange, and the identity of the persons buying from the selling spouse and of the persons selling to the buying spouse was never known. Invariably, however, the buying spouse received stock certificates different from those which the other had sold. Petitioners filed separate income tax returns for these years, and claimed the losses which he or she sustained on the sales as deductions from gross income.

The Commissioner disallowed these deductions on the authority of § 24 (b) of the Internal Revenue Code,[1]

[1] The material parts of § 24 (b) are as follows:

"(b) LOSSES FROM SALES OR EXCHANGES OF PROPERTY.—

"(1) LOSSES DISALLOWED.—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—

"(A) Between members of a family, as defined in paragraph (2) (D);

"(B) Except in the case of distributions in liquidation, between an individual and a corporation more than 50 per centum in value of the

which prohibits deductions for losses from "sales or exchanges of property, directly or indirectly . . . Between members of a family," and between certain other closely related individuals and corporations.

On the taxpayers' applications to the Tax Court, it held § 24 (b) inapplicable, following its own decision in *Ickelheimer* v. *Commissioner*,[2] and expunged the Commissioner's deficiency assessments.[3] The Circuit Court of Appeals reversed the Tax Court [4] and we granted certiorari [5] because of a conflict between circuits [6] and the importance of the question involved.

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outstanding stock of which is owned, directly or indirectly, by or for such individual;

"(C) Except in the case of distributions in liquidation, between two corporations more than 50 per centum in value of the outstanding stock of each of which is owned, directly or indirectly, by or for the same individual, if either one of such corporations, with respect to the taxable year of the corporation preceding the date of the sale or exchange was, under the law applicable to such taxable year, a personal holding company or a foreign personal holding company;

"(D) Between a grantor and a fiduciary of any trust;

"(E) Between the fiduciary of a trust and the fiduciary of another trust, if the same person is a grantor with respect to each trust; or

"(F) Between a fiduciary of a trust and a beneficiary of such trust."

Section 24 (b) (2) (D) defines the family of an individual to include "only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants; . . . ."

[2] 45 B. T. A. 478, affirmed, 132 F. 2d 660 (C. C. A. 2).

[3] 5 T. C. 623.

[4] 158 F. 2d 637 (C. C. A. 6).

[5] 330 U. S. 814. In No. 946, the petition for certiorari of the Estate of Susan P. McWilliams, the deceased mother of John P. McWilliams, was granted at the same time as the petitions in Nos. 945 and 947, and the three cases were consolidated in this Court. As all three present the same material facts and raise precisely the same issues, no further reference will be made to the several cases separately.

[6] The decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Ickelheimer, supra,* note 2, is in conflict on

Petitioners contend that Congress could not have intended to disallow losses on transactions like those described above, which, having been made through a public market, were undoubtedly bona fide sales, both in the sense that title to property was actually transferred, and also in the sense that a fair consideration was paid in exchange. They contend that the disallowance of such losses would amount, *pro tanto,* to treating husband and wife as a single individual for tax purposes.

In support of this contention, they call our attention to the pre-1934 rule, which applied to all sales regardless of the relationship of seller and buyer, and made the deductibility of the resultant loss turn on the "good faith" of the sale, *i. e.,* whether the seller actually parted with title and control.[7] They point out that in the case of the usual intra-family sale, the evidence material to this issue was peculiarly within the knowledge and even the control of the taxpayer and those amenable to his wishes, and inaccessible to the Government.[8] They maintain that the only purpose of the provisions of the 1934 and 1937 Revenue Acts—the forerunners of § 24 (b)[9]—was to

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this point with the decision of the Circuit Court of Appeals for the Sixth Circuit in the present case, and also with that of the Circuit Court of Appeals for the Fourth Circuit in *Commissioner* v. *Kohn,* 158 F. 2d 32.

[7] *Commissioner* v. *Hale,* 67 F. 2d 561 (C. C. A. 1); *Zimmermann* v. *Commissioner,* 36 B. T. A. 279, reversed on other grounds, 100 F. 2d 1023 (C. C. A. 3); *Uihlein* v. *Commissioner,* 30 B. T. A. 399, affirmed, 82 F. 2d 944 (C. C. A. 7).

[8] See H. Rep. No. 1546, 75th Cong., 1st Sess., p. 26 (1939–1 Cum. Bull. (Part 2) 704, 722–723). See also cases cited in note 7, *supra.*

[9] The provisions of § 24 (b) (1) (A) and (B) of the Internal Revenue Code originated in § 24 (a) (6) of the Revenue Act of 1934, 48 Stat. 680, 691. These provisions were reenacted without change as § 24 (a) (6) of the Revenue Act of 1936, 49 Stat. 1648, 1662, and the provisions of § 24 (b) (1) (C), (D), (E), and (F) of the Code were added by § 301 of the 1937 Act, 50 Stat. 813, 827.

overcome these evidentiary difficulties by disallowing losses on such sales irrespective of good faith. It seems to be petitioners' belief that the evidentiary difficulties so contemplated were only those relating to proof of the parties' observance of the formalities of a sale and of the fairness of the price, and consequently that the legislative remedy applied only to sales made immediately from one member of a family to another, or mediately through a controlled intermediary.

We are not persuaded that Congress had so limited an appreciation of this type of tax avoidance problem. Even assuming that the problem was thought to arise solely out of the taxpayer's inherent advantage in a contest concerning the good or bad faith of an intra-family sale, deception could obviously be practiced by a buying spouse's agreement or tacit readiness to hold the property sold at the disposal of a selling spouse, rather more easily than by a pretense of a sale where none actually occurred, or by an unfair price. The difficulty of determining the finality of an intra-family transfer was one with which the courts wrestled under the pre-1934 law,[10] and which Congress undoubtedly meant to overcome by enacting the provisions of § 24 (b).[11]

It is clear, however, that this difficulty is one which arises out of the close relationship of the parties, and would be met whenever, by prearrangement, one spouse sells and another buys the same property at a common price, regardless of the mechanics of the transaction. Indeed, if the property is fungible, the possibility that a sale and purchase may be rendered nugatory by the buying

[10] Cf. *Shoenberg* v. *Commissioner*, 77 F. 2d 446 (C. C. A. 8); *Cole* v. *Helburn*, 4 F. Supp. 230; *Zimmermann* v. *Commissioner*, *supra*, note 7.

[11] See H. Rep. No. 1546, 75th Cong., 1st Sess., p. 26, *supra*, note 8.

spouse's agreement to hold for the benefit of the selling spouse, and the difficulty of proving that fact against the taxpayer, are equally great when the units of the property which the one buys are not the identical units which the other sells.

Securities transactions have been the most common vehicle for the creation of intra-family losses. Even if we should accept petitioners' premise that the only purpose of § 24 (b) was to meet an evidentiary problem, we could agree that Congress did not mean to reach the transactions in this case only if we thought it completely indifferent to the effectuality of its solution.

Moreover, we think the evidentiary problem was not the only one which Congress intended to meet. Section 24 (b) states an absolute prohibition—not a presumption—against the allowance of losses on any sales between the members of certain designated groups. The one common characteristic of these groups is that their members, although distinct legal entities, generally have a near-identity of economic interests.[12] It is a fair inference that even legally genuine intra-group transfers were not thought to result, usually, in economically genuine realizations of loss, and accordingly that Congress did not deem them to be appropriate occasions for the allowance of deductions.

The pertinent legislative history lends support to this inference. The Congressional Committees, in reporting the provisions enacted in 1934, merely stated that "the practice of creating losses through transactions between members of a family and close corporations has been frequently utilized for avoiding the income tax," and that these provisions were proposed to "deny losses to be taken in the case of [such] sales" and "to close this loophole of

[12] See the text of § 24 (b) (1), quoted in note 1.

tax avoidance." [13] Similar language was used in reporting the 1937 provisions.[14] Chairman Doughton of the Ways and Means Committee, in explaining the 1937 provisions to the House, spoke of "the artificial taking and establishment of losses where property was shuffled back and forth between various legal entities owned by the same persons or person," and stated that "these transactions seem to occur at moments remarkably opportune to the real party in interest in reducing his tax liability but, at the same time allowing him to keep substantial control of the assets being traded or exchanged." [15]

We conclude that the purpose of § 24 (b) was to put an end to the right of taxpayers to choose, by intra-family transfers and other designated devices, their own time for realizing tax losses on investments which, for most practical purposes, are continued uninterrupted.

We are clear as to this purpose, too, that its effectuation obviously had to be made independent of the manner in which an intra-group transfer was accomplished. Congress, with such purpose in mind, could not have intended to include within the scope of § 24 (b) only simple transfers made directly or through a dummy, or to exclude

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[13] H. Rep. No. 704, 73d Cong., 2d Sess., p. 23 (1939–1 Cum. Bull. (Part 2) 554, 571); S. Rep. No. 558, 73d Cong., 2d Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 586, 607).

[14] The type of situations to which these provisions applied was described as being that "in which, due to family relationships or friendly control, artificial losses might be created for tax purposes." H. Rep. No. 1546, 75th Cong., 1st Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 704, 724).

[15] 81 Cong. Rec. 9019. Representative Hill, chairman of a House subcommittee on the income-tax laws, explained to the House with reference to the 1934 provisions that the Committee had "provided in this bill that transfers between members of the family for the purpose of creating a loss to be offset against ordinary income shall not be recognized for such deduction purposes." 78 Cong. Rec. 2662.

transfers of securities effected through the medium of the Stock Exchange, unless it wanted to leave a loop-hole almost as large as the one it had set out to close.

Petitioners suggest that Congress, if it truly intended to disallow losses on intra-family transactions through the market, would probably have done so by an amendment to the wash sales provisions,[16] making them applicable where the seller and buyer were members of the same family, as well as where they were one and the same individual. This extension of the wash sales provisions, however, would bar only one particular means of accomplishing the evil at which § 24 (b) was aimed, and the necessity for a comprehensive remedy would have remained.

Nor can we agree that Congress' omission from § 24 (b) of any prescribed time interval, comparable in function to that in the wash sales provisions, indicates that § 24 (b) was not intended to apply to intra-family transfers through the Exchange. Petitioners' argument is predicated on the difficulty which courts may have in deter-

[16] Sec. 118 of the Internal Revenue Code, which first appeared in its present form as § 118 of the Revenue Act of 1932, 47 Stat. 169, 208, provides in part as follows:

"SEC. 118. LOSS FROM WASH SALES OF STOCK OR SECURITIES.

"(a) In the case of any loss claimed to have been sustained from any sale or other disposition of shares of stock or securities where it appears that, within a period beginning 30 days before the date of such sale or disposition and ending 30 days after such date, the taxpayer has acquired (by purchase or by an exchange upon which the entire amount of gain or loss was recognized by law), or has entered into a contract or option so to acquire, substantially identical stock or securities, then no deduction for the loss shall be allowed under section 23 (e) (2); nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business."

mining whether the elapse of certain periods of time between one spouse's sale and the other's purchase of like securities on the Exchange is of great enough importance in itself to break the continuity of the investment and make § 24 (b) inapplicable.

Precisely the same difficulty may arise, however, in the case of an intra-family transfer through an individual intermediary, who, by pre-arrangement, buys from one spouse at the market price and a short time later sells the identical certificates to the other at the price prevailing at the time of sale. The omission of a prescribed time interval negates the applicability of § 24 (b) to the former type of transfer no more than it does to the latter. But if we should hold that it negated both, we would have converted the section into a mere trap for the unwary.[17]

Petitioners also urge that, whatever may have been Congress' intent, its designation in § 24 (b) of sales "between" members of a family is not adequate to comprehend the transactions in this case, which consisted only of a sale of stock by one of the petitioners to an unknown stranger, and the purchase of different certificates of stock by the other petitioner, presumably from another stranger.

We can understand how this phraseology, if construed literally and out of context, might be thought to mean

[17] We have noted petitioners' suggestion that a taxpayer is assured, under the wash sales provisions, of the right to deduct the loss incurred on a sale of securities, even though he himself buys similar securities thirty-one days later; and that he should certainly not be precluded by § 24 (b) from claiming a similar loss if the taxpayer's spouse, instead of the taxpayer, makes the purchase under the same circumstances. We do not feel impelled to comment on these propositions, however, in a case in which the sale and purchase were practically simultaneous and the net consideration received by one spouse and that paid by the other differed only in the amount of brokers' commissions and excise taxes.

only direct intra-family transfers. But petitioners concede that the express statutory reference to sales made "directly or indirectly" precludes that construction. Moreover, we can discover in this language no implication whatsoever that an indirect intra-family sale of fungibles is outside the statute unless the units sold by one spouse and those bought by the other are identical. Indeed, if we accepted petitioners' construction of the statute, we think we would be reading into it a crippling exception which is not there.

Finally, we must reject petitioners' assertion that the *Dobson* rule [18] controls this case. The Tax Court found the facts as we stated them, and then overruled the Commissioner's determination because it thought that § 24 (b) had no application to a taxpayer's sale of securities on the Exchange to an unknown purchaser, regardless of what other circumstances accompanied the sale. We have decided otherwise, and on our construction of the statute, and the conceded facts, the Tax Court could not have reached a result contrary to our own.[19]

Affirmed.

MR. JUSTICE BURTON took no part in the consideration or decision of these cases.

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[18] *Dobson* v. *Commissioner*, 320 U. S. 489.

[19] Cf. *Trust of Bingham* v. *Commissioner*, 325 U. S. 365.

UNITED STATES *v.* SILK, DOING BUSINESS AS ALBERT SILK COAL CO.

NO. 312. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.*

Argued March 10, 1947.—Decided June 16, 1947.

1. In determining whether particular workers are independent contractors or "employees" within the meaning of the Social Security Act, the same rules are applicable as were applied by this Court to the National Labor Relations Act in *Labor Board* v. *Hearst Publications*, 322 U. S. 111. Pp. 713–714.
2. Unloaders of coal who provide their own tools, work only when they wish to work and are paid an agreed price per ton to unload coal from railroad cars, *held*, in the circumstances of this case, to be "employees" within the meaning of the Social Security Act. Pp. 706, 716–718.
3. Truck drivers who own their own trucks, pay the expenses of their operation, employ and pay their own helpers and receive compensation on a piece-work or percentage basis, *held*, in the circumstances of these cases, to be independent contractors and not "employees" within the meaning of the Social Security Act. Pp. 706–710, 718–719.

155 F. 2d 356, affirmed in part and reversed in part.
156 F. 2d 412, affirmed.

No. 312. The District Court granted respondents a judgment for a refund of social security taxes. The Circuit Court of Appeals affirmed. 155 F. 2d 356. This Court granted certiorari. 329 U. S. 702. *Affirmed in part and reversed in part*, p. 719.

No. 673. The District Court granted respondent a judgment for a refund of social security taxes. The Circuit Court of Appeals affirmed. 156 F. 2d 412. This Court granted certiorari. 329 U. S. 709. *Affirmed*, p. 719.

*Together with No. 673, *Harrison, Collector of Internal Revenue*, v. *Greyvan Lines, Inc.*, on certiorari to the Circuit Court of Appeals for the Seventh Circuit, argued March 10, 11, 1947.

Robert L. Stern argued the cause for petitioners. With him on the briefs were *Acting Solicitor General Washington, Sewall Key* and *Lyle M. Turner*. *Jack B. Tate* was also with them on the brief in No. 312.

Ralph F. Glenn argued the cause for respondent in No. 312. With him on the brief were *Robert Stone* and *Warren W. Shaw*.

Wilbur E. Benoy argued the cause for respondent in No. 673. With him on the brief were *Arthur M. Sebastian* and *Robert Driscoll*.

MR. JUSTICE REED delivered the opinion of the Court.

We consider together the above two cases. Both involve suits to recover sums exacted from businesses by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act.[1] In both instances the taxes were collected on assessments made administratively by the Commissioner because he concluded the persons here involved were employees of the taxpayers. Both cases turn on a determination as to whether the workers involved were employees under that Act or whether they were independent contractors. Writs of certiorari were granted, 329 U. S. 702 and 329 U. S. 709, because of the general importance in the collection of social security taxes of deciding what are the applicable standards for the determination of employees under the Act. Varying standards have been applied in the federal courts.[2]

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[1] Titles VIII and IX, Social Security Act, 49 Stat. 636 and 639, as repealed in part 53 Stat. 1.

See Internal Revenue Code, chap. 9, subchap. A and C.

[2] *Texas Co.* v. *Higgins*, 118 F. 2d 636; *Jones* v. *Goodson*, 121 F. 2d 176; *Deecy Products Co.* v. *Welch*, 124 F. 2d 592; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Beard*, 141 F. 2d 376; *Magruder* v. *Yellow*

Respondent in No. 312, Albert Silk, doing business as the Albert Silk Coal Co., sued the United States, petitioner, to recover taxes alleged to have been illegally assessed and collected from respondent for the years 1936 through 1939 under the Social Security Act. The taxes were levied on respondent as an employer of certain workmen some of whom were engaged in unloading railway coal cars and the others in making retail deliveries of coal by truck.

Respondent sells coal at retail in the city of Topeka, Kansas. His coalyard consists of two buildings, one for an office and the other a gathering place for workers, railroad tracks upon which carloads of coal are delivered by the railroad, and bins for the different types of coal. Respondent pays those who work as unloaders an agreed price per ton to unload coal from the railroad cars. These men come to the yard when and as they please and are assigned a car to unload and a place to put the coal. They furnish their own tools, work when they wish and work for others at will. One of these unloaders testified that he worked as regularly "as a man has to when he has to eat" but there was also testimony that some of the unloaders were floaters who came to the yard only intermittently.

Respondent owns no trucks himself but contracts with workers who own their own trucks to deliver coal at a uniform price per ton. This is paid to the trucker by the respondent out of the price he receives for the coal from the customer. When an order for coal is taken in the company office, a bell is rung which rings in the building used by the truckers. The truckers have voluntarily

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Cab Co., 141 F. 2d 324; *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53; *McGowan* v. *Lazeroff*, 148 F. 2d 512; *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745; *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612; *United States* v. *Aberdeen Aerie No. 24*, 148 F. 2d 655, 658; *Grace* v. *Magruder*, 148 F. 2d 679, 680–81; *Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189.

adopted a call list upon which their names come up in turn, and the top man on the list has an opportunity to deliver the coal ordered. The truckers are not instructed how to do their jobs, but are merely given a ticket telling them where the coal is to be delivered and whether the charge is to be collected or not. Any damage caused by them is paid for by the company. The District Court found that the truckers could and often did refuse to make a delivery without penalty. Further, the court found that the truckers may come and go as they please and frequently did leave the premises without permission. They may and did haul for others when they pleased. They pay all the expenses of operating their trucks, and furnish extra help necessary to the delivery of the coal and all equipment except the yard storage bins. No record is kept of their time. They are paid after each trip, at the end of the day or at the end of the week, as they request.

The Collector ruled that the unloaders and truckers were employees of the respondent during the years 1936 through 1939 within the meaning of the Social Security Act and he accordingly assessed additional taxes under Titles VIII and IX of the Social Security Act and Subchapters A and C of Chapter 9 of the Internal Revenue Code. Respondent filed a claim for a refund which was denied. He then brought this action. Both the District Court and the Circuit Court of Appeals [3] thought that the truckers and unloaders were independent contractors and allowed the recovery.

Respondent in No. 673, Greyvan Lines, Inc., a common carrier by motor truck, sued the petitioner, a Collector of Internal Revenue, to recover employment taxes alleged to have been illegally assessed and collected from it under similar provisions of the Social Security Act involved in

[3] 155 F. 2d 356.

Silk's case for the years or parts of years 1937 through the first quarter of 1942. From a holding for the respondent in the District Court petitioner appealed. The Circuit Court of Appeals affirmed. The chief question in this case is whether truckmen who perform the actual service of carrying the goods shipped by the public are employees of the respondent. Both the District Court and the Circuit Court of Appeals [4] thought that the truckmen were independent contractors.

The respondent operates its trucking business under a permit issued by the Interstate Commerce Commission under the "grandfather clause" of the Motor Carrier Act. 32 M. C. C. 719, 723. It operates throughout thirty-eight states and parts of Canada, carrying largely household furniture. While its principal office is in Chicago, it maintains agencies to solicit business in many of the larger cities of the areas it serves, from which it contracts to move goods. As early as 1930, before the passage of the Social Security Act, the respondent adopted the system of relations with the truckmen here concerned, which gives rise to the present issue. The system was based on contracts with the truckmen under which the truckmen were required to haul exclusively for the respondent and to furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish all fire, theft, and collision insurance which the respondent might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused it by the acts of the truckmen, their servants and employees, to paint the designation "Greyvan Lines" on their trucks, to collect all money due the company from shippers or consignees, and to turn in such moneys at the office to which they report after delivering a shipment, to post bonds with the

[4] 156 F. 2d 412.

company in the amount of $1,000 and cash deposits of $250 pending final settlement of accounts, to personally drive their trucks at all times or be present on the truck when a competent relief driver was driving (except in emergencies, when a substitute might be employed with the approval of the company), and to follow all rules, regulations, and instructions of the company. All contracts or bills of lading for the shipment of goods were to be between the respondent and the shipper. The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the Company as a motor carrier under any Federal or State Law" were to be obtained at the company's expense.

The record shows the following additional undisputed facts, not contained in the findings. A manual of instructions, given by the respondent to the truckmen, and a contract between the company and Local No. 711 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America were introduced in evi-

dence. It suffices to say that the manual purported to regulate in detail the conduct of the truckmen in the performance of their duties, and that the agreement with the Union provided that any truckman must first be a member of the union, and that grievances would be referred to representatives of the company and the union. A company official testified that the manual was impractical and that no attempt was made to enforce it. We understand the union contract was in effect. The company had some trucks driven by truckmen who were admittedly company employees. Operations by the company under the two systems were carried out in the same manner. The insurance required by the company was carried under a blanket company policy for which the truckmen were charged proportionately.

The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment. It was enacted in an effort to coordinate the forces of government and industry for solving the problems.[5] The principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the elderly and compensation to workers during periods of unemployment. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation. Employers do not pay taxes on certain groups of employees, such as agricultural or domestic workers

[5] Message of the President, January 17, 1935, and Report of the Committee on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess.; S. Rep. No. 628, 74th Cong., 1st Sess.; S. Rep. No. 734, 76th Cong., 1st Sess.; H. Rep. No. 615, 74th Cong., 1st Sess.; H. Rep. No. 728, 76th Cong., 1st Sess. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619.

but none of these exceptions are applicable to these cases. §§ 811 and 907. Taxes are laid as excises on a percentage of wages paid the nonexempt employees. §§ 804 and 901; I. R. C. §§ 1410, 1600. "Wages" means all remuneration for the employment that is covered by the Act, cash or otherwise. §§ 811, 907; I. R. C. §§ 1426, 1607 (b). "Employment" means "any service, of whatever nature, performed . . . by an employee for his employer, except . . . Agricultural labor" *et cetera.* §§ 811 (b), 907 (c); I. R. C. §§ 1426 (b), 1607 (c). As a corollary to the coverage of employees whose wages are the basis for the employment taxes under the tax sections of the social security legislation, rights to benefit payments under federal old age insurance depend upon the receipt of wages as employees under the same sections. 53 Stat. 1360, §§ 202, 209 (a), (b), (g), 205 (c) (1). See *Social Security Board* v. *Nierotko,* 327 U. S. 358. This relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence. *Helvering* v. *Davis, supra,* 640. No definition of employer or employee applicable to these cases occurs in the Act. See § 907 (a) and I. R. C. § 1607 (a). Compare, as to carrier employment, I. R. C. § 1532 (d), as amended by 60 Stat. 722, § 1. Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto.

Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the gen-

erality of the employment definitions [6] indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[7] These considerations have heretofore guided our construction of the Act. *Buckstaff Bath House Co.* v. *McKinley,* 308 U. S. 358; *Social Security Board* v. *Nierotko,* 327 U. S. 358.

Of course, this does not mean that all who render service to an industry are employees. Compare *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 520. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at his own risk the product of another, or the producer who agrees so to manufacture for another, ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Govern-

[6] See 53 Stat. 1384, 1393, "The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except— . . . ." Compare 49 Stat. 639 and 643.

[7] Nothing to suggest tax avoidance appears in these records.

ment collects employment taxes from the distributor instead of the producer or the other way around.

The problem of differentiating between employee and an independent contractor, or between an agent and an independent contractor, has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, § 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act." *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 120, 123, 124, 128, 129, 131.

Application of the social security legislation should follow the same rule that we applied to the National Labor

Relations Act in the *Hearst* case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.

The long-standing regulations of the Treasury and the Federal Security Agency (H. Doc. 595, 79th Cong., 2d Sess.) recognize that independent contractors exist under the Act. The pertinent portions are set out in the margin.[8] Certainly the industry's right to control how "work shall be done" is a factor in the determination of whether the worker is an employee or independent contractor.

[8] Treasury Regulations 90, promulgated under Title IX of the Social Security Act, Art. 205:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direc-

The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented. This is shown by his additional tax assessments. Other instances of such administrative determinations are called to our attention.[9]

So far as the regulations refer to the effect of contracts, we think their statement of the law cannot be challenged successfully. Contracts, however "skilfully devised," *Lucas* v. *Earl*, 281 U. S. 111, 115, should not be permitted to shift tax liability as definitely fixed by the statutes.[10]

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tion of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." 26 C. F. R. § 400.205. See also Treasury Regulations 91, 26 C. F. R. § 401.3. (Emphasis added.)

[9] The citation of these cases does not imply approval or disapproval of the results. The cases do show the construction of the regulation by the agency. *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Jones* v. *Goodson*, 121 F. 2d 176; *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324; *Texas Co.* v. *Higgins*, 118 F. 2d 636; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

See also note 2.

[10] *Gregory* v. *Helvering*, 293 U. S. 465; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Higgins* v. *Smith*, 308 U. S. 473; *Helvering* v. *Clifford*, 309 U. S. 331.

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Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.[11]

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the

[11] *United States* v. *Silk*, 155 F. 2d 356, 358–9: "But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take the coal for delivery.

"We think that the relationship between appellee and the unloaders is not materially different from that between him and the haulers. In response to a question on cross examination, appellee did testify that the unloaders did what his superintendent at the coal yard told them to do, but when considered in the light of all his testimony, all that

unloaders in the *Silk* case were independent contractors.[12] They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their

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this answer meant was that they unloaded the car assigned to them into the designated bin. . . .

"The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between appellee and the workers in question."

Greyvan Lines v. *Harrison,* 156 F. 2d 412, 414–16. After stating the trial court's finding that the truckmen were not employees, the appellate court noted:

"Appellant contends that in determining these facts the court failed to give effect to important provisions of the contracts which it asserts clearly show the reservation of the right of control over the truckmen and their helpers as to the methods and means of their operations which, it is agreed, furnish the test for determining the relationship here in question. . . ."

It then discussed the manual and concluded:

"While it is true that many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen, we agree with appellee that there was evidence to justify the court's disregarding of it. It was not prepared until April, 1940, although the tax period involved was from November, 1937, through March, 1942, and there was no evidence to show any change or tightening of controls after its adoption and distribution; one driver testified that he was never instructed to follow the rules therein provided; an officer of the Company testified that it had been prepared by a group of three men no longer in their employ, and that it had been impractical and was not adhered to."

After a discussion of the helper problem, this statement appears: ". . . the Company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control, and of whose employment it has no knowledge. And this element of control of the truckmen over their own helpers goes far to prevent the employer-employee relationship from arising between them and the Company. While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations. . . ."

[12] Cf. *Grace* v. *Magruder,* 148 F. 2d 679.

hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act.[13] They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.[14]

There are cases, too, where driver-owners of trucks or wagons have been held employees[15] in accident suits at

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[13] I. R. C., chap. 9, subchap. A, § 1426 (b), as amended, 53 Stat. 1384:

"The term 'employment' means any service performed . . . by an employee for the person employing him . . . except—

. . . . .

"(3) Casual labor not in the course of the employer's trade or business; . . ."

[14] *Swift & Co.* v. *Alston,* 48 Ga. App. 649, 173 S. E. 741; *Holmes* v. *Tennessee Coal, I. & R. Co.,* 49 La. Ann. 1465, 22 So. 403; *Muncie Foundry Co.* v. *Thompson,* 70 Ind. App. 157, 123 N. E. 196; *Chicago, R. I. & P. R. Co.* v. *Bennett,* 36 Okla. 358, 128 P. 705; *Murray's Case,* 130 Me. 181, 154 A. 352; *Decatur R. Co.* v. *Industrial Board,* 276 Ill. 472, 114 N. E. 915; *Benjamin* v. *Fertilizer Co.,* 169 Miss. 162, 152 So. 839.

[15] *Western Express Co.* v. *Smeltzer,* 88 F. 2d 94; *Industrial Commission* v. *Bonfils,* 78 Colo. 306, 241 P. 735; *Coppes Bros. & Zook* v. *Pontius,* 76 Ind. App. 298, 131 N. E. 845; *Burruss* v. *B. M. C. Logging Co.,* 38 N. M. 254, 31 P. 2d 263; *Bradley* v. *Republic Creosoting Co.,* 281 Mich. 177, 274 N. W. 754; *Rouse* v. *Town of Bird Island,* 169 Minn. 367, 211 N. W. 327; *Industrial Commission* v. *Hammond,* 77 Colo. 414, 236 P. 1006; *Kirk* v. *Lime Co. & Insurance Co.,* 137 Me. 73, 15 A. 2d 184; *Showers* v. *Lund,* 123 Neb. 56, 242 N. W. 258; *Burt* v. *Davis-Wood Lumber Co.,* 157 La. 111, 102 So. 87; *Dunn* v. *Reeves Coal Yards Co., Inc.,* 150 Minn. 282, 184 N. W. 1027; *Waters* v. *Pioneer Fuel Co.,* 52 Minn. 474, 55 N. W. 52; *Warner* v. *Hardwood Lumber Co.,* 231 Mich. 328, 204 N. W. 107; *Frost* v. *Blue Ridge Timber Corp.,* 158 Tenn. 18, 11 S. W. 2d 860; *Lee* v. *Mark H. Brown Lumber Co.,* 15 La. App. 294, 131 So. 697.

See particularly *Singer Manufacturing Co.* v. *Rahn,* 132 U. S. 518.

tort or under workmen's compensation laws. But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.[16] These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

No. 312, *United States* v. *Silk*, is affirmed in part and reversed in part.

No. 673, *Harrison* v. *Greyvan Lines, Inc.*, is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of the view that the applicable principles of law, stated by the Court and with which they agree, require reversal of both judgments in their entirety.

MR. JUSTICE RUTLEDGE.

I join in the Court's opinion and in the result insofar as the principles stated are applied to the unloaders in the *Silk* case. But I think a different disposition should be made in application of those principles to the truckers in that case and in the *Greyvan* case.

So far as the truckers are concerned, both are borderline cases.[1] That would be true, I think, even if the so-

[16] Compare *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

[1] The opinion of the Circuit Court of Appeals in the *Greyvan* case stated, after referring to *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655: "It is true that the facts there do not present as close a question as in the case at bar." And see note 3.

called "common law control" test were conclusive,[2] as the District Court and the Circuit Court of Appeals in each case seem to have regarded it.[3] It is even more true under

[2] It is not at all certain that either Silk or Greyvan Lines would not be held liable in tort, under application of the common law test, for injuries negligently inflicted upon persons or property of others by their truckers, respectively, in the course of operating the trucks in connection with their businesses. Indeed this result would seem to be clearly indicated, in the case of Greyvan particularly, in view of the fact that the trucks bore its name, in addition to other factors including a large degree of control exercised over the trucking operations. For federal cases in point see *Silent Automatic Sales Corp.* v. *Stayton,* 45 F. 2d 471 (applying Missouri law); *Falstaff Brewing Corp.* v. *Thompson,* 101 F. 2d 301 (applying Nebraska law); *Young* v. *Wilky Carrier Corp.,* 54 F. Supp. 912, aff'd, 150 F. 2d 764 (applying Pennsylvania law). And see for a general collection of state cases, 9 Blashfield, Cyclopedia of Automobile Law and Practice (1941) § 6056.

Certainly the question of coverage under the statute, as an employee, should not be determined more narrowly than that of employee status for purposes of imposing vicarious liability in tort upon an employer, whether by application of the control test exclusively or of the Court's broader ruling.

[3] In the *Silk* case formal findings of fact and conclusions of law by the District Court do not appear in the record. But a "Statement by the Court" recites details of the arrangements with the truckers and unloaders in the focus of whether Silk exercised control over them and concludes he did not; hence, there was no employer-employee relation. The opinion of the Circuit Court of Appeals, though recognizing the necessity for liberal construction of the Act, treats the facts found in the same focus of control. The court was influenced by the regulations promulgated under the Act (Reg. 90, Art. 205) and also by the Bureau of Internal Revenue (Reg. 91, Art. 3). The opinion concludes: "The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services . . . as is necessary" to create the employer-employee relation. 155 F. 2d 356, 359.

In the *Greyvan* case formal findings and conclusions were filed. The Circuit Court of Appeals, accepting the findings, concluded they did not show "change or tightening of controls" after the company's adoption of a manual in 1940, although its provisions "if strictly en-

the broader and more factual approach the Court holds should be applied.

I agree with the Court's views in adopting this approach and that the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes *pro tanto*.

But I do not think it necessary or perhaps in harmony with sound practice, considering the nature of this Court's functions and those of the district courts, for us to undertake drawing the final conclusion generally in these borderline cases. Having declared the applicable principles of law to be applied, our function is sufficiently discharged by seeing to it that they are observed. And when this has been done, drawing the final conclusion, in matters so largely factual as the end result must be in close cases, is more properly the business of the district courts than ours.

Here the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called "common law control" test as the criterion. This was clearly wrong, in view of the Court's present ruling. But for its action in drawing the ultimate and largely factual conclusion on that basis, the error would require remanding the causes to the District

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forced, would go far to establish an employer-employee relationship . . . ." 156 F. 2d 412, 415. However, it found another factor conclusive: "While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations." 156 F. 2d at 416. Apparently not control of the method of performing the work in general but absence of expressly reserved right of control in a single feature became the criterion used.

Courts in order for them to exercise that function in the light of the present decision.

I would follow that course, so far as the truckers are concerned.

RUTHERFORD FOOD CORP. ET AL. *v.* McCOMB, WAGE AND HOUR ADMINISTRATOR.

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

No. 562. Argued April 9, 10, 1947.—Decided June 16, 1947.

1. Boners of meat worked in a slaughterhouse exclusively for the operator thereof and their work was but one step in a continuous process the other steps of which were performed by persons who were admittedly employees of the operator. *Held:* In the circumstances of this case, the boners were employees of the operator of the slaughterhouse within the meaning of the Fair Labor Standards Act, even though they worked under a contract, owned their own tools, and were paid collectively a certain amount per hundredweight of boned beef, which pay they divided among themselves. Pp. 724–726, 729–730.
2. Decisions defining the coverage of the employer-employee relationship under the National Labor Relations Act and the Social Security Act are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. See *Labor Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *Silk*, *ante*, p. 704. P. 723.
3. Where the work done, in its essence, follows the usual path of an employee, putting an "independent contractor" label on the worker does not deprive him of the protection of the Fair Labor Standards Act. P. 729.
4. Determination of the employer-employee relationship within the contemplation of the Fair Labor Standards Act does not depend on isolated factors but rather upon the circumstances of the whole activity. P. 730.

156 F. 2d 513, conclusion affirmed and direction of judgment modified.

The District Court refused to enjoin alleged violations of the Fair Labor Standards Act. The Circuit Court of Appeals reversed. 156 F. 2d 513. This Court granted

certiorari. 329 U. S. 704. *Conclusion affirmed and direction of judgment modified,* p. 731.

E. R. Morrison argued the cause for petitioners. With him on the brief was *R. L. Hecker.*

Bessie Margolin argued the cause for respondent. With her on the brief were *Acting Solicitor General Washington, Philip Elman, William S. Tyson* and *Morton Liftin.*

MR. JUSTICE REED delivered the opinion of the Court.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to enjoin the Rutherford Food Corporation and the Kaiser Packing Company from further violating the Fair Labor Standards Act.[1] The Administrator alleged that the defendants had repeatedly failed to keep proper records and to pay certain of its employees overtime as required by § 7 of the Act.[2] The District Court refused to grant the injunction. The Circuit Court of Appeals reversed on appeal, and directed the entry of the judgment substantially as prayed for. *Walling* v. *Rutherford Food Corporation,* 156 F. 2d 513. We brought the case here because of the importance of the issues presented by the petition for certiorari to the administration of the Act.

The Fair Labor Standards Act of 1938, enacted June 25, 1938, is a part of the social legislation of the 1930's of the same general character as the National Labor Relations Act of July 5, 1935, 49 Stat. 449, and the Social Security Act of August 14, 1935, 49 Stat. 620. Decisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act. See *Labor Board* v. *Hearst Pub-*

[1] 52 Stat. 1060.

[2] 29 U. S. C. § 207.

lications, 322 U. S. 111; *United States* v. *Silk, ante,* p. 704, decided today.

The petitioners are corporations of Missouri authorized to do business in Kansas. The slaughterhouse of the Kaiser Packing Company, the place of the alleged violations with which we are concerned, and the principal place of business of that company, is in Kansas City, Kansas, from which it ships meat in interstate commerce. Since 1942 most of its product has been boned beef. The petitioner, Rutherford Food Corporation, has its principal place of business and its plant for processing meat products in Kansas City, Missouri. In 1943, Rutherford bought 51% of the stock of Kaiser in order to assure itself of a constant supply of boned beef for contracts it had with the U. S. Army. Kaiser had been operating and continued to operate at a loss, and Rutherford advanced more than $50,000 to Kaiser between March, when Rutherford bought the Kaiser stock, and July, 1943. To assure itself of a continued supply of meat, Rutherford leased Kaiser's facilities and took over operation of the slaughterhouse in July. In May, 1944, the lease was terminated and Rutherford's stock interest in Kaiser sold, so that Kaiser might qualify for subsidies granted by the Defense Supplies Corporation to unaffiliated nonprocessing slaughterers under its Regulation No. 3.[3]

Prior to 1942 Kaiser had one hourly paid employee who acted as a combined butcher, beef boner and order filler. During 1942, in order to be able to furnish beef boned to Army specifications to the Army under contract, Kaiser entered into a written contract with one Reed, an experienced boner, which provided that Reed should assemble a group of skilled boners to do the boning at the slaughterhouse. The terms of the contract were that Reed should be paid for the work of boning an amount per hundred-

[3] 8 F. R. 10826; 8 F. R. 14641; 9 F. R. 1820.

weight of boned beef, that he would have complete control over the other boners, who would be his employees, that Kaiser would furnish a room in its plant for the work, known as the boning vestibule, into which the carcasses of cattle slaughtered by Kaiser would be moved on overhead rails by Kaiser employees, that Kaiser would also furnish barrels for the boned meat which would be washed and moved out of the vestibule by Kaiser's employees. Reed abandoned the work in February, 1943, and the work was taken over under an oral contract by one of the boners who had worked with him. This boner, Schindel, also abandoned the work in May, 1944, and an oral contract was then made by the company with Hooper and Deere, who had worked with Schindel. After a few months Deere left, at which time Hooper entered into a written contract substantially like the one between Kaiser and Reed, save that it provided for rent to be paid by Hooper for the boning room, although as a matter of fact no rent was ever paid. The District Court found that since the boning work had started in 1942, the money paid by Kaiser had been shared equally among all the boners, except for a short time after Hooper took over the work when he paid some of the boners by the hour. It was stipulated further that the boners owned their own tools, although these consisted merely of a hook to hold the meat, a knife to cut it, a sharpener for the knife, and a leather belt (apron). Although the C. I. O. union which was the representative of the workers of the company insisted that the boners be members, and although the written contracts provided that they should join, it was stipulated that the union dues of the boners were not checked off and that the boners were not subject to the authority of the union steward at the plant.

The slaughterhouse operations, of which the boning is a part, are carried on in a series of interdependent steps.

The cattle are slaughtered, skinned and dressed in the killing room, and the carcasses are moved thence on overhead rails into an overnight cooler by employees of Kaiser. The next day they are moved into another cooler and then into the boning vestibule, on the same overhead rail. They move around the boning room on the rail, each boner cutting off a section for boning. The boneless meat is put into barrels, or passed to a trimmer, an employee of Kaiser, who trims waste matter from the boned meat. Waste is put into other barrels. The barrels are moved from the boning room by employees of Kaiser into another room, called the dock, where the meat is weighed and put on trucks. Kaiser has never attempted to control the hours of the boners, but they must "keep the work current and the hours they work depend in large measure upon the number of cattle slaughtered." 156 F. 2d 513, 515. It is undisputed that the president and manager of Kaiser goes through the boning vestibule many times a day and "is after the boners frequently about their failure to cut all of the meat off the bones."

The Administrator thought these facts brought the boners within the classification of employees, as that term is used in the Act. But the District Court thought that they were independent contractors, and denied the injunction sought by the Administrator. The Circuit Court of Appeals, however, said: "The operations at the slaughterhouse constitute an integrated economic unit devoted primarily to the production of boneless beef. Practically all of the work entering into the unit is done at one place and under one roof. . . . The boners work alongside admitted employees of the plant operator at their tasks. The task of each is performed in its natural order as a contribution to the accomplishment of a common objective." In its view the test for determining who was an employee under the Act was not the common law test of

control, "as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law . . . ." It concluded that the "underlying economic realities . . . lead to the conclusion that the boners were and are employees of Kaiser . . . ." 156 F. 2d 513, 516–17.

The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers. It was sought to accomplish this purpose by the minimum pay and maximum hour provisions and the requirement that records of employees' services be kept by the employer.[4] To make the method effective, the Act contains a section granting to the district courts of the United States jurisdiction to enjoin certain violations of the Act here involved, relating to the keeping of records of employment and the paying of overtime.[5] Whether or not the acts charged in this complaint violate the Act depends, so far as the meat boners are concerned, upon a determination as to whether either or both respondents are employers of the boners. As our conclusion requires further action in the trial court to frame the injunction, we shall treat only the question of the relationship of the boners to the alleged employers. We shall not in our consideration undertake to reach any conclusion as to the appropriate form of an injunction. We pass only upon the question whether the boners were

[4] 52 Stat. 1060, §§ 2, 6, 7, 11 (c). *United States* v. *Darby*, 312 U. S. 100, 125; *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 577–78.

[5] 52 Stat. 1060, §§ 17, 15, 7 (a), 11 (c).

employees of the operator of the Kansas plant under the Fair Labor Standards Act.

As in the National Labor Relations Act and the Social Security Act, there is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act. Provisions which have some bearing appear in the margin.[6] The definition of "employ" is broad. It evidently derives from the child labor statutes and it should be noted that this definition applies to the child labor provisions of this Act, § 12.[7] We have decided that it is not so broad as to include those "who, without any express or implied

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[6] 52 Stat. 1060, § 3:

"As used in this Act—

. . . . . .

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .

"(e) 'Employee' includes any individual employed by an employer.

. . . . . .

"(g) 'Employ' includes to suffer or permit to work."

[7] Note 11 in the brief for the United States summarizes the relevant data:

"At the time of the enactment of the Fair Labor Standards Act, the phrase 'employed, permitted or suffered to work' was contained in the child labor statutes of thirty-two States and the District of Columbia. The same phraseology appeared in the Uniform Child Labor Laws recommended in 1911 and in 1930 by the National Conference of Commissioners on Uniform State Laws (Child Labor Bulletin, Vol. I, No. 2, August 1912; Proceedings of the National Conference, 1930), in the Standard Child Labor Law recommended in the Child Labor Legislation Handbook compiled by Josephine C. Goldmark (See e. g., issue of 1904, p. 11), and in the Standards Recommended for Child Labor Legislation by the International Association of Governmental Labor Officials. The phrase 'employed or permitted to work' was found in seventeen State statutes as well as in the Federal statutes held unconstitutional in *Hammer* v. *Dagenhart,* 247 U. S. 251, and *Child Labor Tax Case,* 259 U. S. 20. The statutes are cited in the Appendix to this brief, *infra,* pp. 58–60."

compensation agreement, might work for their own advantage on the premises of another." *Walling* v. *Portland Terminal Co.,* 330 U. S. 148, 152, decided February 17, 1947. In the same opinion, however, we pointed out that "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." 330 U. S. 148, 150. We have said that the Act included those who are compensated on a piece rate basis. *United States* v. *Rosenwasser,* 323 U. S. 360. We have accepted a stipulation that station "redcaps" were railroad employees. *Williams* v. *Jacksonville Terminal Co.,* 315 U. S. 386, 391. There may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees. See *United States* v. *Silk, supra;* compare *Roland Electrical Co.* v. *Walling,* 326 U. S. 657; *Martino* v. *Michigan Window Cleaning Co.,* 327 U. S. 173. We conclude, however, that these meat boners are not independent contractors. We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an "independent contractor" label does not take the worker from the protection of the Act.[8]

The District Court was of the view that:

> "The right to contract is not only an inherent right but a constitutional right, and independent contracts, as a method of quantity production of

[8] See *Walling* v. *American Needlecrafts,* 139 F. 2d 60; *United States* v. *Vogue, Inc.,* 145 F. 2d 609; *Walling* v. *Twyeffort, Inc.,* 158 F. 2d 944.

> boned beef, have not been uncommon in the packing business, generally. . . . The plan under which boners share equally in the boning money is commonly employed in Kansas City and elsewhere, and most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors. There is nothing inequitable in the sharing method under which compensation is divided equally among the group. It gives each man an interest in the amount of work being done by the other members of the group. It also gives no advantage to the man who is boning the fleshier parts of the carcass. Under this plan beginners and casual boners can be equitably taken care of by payment on an hourly basis out of the boning money."

We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity. Viewed in this way, the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

We therefore affirm the conclusion to that effect of the Circuit Court of Appeals and modify the direction of the judgment of that court "for the entry of a judgment substantially as prayed," so as to leave the District Court free to frame its decree in accordance with this decision.

It is so ordered.

MEXICAN LIGHT & POWER CO., LTD. *v.* TEXAS MEXICAN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 404. Argued February 6, 1947.—Decided June 16, 1947.

Goods destined for export by rail to Mexico were shipped from the point of origin over a series of connecting carriers under a bill of lading issued by the initial carrier and covering the shipment to the point of export on the Mexican border, the transportation charges being prepaid to that point. The last connecting carrier in the United States issued a new bill of lading which purported to cover the shipment to its ultimate destination in Mexico, but received no payment for transporting the goods other than its share of that paid to the initial carrier under the original bill of lading. *Held:* Under the Carmack Amendment, the second bill of lading was void and the last connecting carrier in the United States is not liable for injuries to the goods incurred on a Mexican railroad between the border and their ultimate destination in Mexico. Pp. 733–735.

145 Tex. 50, 193 S. W. 2d 964, affirmed.

A Texas state court denied a judgment against an American connecting railroad for injuries sustained on a Mexican railroad to goods exported from the United States. The Texas Court of Civil Appeals reversed. 190 S. W. 2d 838. It was reversed by the Supreme Court of Texas. 145 Tex. 50, 193 S. W. 2d 964. This Court granted certiorari. 329 U. S. 697. *Affirmed,* p. 735.

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Charles W. Bell argued the cause for petitioner. With him on the brief was *Carl G. Stearns.*

John P. Bullington argued the cause and filed a brief for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an action to recover damages for injury to goods in the course of an export shipment by rail. The Westinghouse Electric and Manufacturing Company delivered to the Pennsylvania Railroad Company in Sharon, Pennsylvania, goods ultimately destined for the Mexican Light and Power Company. According to the bill of lading issued by the Pennsylvania Railroad the goods were consigned to

> The Mexican Light & Power Co. Ltd.,
> c/o Fausto Trevino, Customs Agent,
> (National Railways of Mexico).

The destination was Laredo, Texas, with the further notation

> "For Export to: El Oro, Estado de Mexico via Acambaro via Laredo."

The transportation charges were prepaid at the export rate, less than the domestic, and they covered shipment not merely into Laredo but up to the international boundary.

The Texas-Mexican Railway was the last of the series of connecting carriers over which the machinery was routed by the Pennsylvania. The former, having received the shipment at Alice, Texas, continued the carriage to its yards at Laredo. At Laredo, there was issued to Fausto Trevino, the agent, what formally appears to be a bill of lading consigning the shipment to petitioner at El Oro.

The record is silent as to the circumstances that brought this document into existence, but it is admitted that the respondent received no payment for transporting the goods other than its share in the export rate prepaid to the Pennsylvania under the Sharon bill of lading. Trevino did use the second bill of lading for clearing the shipment with the Mexican customs, but there is no showing that the first bill of lading would not have served as documentation for this purpose. The respondent railroad then moved the goods, still in the original cars, from its yards to the international boundary. There, the shipment passed to the National Railways of Mexico and it was on its lines, in Mexico, that the machinery was injured.

Petitioner brought this suit in one of the district courts of Texas. Judgment went for the railroad. The Texas Court of Civil Appeals reversed, 190 S. W. 2d 838, but was in turn reversed by the Supreme Court of Texas. 145 Tex. 50, 193 S. W. 2d 964. We granted certiorari, 329 U. S. 697, because important issues affecting the carrier's liability under the Interstate Commerce Act were pressed upon us.

On full consideration of the case it falls within a very narrow compass. The goods consigned to Laredo moved on the bill of lading issued at Sharon with the indicated connections, including the Texas-Mexican. By virtue of the Carmack Amendment, 34 Stat. 584, amended, 38 Stat. 1196, that bill of lading determines the rights of the consignee. While each connecting carrier is, of course, liable for damage occurring on its line, only the initial carrier is liable for damage on any of the connections. Unless, therefore, the Texas-Mexican Railway was an initial carrier with reference to the Mexican Railroad it cannot be responsible for injuries on that road. And it did not become an initial carrier merely by force of what purported

to be a bill of lading issued at Laredo unless the so-called second bill of lading represents the initiation of a new shipment on the Texas-Mexican.

We agree with the Texas Supreme Court that nothing happened at Laredo to displace the duty which was created at Sharon for the carriage of the goods by the Texas-Mexican to the international boundary, or to modify the terms of its undertaking when, at Alice, it received the goods under the Sharon bill of lading.

What was said of the shipment of cattle in *Missouri, Kansas & Texas R. Co.* v. *Ward,* 244 U. S. 383, 387, is precisely applicable to the shipment of machinery in this case:

> "The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

No matter what the convenience which a consignee may derive from a bill of lading issued by a connecting carrier on a through shipment, unless the connecting carrier has received a consideration for the bill of lading in addition to that which flowed under the bill of lading issued by the initiating carrier, the Carmack Amendment makes such second bill of lading void. It can neither enlarge the liability of the connecting carrier nor contract that of the initiating carrier. That is what was meant when the *Ward* case said that the purpose of the Carmack Amendment was "to create in the initial carrier unity of responsibility for the transportation to destination." *Missouri, Kansas & Texas R. Co.* v. *Ward, supra,* at 386. This is an even stronger case for the application of this principle.

For in the *Ward* case the Court found the second bill of lading void for lack of consideration although it was "alleged to have been issued in consideration of a special reduced rate theretofore duly filed with the Interstate Commerce Commission" because there was nothing to indicate that that special rate "affected the through rate already agreed upon in the original bill of lading." 244 U. S. at 385–86.

Properly finding that the so-called bill of lading did not evidence any new and independent undertaking, when judged by the rigid requirements by which bills of lading are valid under the Carmack Amendment, the Texas Supreme Court was right in holding that the shipment over the Texas-Mexican legally moved only under the original bill of lading, that the Pennsylvania was never displaced as the initial carrier, and that therefore the Texas-Mexican was not liable for damage that occurred on the Mexican Railroad.

Judgment affirmed.

MR. JUSTICE REED, with whom MR. CHIEF JUSTICE VINSON joins, dissenting.

We are of the opinion that the respondent, The Texas Mexican Railway Company, is the initial carrier under the bill of lading issued by it at Laredo for carriage of the articles to El Oro, Mexico. The bill of lading issued by the Pennsylvania Railroad was for carriage from Sharon, Pennsylvania, to Laredo, Texas. Accepting the interpretation of the Court, that this Pennsylvania bill required the delivery of the shipment by the respondent at the International Boundary in Laredo, there remains the necessity of causing the shipment to cross the boundary line and proceed upon its journey into Mexico. As the Court concedes, the bill of lading, sued upon here, was

used to clear "the shipment with the Mexican customs." It is also plain that it was this latter bill that caused the shipment to cross the line. Without it, the respondent could not have made delivery to the Mexican railway system. The Pennsylvania bill of lading called for delivery to the consignee's agent in Laredo, Fausto Trevino. The consideration to respondent for its issue would be a similar service for northbound shipments from the Mexican Railways or promotion of respondent's export business.

The *Ward* case, 244 U. S. 383, is not an authority for the Court's holding. There the suit was brought on a through bill from a Texas point to an Oklahoma point. The defense was that a new contract had been made with a connecting carrier. It was said, p. 387:

> "The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

The facts of this case seem to us entirely different and to require that the respondent railway accept responsibility as the initial carrier.

BAZLEY *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 287. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.*

Argued January 10, 1947.—Decided June 16, 1947.

1. Pursuant to a purported plan of "reorganization" and "recapitalization" of a family corporation, all but one share of which was owned by a taxpayer and his wife and which had an earned surplus of $855,783, each old share of stock having a par value of $100 was exchanged for five new shares of no par value, but a stated value of $60, and new debenture bonds having a total face value of $400,000 payable in ten years but callable at any time. *Held:* The transaction was not a tax-free "reorganization" within the meaning of §§ 112 (b) (3) and 112 (g) (1) (E) of the Internal Revenue Code, and the taxpayer is liable for income taxes on the full value of the debentures. Pp. 742–743.
2. The same conclusion reached as to another similar transaction varying in some details, including the fact that there was left undisturbed on the books of the corporation an earned surplus account equal to the value of the debentures distributed in partial exchange for the old stock. Pp. 743–744.
3. It was not the purpose of the reorganization provisions of § 112 (b) and (g) of the Internal Revenue Code to exempt from payment of a tax what as a practical matter is a realized gain. P. 740.
4. Since a "recapitalization" within the meaning of § 112 (g) (1) (E) is one form of "reorganization," nothing can be a recapitalization for this purpose unless it partakes of those characteristics of a reorganization which underlie the purpose of Congress in postponing the tax liability. P. 741.
5. In the case of a corporation which has undistributed earnings, the creation of new corporate obligations which are transferred to stockholders in relation to their former holdings, so as to produce, for all practical purposes, the same result as a distribution of cash earnings of equivalent value, cannot obtain tax immunity because cast in the form of a recapitalization-reorganization. P. 742.

155 F. 2d 237 and 155 F. 2d 246, affirmed.

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*Together with No. 209, *Adams* v. *Commissioner of Internal Revenue,* also on certiorari to the same Court, argued January 9, 1947.

No. 287. The Tax Court sustained a determination of the Commissioner of Internal Revenue that a taxpayer was liable for income tax on the full value of debentures received under a purported "reorganization" of a family corporation. 4 T. C. 897. The Circuit Court of Appeals affirmed. 155 F. 2d 237. This Court granted certiorari. 329 U. S. 701. *Affirmed*, p. 744.

No. 209. The Tax Court sustained a determination of the Commissioner of Internal Revenue that a taxpayer was liable for income tax on certain debenture bonds received under a purported "reorganization" of a corporation of which he owned all but a few shares. 5 T. C. 351. The Circuit Court of Appeals affirmed. 155 F. 2d 246. This Court granted certiorari. 329 U. S. 695. *Affirmed*, p. 744.

Sydney A. Gutkin argued the cause and filed a brief for petitioner in No. 209.

Henry S. Drinker argued the cause for petitioner in No. 287. With him on the brief were *Frederick E. S. Morrison* and *Calvin H. Rankin.*

J. Louis Monarch argued the cause for respondent. With him on the brief were *Acting Solicitor General Washington, Sewall Key, Arnold Raum* and *L. W. Post.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The proper construction of provisions of the Internal Revenue Code relating to corporate reorganizations is involved in both these cases. Their importance to the Treasury as well as to corporate enterprise led us to grant certiorari, 329 U. S. 695, 329 U. S. 701. While there are differences in detail to which we shall refer, the two cases may be disposed of in one opinion.

In the *Bazley* case, No. 287, the Commissioner of Internal Revenue assessed an income tax deficiency against the taxpayer for the year 1939. Its validity depends on the legal significance of the recapitalization in that year of a family corporation in which the taxpayer and his wife owned all but one of the Company's one thousand shares. These had a par value of $100. Under the plan of reorganization the taxpayer, his wife, and the holder of the additional share were to turn in their old shares and receive in exchange for each old share five new shares of no par value, but of a stated value of $60, and new debenture bonds, having a total face value of $400,000, payable in ten years but callable at any time. Accordingly, the taxpayer received 3,990 shares of the new stock for the 798 shares of his old holding and debentures in the amount of $319,200. At the time of these transactions the earned surplus of the corporation was $855,783.82.

The Commissioner charged to the taxpayer as income the full value of the debentures. The Tax Court affirmed the Commissioner's determination, against the taxpayer's contention that as a "recapitalization" the transaction was a tax-free "reorganization" and that the debentures were "securities in a corporation a party to a reorganization," "exchanged solely for stock or securities in such corporation" "in pursuance of the plan of reorganization," and as such no gain is recognized for income tax purposes. Internal Revenue Code, §§ 112 (g) (1) (E) and 112 (b) (3). The Tax Court found that the recapitalization had "no legitimate corporate business purpose" and was therefore not a "reorganization" within the statute. The distribution of debentures, it concluded, was a disguised dividend, taxable as earned income under §§ 22 (a) and 115 (a) and (g). 4 T. C. 897. The Circuit Court of Appeals for the Third Circuit, sitting *en banc,* affirmed, two judges dissenting. 155 F. 2d 237.

Unless a transaction is a reorganization contemplated by § 112 (g), any exchange of "stock or securities" in connection with such transaction, cannot be "in pursuance of the plan of reorganization" under § 112 (b) (3). While § 112 (g) informs us that "reorganization" means, among other things, "a recapitalization," it does not inform us what "recapitalization" means. "Recapitalization" in connection with the income tax has been part of the revenue laws since 1921. 42 Stat. 227, 230, § 202 (c) (2). Congress has never defined it and the Treasury Regulations shed only limited light. Treas. Reg. 103, § 19.112 (g). One thing is certain. Congress did not incorporate some technical concept, whether that of accountants or of other specialists, into § 112 (g), assuming that there is agreement among specialists as to the meaning of recapitalization. And so, recapitalization as used in § 112 (g) must draw its meaning from its function in that section. It is one of the forms of reorganization which obtains the privileges afforded by § 112 (g). Therefore, "recapitalization" must be construed with reference to the presuppositions and purpose of § 112 (g). It was not the purpose of the reorganization provision to exempt from payment of a tax what as a practical matter is realized gain. Normally, a distribution by a corporation, whatever form it takes, is a definite and rather unambiguous event. It furnishes the proper occasion for the determination and taxation of gain. But there are circumstances where a formal distribution, directly or through exchange of securities, represents merely a new form of the previous participation in an enterprise, involving no change of substance in the rights and relations of the interested parties one to another or to the corporate assets. As to these, Congress has said that they are not to be deemed significant occasions for determining taxable gain.

These considerations underlie § 112 (g) and they should dominate the scope to be given to the various sections, all of which converge toward a common purpose. Application of the language of such a revenue provision is not an exercise in framing abstract definitions. In a series of cases this Court has withheld the benefits of the reorganization provision in situations which might have satisfied provisions of the section treated as inert language, because they were not reorganizations of the kind with which § 112, in its purpose and particulars, concerns itself. See *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462; *Gregory* v. *Helvering,* 293 U. S. 465; *LeTulle* v. *Scofield,* 308 U. S. 415.

Congress has not attempted a definition of what is recapitalization and we shall follow its example. The search for relevant meaning is often satisfied not by a futile attempt at abstract definition but by pricking a line through concrete applications. Meaning frequently is built up by assured recognition of what does not come within a concept the content of which is in controversy. Since a recapitalization within the scope of § 112 is an aspect of reorganization, nothing can be a recapitalization for this purpose unless it partakes of those characteristics of a reorganization which underlie the purpose of Congress in postponing the tax liability.

No doubt there was a recapitalization of the Bazley corporation in the sense that the symbols that represented its capital were changed, so that the fiscal basis of its operations would appear very differently on its books. But the form of a transaction as reflected by correct corporate accounting opens questions as to the proper application of a taxing statute; it does not close them. Corporate accounting may represent that correspondence between change in the form of capital structure and essential identity in fact which is of the essence of a transaction

relieved from taxation as a reorganization. What is controlling is that a new arrangement intrinsically partake of the elements of reorganization which underlie the Congressional exemption and not merely give the appearance of it to accomplish a distribution of earnings. In the case of a corporation which has undistributed earnings, the creation of new corporate obligations which are transferred to stockholders in relation to their former holdings, so as to produce, for all practical purposes, the same result as a distribution of cash earnings of equivalent value, cannot obtain tax immunity because cast in the form of a recapitalization-reorganization. The governing legal rule can hardly be stated more narrowly. To attempt to do so would only challenge astuteness in evading it. And so it is hard to escape the conclusion that whether in a particular case a paper recapitalization is no more than an admissible attempt to avoid the consequences of an outright distribution of earnings turns on details of corporate affairs, judgment on which must be left to the Tax Court. See *Dobson* v. *Commissioner,* 320 U. S. 489.

What have we here? No doubt, if the Bazley corporation had issued the debentures to Bazley and his wife without any recapitalization, it would have made a taxable distribution. Instead, these debentures were issued as part of a family arrangement, the only additional ingredient being an unrelated modification of the capital account. The debentures were found to be worth at least their principal amount, and they were virtually cash because they were callable at the will of the corporation which in this case was the will of the taxpayer. One does not have to pursue the motives behind actions, even in the more ascertainable forms of purpose, to find, as did the Tax Court, that the whole arrangement took this form instead of an outright distribution of cash or debentures,

because the latter would undoubtedly have been taxable income whereas what was done could, with a show of reason, claim the shelter of the immunity of a recapitalization-reorganization.

The Commissioner, the Tax Court and the Circuit Court of Appeals agree that nothing was accomplished that would not have been accomplished by an outright debenture dividend. And since we find no misconception of law on the part of the Tax Court and the Circuit Court of Appeals, whatever may have been their choice of phrasing, their application of the law to the facts of this case must stand. A "reorganization" which is merely a vehicle, however elaborate or elegant, for conveying earnings from accumulations to the stockholders is not a reorganization under § 112. This disposes of the case as a matter of law, since the facts as found by the Tax Court bring them within it. And even if this transaction were deemed a reorganization, the facts would equally sustain the imposition of the tax on the debentures under § 112 (c) (1) and (2). *Commissioner* v. *Estate of Bedford,* 325 U. S. 283.

In the *Adams* case, No. 209, the taxpayer owned all but a few of the 5914 shares of stock outstanding out of an authorized 6000, par value $100. By a plan of reorganization, the authorized capital was reduced by half, to $295,700, divided into 5914 shares of no par value but having a stated value of $50 per share. The 5914 old shares were cancelled and the corporation issued in exchange therefor 5914 shares of the new no-par common stock and 6 per cent 20 year debenture bonds in the principal amount of $295,700. The exchange was made on the basis of one new share of stock and one $50 bond for each old share. The old capital account was debited in the sum of $591,400, a new no-par capital account was credited with $295,700, and the balance of $295,700 was

credited to a "Debenture Payable" account. The corporation at this time had accumulated earnings available for distribution in a sum not less than $164,514.82, and this account was left unchanged. At the time of the exchange, the debentures had a value not less than $164,208.82.

The Commissioner determined an income tax deficiency by treating the debenture bonds as a distribution of the corporation's accumulated earnings. The Tax Court sustained the Commissioner's determination, 5 T. C. 351, and the Circuit Court of Appeals affirmed. 155 F. 2d 246. The case is governed by our treatment of the *Bazley* case. The finding by the Tax Court that the reorganization had no purpose other than to achieve the distribution of the earnings, is unaffected by the bookkeeping detail of leaving the surplus account unaffected. See § 115 (b), and *Commissioner* v. *Wheeler,* 324 U. S. 542, 546.

Other claims raised have been considered but their rejection does not call for discussion.

Judgments affirmed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON dissent in both cases for the reasons stated in the joint dissent of Judges Maris and Goodrich in the court below. *Bazley* v. *Commissioner,* 155 F. 2d 237, 244.

UNITED STATES *v.* DICKINSON.

NO. 77. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Argued December 13, 1946.—Decided June 16, 1947.

1. Without condemning the land, the Government dammed a river and raised the water level by successive stages until it flooded part of respondents' land. More than 6 years after the dam began to impound water, but less than 6 years after the water reached its ultimate level, respondents sued for compensation under the Tucker Act, Judicial Code § 24 (20), 28 U. S. C. § 41 (20). *Held:* Their claims are not barred by the six-year limitation. Pp. 747–750.
2. When the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what really is "taken." P. 749.
3. When the Government takes part of a tract of land by flooding, it must pay for the damage caused by resulting erosion to the remainder of the tract. Pp. 750–751.
4. If the resulting erosion is in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage. P. 751.
5. When the Government takes land by flooding, it must pay the full value thereof, even though the owner subsequently, with the consent of the War Department, reclaims most of it by filling. P. 751.
6. Nothing in the record of this case justifies this Court in setting aside concurrent findings by the two courts below that the landowner was entitled to compensation for an easement for the intermittent flooding of his land above the new permanent water level created by the Government's dam. P. 751.

152 F. 2d 865, affirmed.

In suits under the Tucker Act, Judicial Code § 24 (20), 28 U. S. C. § 41 (20), respondents recovered judgments against the Government for the value of easements taken

*Together with No. 78, *United States* v. *Withrow*, also on certiorari to the same Court.

by it to flood permanently part of their land, for damages by erosion to parts of their land and for an easement for intermittent flooding of parts of their land. The Circuit Court of Appeals affirmed. 152 F. 2d 865. This Court granted certiorari. 328 U. S. 828. *Affirmed,* p. 751.

Ralph S. Boyd argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Frederick Bernays Wiener* and *Marvin J. Sonosky.*

Ernest K. James argued the cause for respondents. With him on the brief was *J. H. McClintic.*

Mr. Justice Frankfurter delivered the opinion of the Court.

These are two suits brought under the Tucker Act (Judicial Code § 24 (20), 28 U. S. C. § 41 (20)) to recover the value of property claimed to have been taken by the Government. The suits were consolidated for purposes of the trial and though they present minor differentiating factors they may here, as below, be disposed of by a single opinion.

In order to improve the navigability of the Kanawha River, West Virginia, Congress authorized construction of the Winfield Dam, South Charleston. Act of August 30, 1935, 49 Stat. 1028, 1035, in connection with H. Doc. No. 31, 73d Cong., 1st Sess., pp. 2–4. The water above the dam was to be impounded to create a deeper channel and to raise the river pool level in that area. Notice of the proposed pool elevation was given to abutting landowners on July 1, 1936, and the dam was completed and officially accepted by the United States on August 20, 1937. The river was to be raised by successive stages from 554.65 feet to 566 feet above sea level. That level was not reached until September 22, 1938. As a result

of the raising of the river the land belonging to the respondents was permanently flooded. In addition, erosion attributable to the improvement damaged the land which formed the new bank of the pool.

Respondents recovered judgments for the value of easements taken by the United States to flood permanently lands belonging to them. Damages were also awarded for the erosion, based on the cost of protective measures which the landowners might have taken to prevent the loss. In addition, the court found that the United States had also acquired an easement for intermittent flooding of part of the land belonging to the defendants, and allowed judgment for the value of such an easement. The Circuit Court of Appeals affirmed the District Court's judgment. 152 F. 2d 865. We granted certiorari, 328 U. S. 828, because important questions were raised relevant to the determination of just compensation for the taking of private property by the Government.

First. The principal attack by the United States against the judgments is that both actions were outlawed. The applicable statute of limitations is six years. The complaints were filed on April 1, 1943. The Government argues that the statute began to run on October 21, 1936, when the dam began to impound water. In any event, it maintains that the six years began to run not later than on May 30, 1937, when the dam was fully capable of operation, the water was raised above its former level, and the property of the respondents was partially submerged for the first time. While on the latter view the time for taking had not run under the statute, Dickinson's claim would be barred because he acquired the land after that date.

The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken."

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The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy. These suits against the Government are authorized by the Tucker Act either as claims "founded upon the Constitution of the United States" or as arising upon implied contracts with the Government. (See the discussion of jurisdiction both in the opinion of the Court and in the concurring opinion in *United States* v. *Lynah,* 188 U. S. 445, and in *Tempel* v. *United States,* 248 U. S. 121.) But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation." The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis* v. *Mills,* 194 U. S. 451, 457. One of the most theory-ridden of legal concepts is a "cause of action." This Court has recognized its "shifting meanings" and the danger of determining rights based upon definitions of "a cause of action" unrelated to the function which the concept serves in a particular situation. *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62, 67 *et seq.*

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action"—when they are born, whether they proliferate, and when they die.

We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really "taken." Accordingly, we find that the taking which was the basis of these suits was not complete six years prior to April 1, 1943, nor at a time preceding Dickinson's ownership. In this conclusion we are fortified by the fact that the two lower courts reached the same conclusion on what is after all a practical matter and not a technical rule of law.

Nothing heretofore ruled by the Court runs counter to what we have said. The Government finds comfort in *Portsmouth Co.* v. *United States,* 260 U. S. 327. But in that case the problem was whether by putting a gun battery into permanent position with a view to converting an area, for all practical purposes, into an artillery range, the Government inevitably took an easement in the land over which the guns were to be fired. The issue was not when a suit must be brought on a claim in respect to land taken by the United States, which is the issue before us, but whether there had been a taking at all.

Second. The Government challenges the compensation awarded for damage to the land due to erosion. It regards this damage as consequential, to be borne without any right to compensation. *Peabody* v. *United States,* 231 U. S. 530. Of course, payment need only be made for what is taken, but for all that the Government takes it must pay. When it takes property by flooding, it takes the land which it permanently floods as well as that which inevitably washes away as a result of that flooding. The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking. This falls under a principle that in other aspects has frequently been recognized by this Court. It was thus put in *Bauman* v. *Ross,* 167 U. S. 548, 574: "when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that ac-

count." So, also, *United States* v. *Welch,* 217 U. S. 333; *United States* v. *Grizzard,* 219 U. S. 180. Compare *Sharp* v. *United States,* 191 U. S. 341, 355; *Campbell* v. *United States,* 266 U. S. 368. Congress has recognized that damage to the owner is assessed not only for the value of the part taken but also "for any injury to the part not taken." See § 6 of the Act of July 18, 1918, 40 Stat. 911, 33 U. S. C. 595. If the resulting erosion which, as a practical matter, constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage, as the courts below held.

Third. At considerable expense, and with the consent of the War Department, Dickinson reclaimed most of his land which the Government originally took by flooding. The Government claims that this disentitled him to be paid for the original taking. The courts below properly rejected this defense. When the property was flooded the United States acquired the land and it became part of the river. By his reclamation, Dickinson appropriated part of what belonged to the United States. Whether the War Department could legally authorize Dickinson's reclamation or whether it was in fact a trespass however innocent, is not before us. But no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose.

Fourth. Judgment was also allowed against the United States for taking an easement for intermittent flooding of land above the new permanent level, and a value for such easements was assessed. We find nothing in this record to justify our setting aside these concurrent findings by two courts. *United States* v. *O'Donnell,* 303 U. S. 501, 508; *Allen* v. *Trust Co.,* 326 U. S. 630, 636.

Judgments affirmed.

AIRCRAFT & DIESEL EQUIPMENT CORP. *v.* HIRSCH ET AL.

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

No. 95. Argued January 15, 1947.—Decided June 16, 1947.

1. Pursuant to the First and Second Renegotiation Acts, the Secretary of War and the War Contracts Adjustment Board, respectively, determined that appellant had realized excessive profits during two years on subcontracts under which it had supplied parts to contractors manufacturing war equipment for the Army; and the Under Secretary of War directed certain of appellant's customers to withhold and pay into the Treasury sums due appellant equal to such excessive profits (less tax credits) for the second of the years in question. After petitioning the Tax Court for redetermination and while such proceedings were pending, appellant sued in a federal district court for a declaratory judgment that the Renegotiation Acts are unconstitutional and for an injunction against further proceedings thereunder. *Held:*

   (a) The suit is premature, since appellant had not exhausted its administrative remedy before the Tax Court. Pp. 764–774.

   (b) The district court had no jurisdiction in equity, since appellant had a complete remedy at law by actions against the contractors to which it had supplied the parts. Pp. 774–781.
2. Mere suggestions of claim for relief raising serious constitutional questions are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably. P. 763.
3. The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. P. 767.
4. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. P. 767.

5. By providing in the Renegotiation Acts for administrative determinations of excessive profits by the War Contracts Price Adjustment Board and for redeterminations *de novo* by the Tax Court, Congress intended to secure uniformity of administrative policy and disposition, expertness of judgment, and finality of determination, at least of those things which Congress intended to and could commit to such agencies for final decision. Pp. 767–768.
6. Congress intended the Tax Court's functions with respect to redetermination of excessive profits under war contracts not only to be put in motion but to be fully performed, before judicial intervention at the instance of one in appellant's position, even though constitutional questions are raised. P. 771.
7. Where Congress clearly intended to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process—especially in the case of wartime legislation resting, at least in part, on war powers. Pp. 773–774.
8. Appellant subcontractor has an adequate remedy at law by suits upon its contracts against its customers; since such suits are not forbidden expressly or impliedly by the Renegotiation Acts, they are not made dependent upon completion of the Tax Court proceedings, and there appears to be no reason why every question of constitutionality raised in this suit could not be presented and determined in such a suit. Pp. 775–777.
9. Appellant's allegations that it would suffer irreparable injury as a result of the withholding of the funds due from its customers are insufficient to sustain the intervention of a court of equity, particularly to avoid or anticipate the congressionally authorized proceeding. Pp. 777–778.
10. Nor, on the facts of this case, is the showing made concerning multiplicity of suits sufficient to justify intervention of a court of equity or the substitution of its extraordinary relief for what appears to be a full, adequate and completely available remedy at law. Pp. 778–781.

62 F. Supp. 520, affirmed.

While proceedings were pending in the Tax Court for redetermination of excessive profits determined by the Secretary of War and the War Contracts Price Adjustment Board to have been realized by a subcontractor on production of war equipment, the subcontractor sued in

a Federal District Court for a declaratory judgment that the Renegotiation Acts are unconstitutional and for an injunction against further proceedings thereunder. The District Court dismissed the suit. 62 F. Supp. 520. On appeal to this Court, *affirmed*, p. 781.

Arthur R. Hall argued the cause for appellant. With him on the brief were *Earl B. Wilkinson, Francis W. Hill, Jr.* and *J. Alfred Moran.*

Robert L. Stern argued the cause for appellees. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Ray B. Houston.*

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This case is the fourth in a series seeking here a determination of the invalidity, on constitutional grounds, of the First and Second Renegotiation Acts[1] and allied legislation.

In *Coffman* v. *Breeze Corporations,* 323 U. S. 316, and in *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129, the Royalty Adjustment Act[2] was attacked. The *Alma Motor* case was remanded to the Circuit Court of Appeals for a determination of the Act's applicability. The suit in the *Coffman* case was by a patent owner to restrain his licensees from paying accrued royalties to the Government pursuant to the Act's provisions. We held

[1] The First Renegotiation Act was contained in § 403 of the Sixth Supplemental National Defense Appropriation Act, 56 Stat. 226, as amended 56 Stat. 798, 982, 57 Stat. 347, 57 Stat. 564. The Second Renegotiation Act appears in the 1943 Revenue Act. 58 Stat. 21, 78, as amended 59 Stat. 294.

[2] Of October 31, 1942, 56 Stat. 1013, 35 U. S. C. (Supp. V, 1946) §§ 89–96.

that the complaint had been rightly dismissed for want of equity jurisdiction, since the plaintiff had an adequate remedy at law by suit against its licensees, and also for want of a justiciable case or controversy.

In *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371, a government contractor challenged the Renegotiation Acts.[3] The complaint sought to enjoin the Secretary of the Navy from taking 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." 326 U. S. at 374. Accordingly we held that the Government was an indispensable party. Since it neither had been joined in the suit nor had consented to be sued in such a proceeding, it followed that the complaint had been properly dismissed.

In one other case, *Macauley* v. *Waterman S. S. Corp.,* 327 U. S. 540, constitutionality was not involved, but coverage of the Renegotiation Acts was put in issue. The suit was brought in a District Court for a declaratory judgment and to restrain further renegotiation proceedings affecting the specified contracts. The contractor had not sought a decision on coverage from the Tax Court. We held that the Tax Court has power to decide such questions in the proceedings authorized by § 403 (e) (1) of the Second Renegotiation Act. Hence, under the authority of *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, the complaint in the *Waterman* case also was held rightly to have been dismissed, in this instance for the plaintiff's failure to exhaust its administrative remedy.

Now the Aircraft & Diesel Equipment Corporation seeks a declaratory judgment that the First and Second Renegotiation Acts are unconstitutional on various grounds. Injunctive relief also is asked. And, in addi-

[3] See note 1.

tion to the constitutional questions, determination is sought of issues of coverage and other matters.

The defendants, appellees here, consist of the members of the War Contracts Price Adjustment Board, the Secretary of War, and the Under Secretary of War.[4] Pursuant to the statutory requirement, 50 Stat. 751, 752, 28 U. S. C. § 380 (a), a district court of three judges was especially convened. After hearing, the complaint was dismissed.[5] One ground for this action was that the suit is premature, since proceedings were pending and undetermined in the Tax Court, pursuant to appellant's applications, for redetermination of its allegedly excessive profits for 1942 and 1943.[6] The court also held that it was without jurisdiction in equity, since in its view adequate remedy at law was available to Aircraft. Probable jurisdiction of the appeal was duly noted here.[7]

We think the District Court correctly dismissed the complaint, and for the reasons stated as grounding its action. The issues expansively include almost all comprehended in the causes previously determined here. But the case reaches this Court in a posture differing in some sub-

[4] The War Contracts Price Adjustment Board is created by § 403 (d) (1) of the Second Renegotiation Act, 50 U. S. C. App. (Supp. V, 1946) § 1191 (d) (1). The present appellees were substituted by an order of the District Court as successors in office of the original defendants.

[5] 62 F. Supp. 520.

[6] See note 9. The Tax Court proceedings remain pending and undetermined at the date of this decision.

[7] On appellant's application the District Court enjoined the defendants, pending determination of the appeal, from taking further action to enforce the statutes, particularly by notifying or requiring appellant's customers to pay into the Treasury of the United States moneys alleged to be due Aircraft under contract provisions, but claimed by appellees to be payable to the Government as excessive profits pursuant to the Acts' terms. Cf. notes 10, 13 *infra*.

stantial respects from that characterizing any of those proceedings. Hence it becomes necessary to set forth with some particularity the facts and controlling issues.

I.

Appellant is in the business of manufacturing diesel fuel injection equipment and precision parts, and aircraft precision parts. Its manufacturing activities, insofar as material,[8] were carried on under subcontracts with government contractors. The contractor in turn furnished the completed aircraft or engines to the United States.

Pursuant to the First Renegotiation Act, the Secretary of War, acting through his delegate the Under Secretary of War, determined on October 27, 1943, that during the fiscal year ended November 30, 1942, appellant had realized excessive profits (less tax credits) amounting to $204,000. On April 29, 1944, the Under Secretary directed appellant's customers to withhold this sum from appellant. Thereafter it filed a petition with the Tax Court[9] for a redetermination of the alleged excessive

[8] The amended complaint alleges that appellant supplied materials to the Department of the Navy under one contract made directly between it and the Government. But it is also alleged that appellant has been paid in full for these supplies. Apparently, therefore, the contract and the relation which it created between appellant and the Government have no bearing upon the issues in this cause.

[9] The First Renegotiation Act did not provide for redetermination by the Tax Court as originally enacted; nor did it specifically provide for review, by any body, of the determination of excessive profits. See Steadman, A Further Legal Inquiry Into Renegotiation: I (1944) 43 Mich. L. Rev. 1, 12. But Tax Court redetermination was afforded by the Second Renegotiation Act and was made retroactive. 50 U. S. C. App. (Supp. V, 1946) § 1191 (e) (2) provides that it is available to "Any contractor or subcontractor . . . aggrieved by a determination of the Secretary made prior to the date of enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excess profits . . . ."

profits. Nevertheless, on July 19, 1944, the Under Secretary further directed appellant's customers to pay the $204,000 into the Treasury of the United States, and this direction was obeyed.[10]

Following the fiscal year ended November 30, 1943, renegotiation proceedings were instituted under the Second Renegotiation Act. On January 11, 1945, the Under Secretary of War, as delegate of the War Contracts Price Adjustment Board, entered an order determining that appellant had realized excessive profits of $1,265,000. Deduction of tax credits reduced this amount to approximately $270,000. Appellant again filed a petition for redetermination with the Tax Court.[11] Then followed this suit.

The amended complaint is too lengthy for detailed summarization in this opinion. Apart from allegations going to constitutionality and coverage, including asserted defects in the renegotiation procedures followed,[12] the

[10] The original Act, as amended, provided: "Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract . . . (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract . . . ." 56 Stat. at 983. See also note 13.

[11] An earlier petition was dismissed on motion of the United States because it was filed during the time when the War Contracts Price Adjustment Board might have initiated a review. Cf. *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. After dismissal of the earlier petition and before filing of the later one, appellant had sought redetermination, pursuant to § 403 (e) (1) of the Second Renegotiation Act, by the War Contracts Price Adjustment Board. The Board denied review and adopted the Under Secretary's redetermination as its own.

[12] For example, in addition to contentions that the Renegotiation Acts as a matter of substantive law violate Article I, § 1, of the Constitution in that they constitute unlawful delegations of legislative power as well as contravene the due process and just compensation

complaint sought to establish jurisdiction in the District Court, equitable in character, by showing the inadequacy of all available legal or other remedies. These included the pending Tax Court proceedings, possible suit in the Court of Claims following completion of the Tax Court's determination, and actions at law against appellant's customers, contractors with the Government, to recover the amounts said to be due under their various contracts.

In particular it was alleged that, notwithstanding the pendency of the Tax Court proceedings, the Board and the Secretary, or his delegates, were taking steps to prevent Aircraft's customers from paying over to it moneys owing on contracts, aggregating $270,000, and claimed to be due the Government as excessive profits. The complaint alleged further that the Board and the Secretary were threatening to direct Aircraft's customers to pay these sums into the Treasury [13] and that, unless they were re-

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provisions of the Fifth Amendment, the jury trial provision of the Seventh Amendment, and the Tenth Amendment, it is said that the order under the Second Renegotiation Act was based in part at least on information said to have been obtained from "governmental and other reliable sources" which the appellant has had no opportunity to examine or rebut.

[13] Section 403 (c) (2) of the Second Renegotiation Act, 50 U. S. C. App. (Supp. V, 1946) § 1191 (c) (2), provides: "Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. . . ."

strained, such payment would be made, to appellant's irreparable injury.[14] No direct relief was asked, by way of judgment or decree, for refund of the $204,000 collected by the Government from appellant's customers, pursuant to the First Renegotiation Act, as excessive profits realized in 1942. It was suggested, however, that if that Act should be found invalid and the Second Act sustained,[15] the Government should be permitted to collect only the difference between $270,000, the amount determined to be excessive profits for 1943, and the $204,000 collected for 1942. The suggestion, of course, if formally

[14] The allegations included the following: "Notwithstanding the fact that the plaintiff has filed its petition for redetermination in The Tax Court of the United States whereby it seeks an orderly determination of the amount, if any, it may owe to the United States of America, as excessive profits for its fiscal year ending November 30, 1943, the War Contracts Price Adjustment Board, purporting to act under the provisions of Section 403 (c) (2) of the Renegotiation Act, purposes to direct the defendant Henry L. Stimson, Secretary of War, or his delegates, to direct contractors, customers of the plaintiff, to withhold moneys due to the plaintiff by such contractors for the account of the United States, in amounts determined by it, the War Contracts Price Adjustment Board, to be due as excessive profits, and Henry L. Stimson, Secretary of War, or his delegates purposes to follow such directions of the War Contracts Price Adjustment Board and further to direct such contractors to pay such sums of money into the Treasury of the United States, in accordance with the procedure adopted by Henry L. Stimson, Secretary of War, acting through his delegate, Robert P. Patterson, in respect of excessive profits found by him to be due for the fiscal year of the plaintiff ending November 30, 1942, as heretofore, recited in this complaint, before The Tax Court of the United States of America shall have made or shall have had opportunity to make any determination of this plaintiff's petition for a redetermination of its excessive profits, if any, for its fiscal year ending 1943." See also note 42.

[15] The omission from the First Act of various provisions contained in the Second, see, *e. g.*, note 9 *supra*, is alleged to afford basis for invalidating the former even though the latter may be held constitutional.

made, would be substantially a claim against the Government by way of setoff of the latter amount. Cf. *Mine Safety Co.* v. *Forrestal, supra.*

The Government has contested each of appellant's claims. But its primary contentions have been aimed at Aircraft's jurisdictional showing. It argues that the suit in substance and legal effect is one against the United States, to which there has been no governmental consent, cf. *Mine Safety Co.* v. *Forrestal, supra;* that the suit is premature, because the Tax Court proceedings have not been completed and until this has been done Aircraft will not have exhausted its administrative remedy, cf. *Macauley* v. *Waterman S. S. Corp., supra;* that the Tax Court has been given exclusive jurisdiction in renegotiation matters; and that, in any event, there is no jurisdiction of an equitable character in the District Court, to afford the relief appellant seeks, since it has an adequate remedy at law by suit upon its contracts to recover any amounts due from its customers, in which all questions of constitutionality may be determined. Cf. *Coffman* v. *Breeze Corporations, supra.*

In the latter connection appellee Hirsch, as chairman of the Board, has filed an affidavit admitting that he and the other appellees, unless restrained, will take steps, as appellant alleges, to prevent payment of the $270,000 by its customers to it, and also to secure payment of that sum into the Treasury. The affidavit sets forth, however, that direction for payment will not be required or made as to more than two or three of appellant's customers and, in the event this does not result in payment of the full amount, the Government will proceed to collect whatever may remain by suit against appellant.

Aircraft, on the other hand, both in the amended complaint and by the supporting affidavit of its president, alleged that no such sum as $270,000 was owing to it from, or could be collected by direction to, any two or three of

its customers. Rather it was set forth that collection of any such amount could be made only by direction to some sixteen or more customers. And on the same basis it is asserted that Aircraft's remedy by suit against its customers would require institution of numerous actions in different jurisdictions, resulting in expense and delay, as well as loss of good will and incurring the continued risk of the customers' solvency.[16] Accordingly Aircraft claims that jurisdiction in equity is conferred upon the District Court both by reason of the multiplicity of suits involved in asserting the legal remedy by actions against its customers and because of the injurious consequences which would follow from pursuing that course.

II.

We do not find it necessary to undertake determining the threshold question whether the suit is one against the United States. Were the issue squarely presented as a formal claim for refund or setoff concerning the $204,000 collected by the Government for 1942, the case in that aspect would be very close to *Mine Safety Co.* v. *Forrestal, supra.*[17]

We do not tarry, however, to consider further this feature of the case, since the absence of formal and specific claim in the nature of setoff or otherwise indicates, we

[16] See note 42 *infra.*

[17] Although asserted by way of equitable setoff, the effect of allowing such a claim would be, as we said in the *Mine Safety* case, to prevent the Secretary from taking certain action which, though it would not "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," nevertheless would amount to "an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented," 326 U. S. 374, 375, and to which, as in that case, it has not been made formally a party.

think, a strategic decision to avoid the difficulties which would follow upon its definite and unequivocal assertion, on the score of the nature of the suit as being one in fact and function against the Government. Something more than a mere suggestion of claim for relief is required to bring into play judicial power of affording remedy, especially when it appears there may be good reason deliberately accepted for going no farther. This is reinforced when the suggestion, if acted on, would involve the Court in decision of serious constitutional questions. They are not to be entertained upon dubious presentations or, most certainly, when the presentation reasonably may be taken as not intended to put them forward squarely and inescapably. Cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129. Accordingly we put to one side the lengthy allegations concerning the 1942 determination, and confine our consideration to the issues relating to the redetermination made for the fiscal year of 1943.

These also, the Government urges, substantially are effective to make the suit one against the Government, to which it has not consented. And for this view, likewise, it relies upon the *Mine Safety* decision, as well as others.[18] Appellant undertakes to distinguish the cases upon the basis that in the *Mine Safety* case the official action sought to be enjoined was conduct effective to stop the payment of funds out of the Treasury, whereas here the analogous conduct affects no funds in the Government's actual possession but seeks only to touch moneys held by third persons for appellant's or the Government's account. The difference, it is urged, is between action affecting only the withholding of government moneys and action effective to bring about collection from third persons of moneys claimed to be due to the Government.

[18] Especially *Louisiana* v. *McAdoo,* 234 U. S. 627; *Belknap* v. *Schild,* 161 U. S. 10; *In re Ayers,* 123 U. S. 443.

That difference indeed may be substantial. But we do not decide whether it is sufficient to enable the appellant to avoid the difficulty presented of foreclosing the Government's claim by a suit brought only against its officials, essentially as trespassers,[19] without joining the Government itself. In other words, we do not determine whether the suit is, in legal effect, one against the Government, since in our opinion the other grounds going to the District Court's jurisdiction are adequate to sustain its dismissal of the cause.

Ordinarily of course issues relating to exhaustion of administrative remedies, as a condition precedent to securing judicial relief, and to the existence of jurisdiction in equity are either separate or separable matters, to be treated as entirely or substantially distinct. The one generally speaking is simply a condition to be performed prior to invoking an exercise of jurisdiction by the courts. The other goes to the existence of judicial power in the basic jurisdictional sense. In this case, however, the exhaustion problem and that of equity jurisdiction are closely, indeed inseparably, related. And both are colored by the relevant specific provisions of the Renegotiation Acts, more particularly the Second, since it alone provides for Tax Court redetermination.[20]

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[19] Appellant's claim is that ordering its customers not only to withhold funds due to it under the contracts but also to pay them into the Treasury would be, in effect, a "trespass upon its property" within the rule of *United States* v. *Lee*, 106 U. S. 196; cf. *Land* v. *Dollar*, 330 U. S. 731, and that execution of such orders would deprive it of vested property rights, contrary to various constitutional provisions. Since a decision of the constitutional issues would determine the Government's right to the funds, in any event, the case, like *Land* v. *Dollar*, *supra*, would seem to be one "where the question of jurisdiction [as involving the Government's immunity to suit] is dependent on decision of the merits." 330 U. S. at 735.

[20] The provision, however, applies to determinations made prior to the Act's effective date. See note 9 *supra*.

In *Macauley* v. *Waterman S. S. Corp., supra,* we were called upon to consider the relation between the Tax Court proceedings, as provided by § 403 (e) (1), and judicial proceedings instituted in the district or other courts of the United States in regard to renegotiation matters. Section 403 (e) (1) authorizes "any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by" him, to file a petition for redetermination with the Tax Court within ninety days after notice of the order is mailed.[21] The section then provides:

> "Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency."

The section expressly states that the proceeding "shall not be treated as a proceeding to review the determination of the Board,[22] but shall be treated as a proceeding de novo." And the Tax Court is given the same powers and duties, "insofar as applicable," respecting "the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers," together with other procedural matters, as the court has under specified sections of the

[21] Otherwise the Board's order becomes final. § 403 (c) (1). The provision reads: "In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency."

Similarly, a limitation of one year is placed upon "all liabilities of the contractor or subcontractor for excessive profits received or accrued" during each fiscal year. See § 403 (c) (3).

[22] See note 11 *supra.*

Internal Revenue Code in redetermining a deficiency in taxes. Moreover, § 403 (e) (1) commands: "The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2)."

In the *Waterman* case, taking account of these provisions, we said: "The legislative history of the Renegotiation Act, moreover, shows that Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law,[23] which latter include the issue raised here of whether the contracts in question are subject to the Act." 327 U. S. at 544. "To grant the injunction sought," the opinion continued, "the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies [24] authorized to do so have not yet made their determination. Here just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun. The District Court consequently was correct in holding that it lacked jurisdiction to act." *Ibid.*, 544–545.

The *Waterman* case differed from this one in three respects. There the appellant had "hardly begun" the administrative process, while here Aircraft has done all that it can do. The Waterman Corporation had contracted directly with a government agency, the Maritime Commission. Here the appellant is a subcontractor, a difference of some importance in the matter of jurisdiction in equity later to be noted. The *Waterman* case, as we

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[23] Citing, at 90 Cong. Rec. 1355, the statement of a sponsor in the House that the Tax Court could decide "all questions of fact and law . . . ." See also notes 30, 35 *infra*.

[24] The Waterman S. S. Corporation not only had failed to file a petition with the Tax Court but also had refused to attend renegotiation conferences with the Board or to supply information sought by it.

have said, raised only questions of coverage, not issues of constitutionality. Here both types of question are presented. On the other hand, the cases are substantially identical in the nature of the relief sought. Each complaint asked for a declaratory judgment upon the legal issues and for injunctive relief restraining further action looking toward application of the Act's provisions.

We do not think the differences mentioned are sufficient to distinguish the cases for purposes of applying the exhaustion rule. Certainly no such effect can be derived from the fact that in the *Waterman* case the plaintiff had not begun the administrative process, while here Aircraft has gone as far as it can. The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.

The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniform-

ity of administrative policy and disposition,[25] expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision.

There can be no doubt whatever, in view of the legislative history, that Congress had each of these ends in view when it provided for the Tax Court proceedings, as well as for action by the Board prior to that stage. Indeed the Board was created in large part to bring under a single aegis the last stage of informal renegotiation before the Tax Court action, in order thus to secure as nearly as possible uniform policy and administration of renegotiation problems.[26] This policy was followed and reinforced in the provision for Tax Court redetermination. And that procedure was chosen deliberately in preference to judicial review in the Court of Claims or elsewhere, primarily because of the Tax Court's [27] expertness in fiscal matters analogous to those arising in connection with renegotia-

[25] See note 26 *infra*.

[26] See 89 Cong. Rec. 9928–9929. Previously the governmental departments concerned with renegotiation had set up a central board to effect a "more uniform policy in the determination of excessive profits," H. Rep. 871, 78th Cong., 1st Sess., 75, but there was dissatisfaction with the board thus voluntarily established, see 89 Cong. Rec. 9934, and "insistence in Congress that coordination between the departments having renegotiating authority under the prior act be not a matter of voluntary cooperation but one of statutory necessity." Steadman, A Further Legal Inquiry Into Renegotiation: I (1944) 43 Mich. L. Rev. 1, 6.

[27] See 53 Stat. 158, as amended by 56 Stat. 957, 26 U. S. C. (Supp. V, 1946) § 1100: "The Board of Tax Appeals (hereinafter referred to as the 'Board') shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of The Tax Court of the United States."

tion problems,[28] as well as its essentially judicial procedures and experience.[29]

It is equally clear that Congress intended to endow the Tax Court's decisions with a very large degree of finality, as appears from the very terms of § 403 (e) (1), from the whole structure of the Act, and from the legislative history.[30] The express command of § 403 (e) (1) is not simply that the Tax Court shall have "exclusive jurisdiction, by order, to finally determine" the amount of excessive profits, if any. It is also that the determination "shall not be reviewed or redetermined by any court or agency." This is buttressed by the prohibition that filing the petition shall not operate to stay execution of the Board's order under § 403 (c) (2).[31] And not irrelevant to the statute's general policy of finality are the provisions making the Board's determinations final, if the petition for Tax Court redetermination is not filed in the specified time, and those of the Secretary or his delegates final if similar action is not taken to secure redetermination by the Board. § 403 (c) (1).

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[28] See H. Rep. 871, 78th Cong., 1st Sess., 77; Steadman, A Further Legal Inquiry Into Renegotiation: II (1944) 43 Mich. L. Rev. 235, 270; cf. S. Rep. 627, 78th Cong., 1st Sess., 109; H. Rep. 1079, 78th Cong., 2d Sess., 83.

[29] *Dobson* v. *Commissioner,* 320 U. S. 489, 498; cf. note 27.

[30] "That court will have exclusive jurisdiction, by an order, to make a final determination as to whether excessive profits have been received or accrued, or whether a fair price has been determined, and The Tax Court's determination may not be reviewed or redetermined by any other court or agency." H. Rep. 871, 78th Cong., 1st Sess., 77. See also 89 Cong. Rec. 9930: "The committee has provided that any contractor aggrieved by a determination of excessive profits under the old law, whether he was cooperative and signed a closing agreement or not, may have a review of that determination in the Tax Court of the United States and in the review have all issues, constitutional and otherwise, decided by the court."

[31] See note 13 *supra.*

True, the statute expressly confers rights to follow through the various stages of the procedure to the end of the Tax Court phase. Nevertheless its entire structure indicates the congressional purpose to have matters of renegotiation promptly and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded.

At the height of the war Congress recognized, as did the procuring agencies,[32] that speed in procurement, and consequently in production of war materials, outweighed all other considerations normally applicable. And while renegotiation was a product of that necessity rather than a cause, the problems it raised were time consuming and closely related to pricing difficulties.[33] Often they worked to hinder and delay the process of procurement. Congress therefore sought, so far as possible, to relieve the interrelated processes from the tedious burden of litigation. It did this by writing the policy of finality into the Act's provisions at each successive procedural stage, although

[32] The record contains an affidavit made by Robert P. Patterson when Under Secretary of War which reads in part: "Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. . . ."

". . . the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis."

[33] The Second Renegotiation Act separated the repricing authority from renegotiation. See 58 Stat. 92, 50 U. S. C. App. (Supp. V, 1946) § 1192. See also S. Rep. 627, 78th Cong., 1st Sess., 37–38.

saving the right of resort eventually to the Tax Court to those acting promptly in the prescribed way.

We do not express any opinion, indeed we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters. But we cannot infer from a statute so conditioned in background, purpose, terms and compulsion derived from the inevitable circumstances of its application that Congress intended to allow skirting the procedures devised altogether or partially, more particularly in any case where following them could result in no greater loss than the delay and inconvenience which would flow from inability to seek some other remedy not dependent upon their completion.

We are not forced in this case, however, to decide whether Congress intended to give the Tax Court the last word upon all questions of fact and law, or whether it could do so if that were surely its purpose. Nor need we become involved in an attempt to decide what particular questions it might have left, or did leave, for that body's final and conclusive disposition. For it seems obvious, in view of the Act's terms, history, objects and the policies incorporated, that Congress clearly and at the very least intended the Tax Court's functions not only to be put in motion but to be fully performed, before judicial intervention should take place at the instance of one in appellant's position.

This indeed was the ruling of the *Waterman* case. And we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this cause. Nor is it overcome, in our judgment, by the showing which has been made on this record of irreparable injury and of the need as well as the power of equity to forestall the complete operation of the congressionally prescribed procedure.

On the contrary, whatever may be true of other situations,[34] in this case the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its function. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint.

The Tax Court may decide entirely in appellant's favor. Indeed, if it can sustain there the claims and issues it offers to support here, that possibility is not an unlikely one. For, apart from the questions of constitutionality and of the Tax Court's power to decide them finally or otherwise,[35] appellant has put forward, in both proceedings,[36] claims of exemption and noncoverage relating to contracts involving much larger amounts than the aggregate sums affected by renegotiation, after deduction of tax credits.[37] And if those claims are well founded, as to which of course we express no opinion, the Tax Court's determination

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[34] See note 38 *infra*.

[35] See notes 23, 30 *supra*; cf. *Helvering* v. *Independent Life Ins. Co.*, 292 U. S. 371, reversing 67 F. 2d 470, affirming 17 B. T. A. 757; *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T. C. 863.

[36] A copy of the petition for redetermination filed in the Tax Court by appellant has been attached as an exhibit to the complaint.

[37] Appellant in its complaint alleged, for example, that although for the fiscal year ending November 30, 1943, its total sales amounting to $3,548,845.50 were renegotiated, "only $2,207,574.95, in any event, were subject to renegotiation; that $1,312,250.07 of its total sales were of 'Standard Commercial Articles' as defined in the Renegotiation Act; were articles sold under competitive conditions affecting the sale thereof in a manner which reasonably protected the Government against excessive prices, and, as such, were not subject to renegotiation; that $29,020.48 of its total sales were not sold for the ultimate use of the United States of America or any department, agency or instrumentality thereof, but were made and sold for civilian use, and, as such, were not subject to renegotiation."

of these matters of coverage, which we held in the *Waterman* case are initially at least for its disposition, well might render consideration of the constitutional questions by it unnecessary and this cause moot.

Certainly that possible outcome should not be anticipated, either here or by the District Court, through a decision in this case on the constitutional issues. *Rescue Army* v. *Municipal Court,* 331 U. S. 549. No more should it be forestalled by decision upon the matters of coverage. *Macauley* v. *Waterman S. S. Corp., supra.*

It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.[38] But, without going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inade-

[38] Thus, the Court has permitted resort to a federal court of equity where a state was enforcing confiscatory rates and by its law precluded a stay or supersedeas until the state courts "acting in a legislative capacity" had taken final action. *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290; *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196; *Porter* v. *Investors Syndicate,* 286 U. S. 461. For other decisions holding that a federal court may exercise its equitable jurisdiction where there is an inadequate state remedy to correct a constitutional wrong, see *Hillsborough* v. *Cromwell,* 326 U. S. 620; *Wallace* v. *Hines,* 253 U. S. 66.

The rule has been applied most frequently in respect to state rather than federal administrative action, though of course it is not inapplicable to the latter, notwithstanding the power of Congress to regulate the jurisdiction and procedure of the federal courts may present obstacles to its application not present in state cases.

quacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded.

More especially is this true with legislation, of this type, adopted during and to meet the emergency of war and resting, at least in part, upon war powers. For, in such cases, "only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed," *Yakus* v. *United States,* 321 U. S. 414, 435, a statement implicitly requiring exhaustion, not merely initiation, of the statutory procedure.

We need not decide in this case, however, whether mere doubt concerning the adequacy of administrative or other relief would be sufficient for allowing anticipation of the administrative determination. For that course is not to be followed if there is another remedy, not inconsistent with the congressional command, and of certain character, even though it be neither so expeditious or convenient as some other sought to be substituted which circumvents that command. To this of course should be added the further qualification that following the prescribed remedy, upon the showing made, will not certainly or probably result in the loss or destruction of substantive rights.

This brings us to consideration of the showing made here in support of equity's intervention. That showing, we think when considered in the light of the foregoing principles and of the statute's clear purpose and intent, is not sufficient.

Whatever may be the scope allowed generally for equity to intervene upon the ground of inadequacy of legal remedies, where no explicit congressional command exists for following a prescribed procedure, the problem when

such a mandate is present is entirely different from one tendered in its absence. The very fact that Congress has made the direction must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. That fact itself may be of such weight as to turn the scales the other way, even in situations much more doubtful than the present one. In short, the so-called general principles governing the exercise of jurisdiction in equity are not to be taken, in such a case, as isolated from all effect of the legislative mandate or necessarily or even readily as overriding it.

In the first place, there can be no doubt of the availability or indeed of the certainty and effectiveness of appellant's remedy at law by suit upon its contracts against its customers claimed to owe it money under those agreements. Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings.[39] Moreover we know of no reason

[39] It is unnecessary to consider whether in such a suit a district court should find it proper to defer its final decision until after the Tax Court had made its final redetermination, in order possibly to avoid the necessity of deciding the constitutional questions. Cf. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 599, and cases cited. For, even in the event of such action, the court would have power to preserve, pending the administrative decision, the *status quo* and all rights of the appellant. The provision in § 403 (e) (1) that the filing of a petition with the Tax Court "shall not operate to stay the execution of the order of the [War Contracts Price Adjustment] Board" under § 403 (c) (2) does not mean that the courts are deprived of their power to grant stays where necessary. "Where Congress wished to deprive the courts of this historic power, it knew how to use apt words . . . ." *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 17. It did so in the Emergency Price Control Act of 1942, 56 Stat. 23; see *Yakus* v. *United States*, 321 U. S. 414, 429, 437, using very explicit language. Here the provision literally at any rate appears to mean only that there shall be no automatic stay by virtue of filing the petition in the Tax Court.

why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit.

In addition, there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it or, at the least, undertaking the responsibility for making the defense. For by § 403 (c) (2)[40] it is expressly provided: "Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph."

In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to indemnify or reimburse the contractor for the liability thus incurred. In effect, the Government has consented to suit by the contractor in the Court of Claims on account of any liability the contractor incurs by virtue of lawful payment of the subcontractor's claims.

Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of the appellant, including constitutional ones.

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[40] The paragraph covers withholding payment pursuant to direction by the Board to the contractor, for the account of the United States. See note 13 *supra*.

In this respect the case stands identically with *Coffman* v. *Breeze Corporations, supra.*[41] If any such inadequacy exists, it must be by virtue of factors extraneous to the nature of the suit itself and not present in the *Coffman* case.

These appellant seeks to establish in its showing relating to multiplicity of suits and irreparable injury. Apart from multiplicity, the showing concerning injury certainly would not be sufficient to justify eliminating the Tax Court proceeding.[42] Boiled down, the allegations come

[41] The situation of the licensor in the *Coffman* case, with reference to the remedy by suit against its licensees was exactly the same as appellant's situation here in respect to suit against its customers, the contractors with the Government. We said, as to the adequacy of that remedy: "But whether the provisions of the Act be valid or invalid appellant shows no ground for equitable relief. If valid they would be a defense, and appellant would be entitled to no relief other than that afforded by the suit against the Government authorized by § 2 of the Act. If invalid, appellant's right to recover remains unimpaired. The sufficiency of the defense may be as readily tested in a suit at law to recover the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury. In either case appellant would receive all the relief to which it shows itself entitled." 323 U. S. at 323.

The *Coffman* decision stood squarely upon the grounding of the adequacy of the remedy by suit against the licensees, although it rested also upon the alternative ruling that there was no case or controversy. This was for the reason that the appellant asserted no right to recover the royalties, but asked only a determination that the Royalty Adjustment Act was unconstitutional "and, if so found, that compliance with the Act be enjoined, an issue which appellee . . . declines to contest." This, we said, made the prayer of the bill "but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties." 323 U. S. at 323, 324.

[42] It is alleged that appellant, unless allowed to maintain this suit, will be caused unnecessarily to run the risk of impaired credit or insolvency of customers directed to withhold funds; that its working capital essential to carrying out its obligations with contractors and subcontractors would be reduced; that its operations "will be ham-

to appellant's assuming, for the period necessary to secure either the Tax Court's decision or final judgment in suits against its customers directed to withhold, the continued risk of their solvency, without specific allegation that any of them is seriously so threatened or facts to support such a claim; and to deprivation, for the same period, of the use of $270,000 directed to be withheld.[43] We do not think this showing alone, without regard to multiplicity, approaches what would be required to sustain the intervention of a court of equity, particularly in order to avoid or anticipate the congressionally authorized proceeding.

Nor, in the facts of this case, is the showing made concerning multiplicity of suits sufficient for that purpose. Appellant's case as made in this feature is that it would be forced to sue some sixteen "or more" customers, in various and scattered jurisdictions, with consequent expense of litigation and "resultant ill-feeling and irreparable injury" to good will and appellant's business. On

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pered and its business irreparably damaged by the reduction of its working capital"; and that it will be forced either to continue supplying customers directed to withhold payment, impairing its assets and the interests of stockholders or, in the alternative, to refuse making such shipments with the asserted consequence of being unable to continue in business, "inasmuch as a substantial portion of its market for its products presently is prime contractors with the United States and subcontractors thereof."

[43] Appellant also alleges that it "could not recover interest for the use of its money" in a suit against the United States in the Court of Claims, which on other counts it asserts is both unavailable and inadequate. There is no allegation, however, concerning interest as not being recoverable in suits against its customers. And, as we have pointed out above, the statutory indemnity provided for such contractors is in sufficiently broad terms to cover interest as well as any other liability incurred by them through authorized withholding, a guaranty which certainly would not preclude recovery of interest by the suit against the contractors if terminated on the merits in appellant's favor.

the other hand stands the affidavit of appellee Hirsch that direction for withholding and payment into the Treasury will not be needed or given in more than two or three instances, and in case any balance should remain it will be collected through suit instituted by the Government.

Whether the District Court accepted one version of the facts or the other, it found there was no sufficient basis in the claim of multiplicity to sustain equity's assumption of jurisdiction. We would not be disposed to override that judgment of the trial court, turning as much as it may upon questions of fact.[44]

Moreover, it is not apparent, at any rate from the allegations, why it would be necessary for appellant to sue all of the sixteen customers or indeed perhaps more than one of them in order to secure a determination of its constitutional rights or preserve its rights. A single test suit would serve the former purpose fully, and there are no allegations of fact sufficient to show that appellant's rights of recourse against others probably would be lost by awaiting the outcome of such a suit, either legally through the operation of statutes of limitations or practically, as we have said, through any probable incidence of insolvency.

In the absence of either kind of showing, the injury appellant seeks to avoid by the argument of multiplicity actually comes down, as we have said, to deprivation of the use of the amount withheld for the period required for

[44] It is perhaps of some significance in this respect that the complaint contains allegations, though not made in this connection, relating to both the fiscal years 1942 and 1943 to the effect that over 80 per cent of the dollar value of appellant's total shipments were made to three private concerns, Fairchild Engine and Airplane Corporation, General Motors Corporation, Woodward Governor Company, and the United States Navy. Concerning the shipments to the Navy, see note 8.

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completion of the Tax Court proceedings or a test suit against a customer. Whether or not there will be any injury in this limited respect depends of course, first, on the outcome of the Tax Court proceedings, particularly in relation to the matters of coverage; second, on whether, upon the assumption that those proceedings sustain the Government's claim as to all or part of the $270,000, the amount thus found due is finally held, in authorized litigation, to be due and owing to the appellant or to the Government. And, as we have also said, if that result should favor the appellant, the Government's obligation to indemnify the contractor would be, in effect, indirectly available to appellant to indemnify it for any loss of the use of the moneys withheld.[45]

Whatever might be true in other circumstances, this showing as to the necessity for suing many customers is hardly sufficient to justify the substitution of equity's extraordinary relief for what in all the conditions of this case appears to be a full, adequate and completely available remedy at law. *Coffman* v. *Breeze Corporations, supra; Macauley* v. *Waterman S. S. Corp., supra.*

Indeed the argument of multiplicity, with others, was expressly advanced and rejected in the *Waterman* case, as ground for not applying the *Myers* rule and for sustaining declaratory and equitable intervention to circumvent it. After noting the company's claim, with others, that "it would be subjected to a multiplicity of suits in order to recover the money due on the contracts," we there said: "Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise

[45] See note 43 *supra.*

because of these future contingencies." 327 U. S. at 545.

This case is perhaps even stronger than the *Waterman* case for application of the *Myers* rule. For here the appellant is a subcontractor retaining what the contractor complainant did not have in the *Waterman* case, namely, a completely adequate remedy at law against its customers, buttressed by the Government's guaranty of indemnity to the contractor for all liability incurred by him on account of withholding funds allegedly due the appellant.

In view of that fact the further one that constitutional issues are included among those tendered in this case but were not presented in the *Waterman* case, becomes wholly immaterial. To countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm.

The judgment is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE DOUGLAS dissents.

DECISIONS PER CURIAM, ETC., FROM APRIL 8, 1947, THROUGH JUNE 23, 1947.*

No. 1229. PEETE *v.* CALIFORNIA. April 10, 1947. Petition for writ of certiorari to the Supreme Court of California denied. The motion for a stay is also denied. *Morris Levine* for petitioner.

No. 129, Misc. EX PARTE ROCKOWER. April 14, 1947. The request of the petitioner for leave to withdraw the application filed herein is granted.

No. 133, Misc. EX PARTE FAHEY ET AL. April 14, 1947. A rule is ordered to issue, returnable Monday, April 28, next, requiring the respondents to show cause why leave to file the petition for writ of mandamus and/or prohibition and/or injunction should not be granted. The cause is assigned for argument on the return to the rule immediately following the hearing in *Fahey* v. *Mallonee*, No. 687. All proceedings tending to effectuate the order of the District Judge granting a motion with respect to costs and expenses of certain appellees in case No. 687 and counsel fees are hereby stayed pending the further order of this Court. *Acting Solicitor General Washington* for petitioners.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which judgments or orders hereinafter reported were announced on May 12 and 19, 1947, with the exception of cases No. 11, original, and No. 715, *post*, p. 788.

For orders on applications for certiorari, see *post*, pp. 797, 805; rehearing, *post*, p. 863.

No. 1143. UNITED STATES *v.* MT. CLEMENS POTTERY CO. ET AL. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit dismissed on motion of counsel for the petitioner. *Attorney General Clark* for the United States. Reported below: 149 F. 2d 461.

No. 512. RALEY ET AL., TRADING AS RALEY'S FOOD STORE, *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. Certiorari, 329 U. S. 705, to the United States Court of Appeals for the District of Columbia. April 28, 1947. Motion to vacate order of this Court substituting Fleming for Porter denied.

No. 1223. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Appeal from the Supreme Court of Pennsylvania; and

No. 1230. NEWTON OIL CO. *v.* BOCKHOLD ET AL. Appeal from the Supreme Court of Colorado. April 28, 1947. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *George Henry Huft* for appellant in No. 1223. *Max P. Zall* for appellant in No. 1230. *Charles E. Thomas, Samuel Graff Miller* and *William McKelvy Rutter* for appellee in No. 1223. *Henry E. Lutz* for appellees in No. 1230. Reported below: No. 1223, 355 Pa. 377, 49 A. 2d 707; No. 1230, 115 Colo. 510, 176 P. 2d 904.

No. 1224. MOTOR HAULAGE CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United

States for the Eastern District of New York. April 28, 1947. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Parker McCollester* for appellant. *Acting Solicitor General Washington, Daniel W. Knowlton* and *J. Stanley Payne* for the United States et al., appellees. *H. Lauren Lewis* for the Regular Common Carrier Conference, American Trucking Associations, appellee. Reported below: 70 F. Supp. 17.

No. 132, Misc. EX PARTE MCMAHAN. April 28, 1947. Application denied.

No. 134, Misc. EX PARTE GRAMLICH. April 28, 1947. The motion for leave to file petition for writ of habeas corpus is denied.

No. 135, Misc. MITCHELL *v.* NEBLETT, JUDGE. April 28, 1947. The motion for leave to file petition for writ of mandamus is denied. Petitioner *pro se*. *Acting Solicitor General Washington* for respondent.

No. 85. TRAILMOBILE COMPANY ET AL. *v.* WHIRLS. April 28, 1947. Order entered amending opinion.

Opinion reported as amended, 331 U. S. 40.

No. 1104. TRUDELL *v.* MISSISSIPPI; and

No. 1105. LEWIS *v.* MISSISSIPPI. Appeals from and petitions for writs of certiorari to the Supreme Court of Mississippi. May 5, 1947. *Per Curiam:* The appeals are dismissed and the petitions for writs of certiorari are

denied. MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petitions for certiorari should be granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases. *Thurgood Marshall* for appellants-petitioners. Reported below: No. 1104, 28 So. 2d 124; No. 1105, 28 So. 2d 122.

No. 136, Misc. PORESKY *v.* FORD, U. S. DISTRICT JUDGE. May 5, 1947. The motion for leave to file a petition for writ of mandamus is denied.

No. 1095. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, ET AL. *v.* MOBERLY MILK PRODUCTS CO. May 5, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia dismissed on motion of counsel for the petitioner. *Acting Solicitor General Washington* and *Carl A. Auerbach* for petitioner. Reported below: 82 U. S. App. D. C. —, 160 F. 2d 259.

No. 1051. HEALTH-MOR, INC. *v.* PORTER, PRICE ADMINISTRATOR. See *post*, p. 821.

No. 1346. FRANCIS *v.* RESWEBER, SHERIFF. On petition for writ of certiorari to the Supreme Court of Louisiana; and

No. 140, Misc. FRANCIS *v.* RESWEBER, SHERIFF, ET AL. On motion for leave to file petition for writ of habeas corpus. May 8, 1947. The petition for leave to file an original petition for writ of habeas corpus is denied for reasons set forth in *Ex parte Hawk*, 321 U. S. 114. In view of the grave nature of the new allegation set forth

in this petition, the denial is expressly without prejudice to application to proper tribunals. MR. JUSTICE MURPHY is of opinion that the petition should be granted. The petition for writ of certiorari and the application for stay are denied. MR. JUSTICE RUTLEDGE is of the opinion that the application in No. 140, Misc. should be treated as a petition for rehearing in No. 142 of October Term, 1946, 329 U. S. 459; so regarded, the petition should be granted; the judgment in No. 142 should be vacated; and that cause remanded to the Supreme Court of Louisiana for further proceedings to determine the issues of fact presented by the petition. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 940. HILL PACKING CO. *v.* CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. May 12, 1947. *Per Curiam:* The judgment is affirmed. *Rice* v. *Board of Trade of Chicago,* 331 U. S. 247. MR. JUSTICE REED and MR. JUSTICE RUTLEDGE agree only that probable jurisdiction should be noted. *Arnold J. Brock* for appellant. Reported below: 296 N. Y. 668, 69 N. E. 2d 821.

No. 1294. DOBBS *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. May 12, 1947. *Per Curiam:* The appeal is dismissed. 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. *Ex parte Hawk,* 321 U. S. 114; *Mooney* v. *Holohan,* 294 U. S. 103. MR. JUSTICE MURPHY is of the opinion that certiorari should be granted. *Forrest B. Jackson* and *S. D. Redmond* for appellant. Reported below: 29 So. 2d 84.

No. 11, original. GEORGIA *v.* PENNSYLVANIA RAILROAD CO. ET AL. May 12, 1947. Upon consideration of the motion of the State of Alabama for leave to file petition of intervention, the opposition thereto, and the Special Report of the Special Master thereon, the motion is denied. *A. A. Carmichael,* Attorney General, and *Claud D. Scruggs,* Assistant Attorney General, for the State of Alabama. *John Dickinson, Robert V. Fletcher* and *Hugh B. Cox* for the Pennsylvania Railroad Co. et al., and *William L. Grubbs, J. N. Flowers, Elmer A. Smith, W. R. C. Cocke, William H. Swiggart* and *S. R. Prince* for the Atlantic Coast Line Railroad Co. et al., defendants.

No. 137, Misc. EX PARTE MCMAHAN. May 12, 1947. The motion for leave to file a petition for writ of mandamus is denied.

No. 138, Misc. MACBLAIN *v.* BURKE, WARDEN. May 12, 1947. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 139, Misc. EX PARTE REASOR. May 12, 1947. The motion for leave to file a petition for writ of certiorari is denied.

No. 1241. FISHER *v.* NEW YORK. May 12, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, dismissed on motion of the petitioner.

No. 715. OKLAHOMA ET AL. *v.* UNITED STATES. Certiorari, 329 U. S. 711, to the Circuit Court of Appeals for

the Tenth Circuit. Argued April 28, 29, 1947. Decided May 19, 1947. *Per Curiam:* The judgment is affirmed. *Oklahoma* v. *Texas,* 258 U. S. 574; *Brewer Oil Co.* v. *United States,* 260 U. S. 77. *Mac Q. Williamson,* Attorney General, argued the cause for the State of Oklahoma, and *Nathan Scarritt* argued the cause for the Champlin Refining Company, petitioners. With them on the brief were *Harry O. Glasser* and *E. S. Champlin. Stanley M. Silverberg* argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Fred W. Smith. Edward F. Arn,* Attorney General of Kansas, filed a brief for that State, as *amicus curiae,* urging reversal. Reported below: 156 F. 2d 769.

No. 1161. TIMES-MIRROR CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. May 19, 1947. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is vacated and the cause is remanded with directions to make findings of fact. Cf. *Virginian R. Co.* v. *United States,* 272 U. S. 658, 675; Rule 52 of the Federal Rules of Civil Procedure. *Elisha Hanson, T. B. Cosgrove* and *John N. Cramer* for petitioners. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent.

No. 141, Misc. ROBINSON *v.* SHELBOURNE, JUDGE. May 19, 1947. Application denied.

No. 793. UNITED STATES *v.* MICHENER. Certiorari, 329 U. S. 711, to the Circuit Court of Appeals for the

Eighth Circuit. Argued April 30, 1947. Decided June 2, 1947. *Per Curiam:* Reversed. *Blockburger* v. *United States,* 284 U. S. 299; *Albrecht* v. *United States,* 273 U. S. 1; *Gavieres* v. *United States,* 220 U. S. 338. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE share the view of the Circuit Court of Appeals, 157 F. 2d 616, that this case is controlled by the principles announced in *Morgan* v. *United States,* 294 F. 82, 84; *Tritico* v. *United States,* 4 F. 2d 664, and *Goetz* v. *United States,* 39 F. 2d 903, and accordingly would affirm the judgment below. *W. Marvin Smith* argued the cause for the United States. With him on the brief were *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro. Roger Kent* argued the cause and filed a brief for respondent. Reported below: 157 F. 2d 616.

Nos. 1286 and 1370. SPEARS *v.* SPEARS. Appeals from the Supreme Court of Michigan. June 2, 1947. *Per Curiam:* The appeals are dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. Appellant *pro se. George A. Sutton* for appellee.

No. 1309. CORN PRODUCTS REFINING CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. June 2, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402; *United States* v. *Wabash R. Co.,* 321 U. S. 403. *Ernest S. Ballard* and

Parker McCollester for appellant. *Acting Solicitor General Washington* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 69 F. Supp. 869.

No. 1334. UNITED STATES *v.* WHEELBARGER;

No. 1335. UNITED STATES *v.* RAMBEAU;

No. 1336. UNITED STATES *v.* LEWIN; and

No. 1341. UNITED STATES *v.* SAGNER. Appeals from the District Court of the United States for the District of Oregon. June 2, 1947. *Per Curiam:* The judgments are reversed. *United States* v. *Palletz,* 330 U. S. 812, and authorities cited. *Acting Solicitor General Washington* for the United States. Reported below: No. 1341, 71 F. Supp. 52.

No. 1344. HUMBLE OIL & REFINING CO. *v.* RAILROAD COMMISSION OF TEXAS ET AL.; and

No. 1345. WILLIAMS ET AL. *v.* RAILROAD COMMISSION OF TEXAS ET AL. Appeals from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. June 2, 1947. *Per Curiam:* The motion to affirm is granted and the judgments are affirmed. *J. A. Rauhut, Nelson Jones, Norman L. Meyers, Rex G. Baker* and *R. E. Seagler* for appellant in No. 1344. *Dan Moody* for Williams et al., appellants in No. 1345. *Price Daniel,* Attorney General of Texas, and *Fagan Dickson,* First Assistant Attorney General, for the Railroad Commission of Texas et al., and *James P. Hart* for Ashcroft et al., appellees. Reported below: 193 S. W. 2d 824.

No. —. BAUER *v.* CLARK, ATTORNEY GENERAL OF THE UNITED STATES. June 2, 1947. The application for the appointment of counsel is denied.

No. 142, Misc. EDMONDSON *v.* BRADY, WARDEN. June 2, 1947. The motion for leave to file petition for writ of certiorari is denied.

No. 143, Misc. MALOYAN *v.* UNITED STATES CONGRESS. June 2, 1947. The application is denied.

No. 144, Misc. EX PARTE SWITZER. June 2, 1947. The application is denied for the reason that it is not made within the time provided by law.

No. 1317. FURMAN *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, dismissed on motion of the petitioner.

No. 1234. HELFEND *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. See *post*, p. 838.

No. 107, Misc. EX PARTE BEST. June 9, 1947. The application is dismissed on motion of counsel for the petitioner.

No. 146, Misc. FORD *v.* RAGEN, WARDEN; and

No. 148, Misc. HOOPER *v.* RAGEN, WARDEN. June 9, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 147, Misc. JOHNSON *v.* UTAH. June 9, 1947. The application is denied.

No. 151, Misc. McMONIGLE *v.* CALIFORNIA. June 9, 1947. The application for a stay is denied.

No. 1040. McCANN *v.* CLARK, ATTORNEY GENERAL OF THE UNITED STATES. See *post*, p. 846.

No. 724. WADE ET AL., DOING BUSINESS AS CADILLAC TOOL & DIE CO., ET AL. *v.* STIMSON ET AL. Appeal from the District Court of the United States for the District of Columbia. June 16, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, decided this day. *John W. Piester* and *Paul B. Elcan* for appellants. *Acting Solicitor General Washington* for appellees. Reported below: 65 F. Supp. 277.

No. 836. ALASKA JUNEAU GOLD MINING CO. *v.* ROBERTSON ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 16, 1947. *Per Curiam:* The petition for rehearing is granted. The order entered May 12, 1947, denying certiorari, 331 U. S. 823, is vacated and the petition for writ of certiorari is granted limited to the question presented by the petition for rehearing as to the effect of the Portal-to-Portal Act of 1947, approved May 14, 1947, 61 Stat. 84. The judgment of reversal of the Circuit Court of Appeals is modified so as to provide that on remand to the District Court that Court shall have authority to consider any matters presented to it under the Portal-to-Portal Act of 1947. *Wm. E. Colby* for petitioner. Reported below: 157 F. 2d 876.

No. 149, Misc. CARR *v.* NEW YORK;

No. 152, Misc. FINKLE *v.* RAGEN, WARDEN; and

No. 153, Misc. VAN PELT *v.* RAGEN, WARDEN. June 16, 1947. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 96, Misc. FITZPATRICK *v.* RAGEN, WARDEN; and

No. 150, Misc. TOMANEK *v.* RAGEN, WARDEN. June 16, 1947. The motions for leave to file petitions for writs of certiorari are denied.

No. 154, Misc. TEGTMEYER *v.* TEGTMEYER. June 16, 1947. The application is denied.

No. 754, October Term, 1945. SEWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 16, 1947. The motion for an extension of time within which to file a second petition for rehearing is denied. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 184. CONE *v.* WEST VIRGINIA PULP & PAPER CO. June 16, 1947. The motion to recall and amend the mandate is denied.

No. 425. MORRIS *v.* WALLING, WAGE & HOUR ADMINISTRATOR; and

No. 562. RUTHERFORD FOOD CORP. ET AL. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. June 16, 1947. McComb substituted as the party respondent in these cases.

No. 497. 149 MADISON AVENUE CORP. ET AL. *v.* ASSELTA ET AL. June 16, 1947. On consideration of the motion of counsel for the petitioners to modify the judgment of this Court in this case, it is ordered that the judgment of affirmance entered herein on May 5, 1947, 331 U. S. 199, be modified so as to provide that the judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with authority in that Court to consider any matters presented to it under the Portal-to-Portal Act of 1947, approved May 14, 1947, 61 Stat. 84. *Walter Gordon Merritt* and *Robert R. Bruce* for petitioners.

No. 1285. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. Certiorari, 331 U. S. 800, to the Circuit Court of Appeals for the Sixth Circuit. June 16, 1947. The motion of petitioner for enlargement on recognizance is granted and the matter is referred to the District Court for determination as to whether surety ought to be required or the personal recognizance of the petitioner shall suffice and for the entry of an appropriate order. *G. Leslie Field* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for respondent.

No. 1486. RABIN *v.* MICHIGAN. June 16, 1947. The application for a stay is denied. *Walter M. Nelson* and *George Stone* for petitioner.

No. 1377. LEE *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. June 16, 1947. The appeal is dismissed for want of jurisdiction. § 237 (a), Judicial Code, as amended, 28 U. S. C. § 344 (a). Treating the

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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. *Forrest B. Jackson* for appellant. Reported below: 201 Miss. —, 30 So. 2d 74.

No. 1422. MORGAN ET AL. *v.* GILMAN. June 16, 1947. The petition for writ of certiorari to the Supreme Court of Florida is dismissed on motion of counsel for the petitioners. *Tim J. Campbell* for petitioners. Reported below: 158 Fla. 605, 29 So. 2d 372.

No. 987. TWYEFFORT, INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. See *post*, p. 851.

No. 145, Misc. EX PARTE MCCORMICK. June 16, 1947. The motion for leave to file petition for writ of habeas corpus is denied.

No. 700. BORG-WARNER CORP. ET AL. *v.* GOODWIN ET AL. June 16, 1947. The motion for leave to file a second petition for rehearing is granted.

No. 466. GREENBERG *v.* CALIFORNIA. Appeal from the District Court of Appeal, 2d Appellate District, of California. June 23, 1947. *Per Curiam:* The judgment is affirmed. *Adamson* v. *California*, 332 U. S. 46, decided this day. *Morris Lavine* for appellant. *Robert W. Kenny*, Attorney General of California, and *Frank W. Richards*, Deputy Attorney General, for appellee. Reported below: 73 Cal. App. 2d 675, 167 P. 2d 214.

No. 300. EVERETT *v.* DOWNING. June 23, 1947. The application of the petitioner for reconsideration of the order denying leave to file a second petition for rehearing is denied.

Nos. 1286 and 1370. SPEARS *v.* SPEARS. June 23, 1947. The motion of the appellant for an extension of time within which to file a petition for rehearing is denied.

No. 1404. COUNSELMAN *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. See *post*, p. 861.

No. 69. AMERICAN STEVEDORES, INC. *v.* PORELLO ET AL. June 23, 1947. Order entered amending opinion.

Opinion reported as amended, 330 U. S. 446.

ORDERS GRANTING CERTIORARI, FROM APRIL 8, 1947, THROUGH JUNE 23, 1947.

No. 1083. WILLIAMS ET AL. *v.* FANNING, POSTMASTER OF THE CITY OF LOS ANGELES. April 14, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted limited to the first question presented by the petition for the writ. *Irving M. Walker* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Paul A. Sweeney* and *Melvin Richter* for respondent. Reported below: 158 F. 2d 95.

No. 1092. MOGALL *v.* UNITED STATES. April 14, 1947. The petition for writ of certiorari to the Circuit Court of

Appeals for the Fifth Circuit is granted. *Charles Kehl* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 158 F. 2d 792.

No. 1064. FEDERAL CROP INSURANCE CORP. *v.* MERRILL ET AL., DOING BUSINESS AS MERRILL BROS. April 28, 1947. Petition for writ of certiorari to the Supreme Court of Idaho granted. *Acting Solicitor General Washington* for petitioner. *O. A. Johannesen* for respondents. Reported below: 67 Idaho —, 174 P. 2d 834.

No. 1108. HANNEGAN, POSTMASTER GENERAL, *v.* READ MAGAZINE, INC. ET AL. April 28, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Acting Solicitor General Washington* for petitioner. *Mac Asbill* for respondents. Reported below: 81 U. S. App. D. C. 339, 158 F. 2d 542.

No. 1144. ESTATE OF SPIEGEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Herbert A. Friedlich, Leo F. Tierney, Harry Thom* and *Louis A. Kohn* for petitioners. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss, Stanley M. Silverberg* and *Melva M. Graney* for respondent. Reported below: 159 F. 2d 257.

No. 1147. LOCAL 2880, LUMBER & SAWMILL WORKERS UNION, *v.* NATIONAL LABOR RELATIONS BOARD. May 5,

1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *George E. Flood* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Margaret M. Farmer* for respondent. Reported below: 158 F. 2d 365.

No. 1162. BLUMENTHAL *v.* UNITED STATES;
No. 1163. GOLDSMITH *v.* UNITED STATES;
No. 1164. WEISS *v.* UNITED STATES; and
No. 1165. FEIGENBAUM *v.* UNITED STATES. May 5, 1947. The petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit are granted. *Hugh K. McKevitt* for petitioner in No. 1162. *Walter H. Duane* and *Arthur B. Dunne* for petitioner in No. 1163. Petitioner *pro se* in No. 1164. *Leo R. Friedman* for petitioner in No. 1165. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Norma G. Zarky* for the United States. Reported below: 158 F. 2d 762, 883.

No. 1176. RODGERS *v.* UNITED STATES. May 5, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted limited to the first two questions presented by the petition for the writ. Petitioner *pro se*. *Acting Solicitor General Washington, Assistant Attorney General Berge, J. Stephen Doyle, Jr., James A. Doyle* and *Katherine A. Markwell* for the United States. Reported below: 158 F. 2d 835.

No. 1161. TIMES-MIRROR CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. See *ante*, p. 789.

No. 1193. UNITED STATES *v.* DI RE. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Acting Solicitor General Washington* for the United States. Reported below: 159 F. 2d 818.

No. 1264. KAVANAGH, COLLECTOR OF INTERNAL REVENUE, *v.* NOBLE. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Acting Solicitor General Washington* for petitioner. *E. M. Baynes* and *W. H. Harris* for respondent. Reported below: 160 F. 2d 104.

No. 1265. JONES, COLLECTOR OF INTERNAL REVENUE, *v.* LIBERTY GLASS CO. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Acting Solicitor General Washington* for petitioner. Reported below: 159 F. 2d 316.

No. 1285. VON MOLTKE *v.* GILLIES, SUPERINTENDENT. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *G. Leslie Field* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 161 F. 2d 113.

No. 1300. MANDEVILLE ISLAND FARMS, INC. ET AL. *v.* AMERICAN CRYSTAL SUGAR CO. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Guy Richards Crump* for petitioners. *Louis W. Myers* and *Pierce Works* for respondent. Reported below: 159 F. 2d 71.

No. 1244. DELGADILLO *v.* DEL GUERCIO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *A. L. Wirin* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 159 F. 2d 130.

No. 1098. SHAPIRO *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Menahem Stim* for petitioner. *Acting Solicitor General Washington* for the United States. Reported below: 159 F. 2d 890.

No. 1256. COX *v.* UNITED STATES;

No. 1257. THOMPSON *v.* UNITED STATES; and

No. 1258. ROISUM *v.* UNITED STATES. June 9, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Hayden C. Covington* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 157 F. 2d 787.

No. 1024. WADE *v.* MAYO, STATE PRISON CUSTODIAN. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *E. M. Baynes* for petitioner. *J. Tom Watson,* Attorney General of Florida, and *Sumter Leitner,* Assistant Attorney General, for respondent. Reported below: 158 F. 2d 614.

No. 836. ALASKA JUNEAU GOLD MINING CO. *v.* ROBERTSON ET AL. See *ante,* p. 793.

No. 1340. CHICAGO & SOUTHERN AIR LINES, INC. *v.* WATERMAN STEAMSHIP CORP.; and

No. 1371. CIVIL AERONAUTICS BOARD *v.* WATERMAN STEAMSHIP CORP. June 16, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit are granted. *R. Emmett Kerrigan* for petitioner in No. 1340. *Acting Solicitor General Washington* for petitioner in No. 1371. *Bon Geaslin* for respondent. Reported below: 159 F. 2d 828.

No. 1383. MEMPHIS NATURAL GAS CO. *v.* STONE, CHAIRMAN, STATE TAX COMMISSION. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Mississippi granted. *Edward P. Russell* for petitioner. Reported below: 201 Miss. —, 29 So. 2d 268.

No. 1295. POWNALL ET AL. *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Leo R. Friedman* and *Jos. I. McMullen* for petitioners. *Acting Solicitor General Washington* for the United States. Reported below: 159 F. 2d 73.

No. 1391. ALEXANDER WOOL COMBING CO. *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Edward C. Park* for petitioner. *Acting Solicitor General Washington* for the United States. Reported below: 160 F. 2d 103.

No. 1427. LICHTER ET AL., DOING BUSINESS AS SOUTHERN FIREPROOFING CO., *v.* UNITED STATES. June 16, 1947.

Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Paul W. Steer* for petitioners. *Acting Solicitor General Washington* for the United States. Reported below: 160 F. 2d 329.

No. 1395. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF CHURCH. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Acting Solicitor General Washington* for petitioner. *William W. Owens* for respondent. Reported below: 161 F. 2d 11.

No. 1123. HALEY *v.* OHIO. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Ohio granted. *E. L. Mills, Edgar W. Jones* and *D. Bruce Mansfield* for petitioner. *D. Deane McLaughlin, W. Bernard Rodgers* and *John Rossetti* for respondent. Reported below: 147 Ohio St. 340, 70 N. E. 2d 905.

No. 1377. LEE *v.* MISSISSIPPI. See *ante,* p. 795.

No. 1268. SHELLEY ET AL. *v.* KRAEMER ET UX. June 23, 1947. The petition for writ of certiorari to the Supreme Court of Missouri is granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Geo. L. Vaughn* and *Herman Willer* for petitioners. *Benjamin F. York* for respondents. *Luther Ely Smith* and *Victor B. Harris* filed a brief for the St. Louis Civil Liberties Committee, as *amicus curiae,* in support

of the petition. Reported below: 355 Mo. 814, 198 S. W. 2d 679.

No. 1363. McGHEE ET UX. *v.* SIPES ET AL. June 23, 1947. The petition for writ of certiorari to the Supreme Court of Michigan is granted. MR. JUSTICE REED took no part in the consideration or decision of this application. *Thurgood Marshall* for petitioners. *Lloyd T. Chockley, Henry Gilligan* and *James A. Crooks* for respondents. Reported below: 316 Mich. 614, 25 N. W. 2d 638.

No. 1402. UNITED STATES *v.* FRIED ET AL. June 23, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. *Acting Solicitor General Washington* for the United States. *J. Bertram Wegman* for respondents. Reported below: 161 F. 2d 453.

No. 1448. PRICE *v.* JOHNSTON, WARDEN. June 23, 1947. The petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit is granted. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 159 F. 2d 234.

No. 1476. PATTON *v.* MISSISSIPPI. June 23, 1947. The petition for writ of certiorari to the Supreme Court of Mississippi is granted. Execution of the sentence of death imposed on this petitioner is stayed pending the final disposition of the case by this Court. *Thurgood Marshall* for petitioner. Reported below: 201 Miss. —, 29 So. 2d 96.

ORDERS DENYING CERTIORARI, FROM APRIL 8, 1947, THROUGH JUNE 23, 1947.

No. 1229. PEETE *v.* CALIFORNIA. See *ante*, p. 783.

No. 875. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, *v.* LEE, DOING BUSINESS AS VITAMIN PRODUCTS CO. April 14, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Acting Solicitor General Washington* and *Carl A. Auerbach* for petitioner. *Walter H. Bender* for respondent. Reported below: 158 F. 2d 984.

No. 1015. MAYFAIR MEAT PACKING CORP. ET AL. *v.* UNITED STATES. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *A. Harry Weissman* for petitioners. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Norma G. Zarky* for the United States. Reported below: 158 F. 2d 685.

No. 1049. CURTIS *v.* FAKE, U. S. DISTRICT JUDGE, ET AL. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. Petitioner *pro se*. *H. Brua Campbell* for the Utah Fuel Co. et al., respondents. Reported below: 158 F. 2d 284.

Nos. 1068 and 1069. FREEMAN *v.* UNITED STATES. April 14, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *John J. Kennett* and *O. C. Moore* for petitioner. *Acting*

Solicitor General Washington, Robert S. Erdahl, Sheldon E. Bernstein, William E. Remy, David London and *Jacob W. Rosenthal* for the United States. Reported below: 158 F. 2d 891.

No. 1078. VACU-MATIC CARBURETOR CO. *v.* FEDERAL TRADE COMMISSION. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Theodore E. Rein* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Berge* and *W. T. Kelley* for respondent. Reported below: 157 F. 2d 711.

No. 1085. PERNICIARO *v.* UNITED STATES. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hugh M. Wilkinson* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 158 F. 2d 792.

No. 1086. FIRST NATIONAL BANK ET AL. *v.* SCOFIELD, COLLECTOR OF INTERNAL REVENUE. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Edward S. Boyles* for the First National Bank, petitioner. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss* and *Irving I. Axelrad* for respondent. Reported below: 158 F. 2d 268.

No. 1094. ELIZABETH ARDEN, INC. ET AL. *v.* FEDERAL TRADE COMMISSION. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second

Circuit denied. *Stuart N. Updike* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Berge* and *W. T. Kelley* for respondent. Reported below: 156 F. 2d 132.

No. 1103. COMMERS *v.* UNITED STATES. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *C. E. Pew* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Frederick Bernays Wiener* and *Paul A. Sweeney* for the United States. Reported below: 159 F. 2d 248.

No. 1117. MASON & DIXON LINES, INC. *v.* VIRGINIA EX REL. STATE CORPORATION COMMISSION. April 14, 1947. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *J. Ninian Beall* for petitioner. *Abram P. Staples,* Attorney General of Virginia, for respondent. Reported below: 185 Va. 877, 41 S. E. 2d 16.

No. 1122. DECKER ET AL., EXECUTORS, ET AL. *v.* KANN ET AL. April 14, 1947. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *C. J. Batter* and *R. Palmer Ingram* for petitioners. *Ferdinand T. Weil* for respondents. Reported below: 355 Pa. 331, 49 A. 2d 714.

No. 1126. WEIL *v.* H. F. HAESSLER HARDWARE CO. April 14, 1947. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Emil Hersh* for petitioner. *Norton A. Torke* for respondent. Reported below: 249 Wis. 385, 24 N. W. 2d 662.

No. 1127. AMAYA ET AL. *v.* STANOLIND OIL & GAS CO. ET AL. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Lewis B. Perkins* for petitioners. *Charles D. Turner, Frank M. Kemp* and *B. D. Tarlton* for respondents. Reported below: 158 F. 2d 554.

No. 1181. PAULING *v.* PAULING. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *L. A. Stebbins* and *Frederick H. Stinchfield* for petitioner. *William L. Prosser* for respondent. Reported below: 159 F. 2d 531.

Nos. 1200, 1201, 1202, 1203, 1204 and 1205. WORCESTER ET AL. *v.* CHICAGO TRANSIT AUTHORITY ET AL. April 14, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Clyde E. Shorey* for petitioners. *Werner W. Schroeder* for the Chicago Transit Authority, and *Tappan Gregory, Henry F. Tenney* and *J. Arthur Miller* for the Bondholders Committees, respondents. Reported below: 160 F. 2d 59.

No. 999. DURRETT *v.* UNITED STATES. April 14, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 157 F. 2d 518.

No. 1013. HASSON *v.* UNITED STATES. April 14, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Ira Chase Koehne* for petitioner. *Acting Solicitor General*

Washington, Robert S. Erdahl and *Sheldon E. Bernstein* for the United States. Reported below: 81 U. S. App. D. C. 333, 158 F. 2d 330.

No. 1118. LANE *v.* NEW YORK. April 14, 1947. Petition for writ of certiorari to the County Court of Oneida County, New York, denied.

No. 1125. SLATER *v.* NEW YORK. April 14, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 1132. MARTIN *v.* NEW YORK. April 14, 1947. Petition for writ of certiorari to the County Court of Rockland County, New York, denied.

No. 1145. BORDELEAU *v.* NEW YORK. April 14, 1947. Petition for writ of certiorari to the Court of General Sessions of the City and County of New York, New York, denied.

No. 1171. ROSS *v.* NIERSTHEIMER, WARDEN. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois; and

No. 1192. POPPE *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Winnebago County, Illinois. April 14, 1947. Denied.

No. 1223. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION; and

No. 1230. NEWTON OIL CO. *v.* BOCKHOLD ET AL. See *ante*, p. 784.

No. 1062. WILSON ET AL. *v.* RECONSTRUCTION FINANCE CORPORATION. April 28, 1947. Petition for writ of certiorari to the Ciruit Court of Appeals for the Fifth Circuit denied. Petitioners *pro se*. *Acting Solicitor General Washington* and *Robert L. Stern* for respondent. Reported below: 158 F. 2d 564.

No. 1075. UNITED STATES *v.* ALBERT & HARRISON, INC. April 28, 1947. Petition for writ of certiorari to the Court of Claims denied. *Acting Solicitor General Washington* for the United States. *Foster Wood* for respondent. Reported below: 107 Ct. Cl. 292, 68 F. Supp. 732.

No. 1088. UNITED STATES EX REL. KNAUER *v.* JORDAN, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Theodore W. Miller* for petitioner. *Acting Solicitor General Washington, Frederick Bernays Wiener, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 158 F. 2d 337.

No. 1113. MACKE ET AL. *v.* UNITED STATES. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Frederic M. P. Pearse* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 159 F. 2d 673.

No. 1116. DEFRATES *v.* ILLINOIS. April 28, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Harold V. Snyder* for petitioner. Reported below: 395 Ill. 439, 70 N. E. 2d 591.

No. 1120. JONSSON *v.* UNITED STATES. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edward Arkin* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett* and *Samuel D. Slade* for the United States. Reported below: 158 F. 2d 682.

No. 1128. HEFLER ET AL. *v.* UNITED STATES. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Jacob W. Friedman* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 159 F. 2d 831.

No. 1133. BENNION *v.* NEW YORK LIFE INSURANCE CO. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Shirley P. Jones* and *John Lord O'Brian* for petitioner. *George A. Critchlow* and *Edwin Borchard* for respondent. Reported below: 158 F. 2d 260.

No. 1149. ANTIS ET AL. *v.* MONTGOMERY WARD & CO., INC. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

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Daniel G. Shea and *George S. Fitzgerald* for petitioners. Reported below: 158 F. 2d 948.

No. 1157. STANDARD SURETY & CASUALTY CO. *v.* PLANTSVILLE NATIONAL BANK ET AL. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *C. J. Danaher* and *Neil Burkinshaw* for petitioner. *Norris C. Bakke, James M. Kane, Harold L. Allen, John L. Cecil* and *Irving H. Jurow* for respondents. Reported below: 158 F. 2d 422.

No. 1158. WILLIAMS *v.* UNITED STATES. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edward L. Blackman* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *Melva M. Graney* for the United States. Reported below: 159 F. 2d 243.

No. 1225. JOHN J. CASALE, INC. *v.* SKIDMORE ET AL. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Charles E. Cotterill* for petitioner. *Harold R. Korey* and *Emanuel Tacker* for respondents. Reported below: 160 F. 2d 527.

No. 1107. GREENHOUSE BROS. & FINKELSTEIN, INC. *v.* RECONSTRUCTION FINANCE CORPORATION. April 28, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *Edward Schoeneck* for petitioner. *Acting Solici-*

tor General Washington and *John R. Benney* for respondent. Reported below: 159 F. 2d 712.

No. 340. McCann *v.* Clark, Attorney General of the United States. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for respondent.

No. 841. McCann *v.* Adams, Warden, et al. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for respondents.

No. 872. Giles *v.* United States. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 157 F. 2d 588.

No. 912. Davis *v.* Johnston, Warden. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 157 F. 2d 64.

No. 918. McMahan *v.* Johnston, Warden. April 28, 1947. Petition for writ of certiorari to the Circuit

Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 157 F. 2d 915.

No. 948. WOOD *v.* HOWARD, WARDEN. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 157 F. 2d 807.

No. 1026. RUBEN *v.* WELCH, SUPERINTENDENT. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 159 F. 2d 493.

No. 1121. PERRY, ADMINISTRATRIX, *v.* WHEELER, ADMINISTRATOR. April 28, 1947. Petition for writ of certiorari to the Supreme Court of Vermont denied. *John J. Finn* for petitioner. Reported below: 115 Vt. 1, 49 A. 2d 562.

No. 1142. SMALL *v.* NEW YORK. April 28, 1947. Petition for writ of certiorari to the Court of General Sessions of the City and County of New York, New York, denied.

No. 1182. WENDERLIN *v.* NEW YORK. April 28, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 1185. HART *v.* SQUIER, WARDEN. April 28, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington* for respondent. Reported below: 159 F. 2d 639.

No. 1198. SERIC *v.* NEW YORK. April 28, 1947. Petition for writ of certiorari to the 4th Appellate Department of the Supreme Court of New York denied.

No. 1209. LEWIS *v.* MICHIGAN. April 28, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 1212. EVANS *v.* BUSH, WARDEN. April 28, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 1216. SCARPINATO *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court, Criminal Court of Cook County, and the Circuit Court of Will County, Illinois;

No. 1221. MICHALOWSKI *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois;

No. 1232. HOWE *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Ogle County, and the Circuit Court of Will County, Illinois; and

No. 1233. WILKERSON *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois. April 28, 1947. Denied.

No. 1104. TRUDELL *v.* MISSISSIPPI; and
No. 1105. LEWIS *v.* MISSISSIPPI. See *ante*, p. 785.

No. 575. GORUM ET AL. *v.* LOUDENSLAGER ET AL. May 5, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Joseph N. Hassett* for petitioners. *Walter A. Raymond* and *Lawrence E. Goldman* for respondents. Reported below: 355 Mo. 181, 195 S. W. 2d 498.

No. 1104. PROVENZANO, DOING BUSINESS AS O. K. PLUMBING CO., *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Emilie N. Wanderer* for petitioner. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Jacob W. Rosenthal* for respondent. Reported below: 159 F. 2d 47.

No. 1036. SMITH *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *John J. Kennett* for petitioner. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Albert J. Rosenthal* for respondent. Reported below: 158 F. 2d 372.

No. 1038. POTOMAC ELECTRIC POWER CO. *v.* PUBLIC UTILITIES COMMISSION ET AL.; and
No. 1135. UNITED STATES *v.* PUBLIC UTILITIES COMMISSION ET AL. May 5, 1947. Petitions for writs of certiorari to the United States Court of Appeals for the Dis-

trict of Columbia denied. *S. Russell Bowen, T. Justin Moore, George D. Gibson* and *John W. Riely* for the Potomac Electric Power Co., petitioner in No. 1038 and respondent in No. 1135. *Acting Solicitor General Washington* for the United States, respondent in No. 1038 and petitioner in No. 1135. *Vernon E. West* and *Lloyd B. Harrison* for the Public Utilities Commission, respondent. *John O'Dea* filed a brief as People's Counsel, opposing the petitions. Reported below: No. 1038, 81 U. S. App. D. C. 225, 158 F. 2d 521; No. 1135, 81 U. S. App. D. C. 237, 158 F. 2d 533.

No. 1138. HENSLEY *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James R. Kirkland* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 82 U. S. App. D. C. —, 160 F. 2d 257.

No. 1150. SCHUSTER, DOING BUSINESS AS GENERAL MACHINE WORKS, AND AS THE A. & A. TOOL & SUPPLY CO., *v.* STURGEON, ACTING COLLECTOR OF INTERNAL REVENUE, ET AL. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Herbert K. Hyde* for petitioner. *Acting Solicitor General Washington, Sewall Key, A. F. Prescott* and *Harry Marselli* for respondents. Reported below: 158 F. 2d 811.

No. 1156. STOTT ET AL. *v.* TIDE WATER ASSOCIATED OIL CO. ET AL. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Hobert Price* for petitioners. *John W. Rutland, Jr.* for respondents. Reported below: 159 F. 2d 174.

No. 1159. C. C. CLARK, INC. *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Ed. M. Lowrance* and *F. E. Hagler* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *Arthur L. Jacobs* for the United States. Reported below: 159 F. 2d 489.

No. 1160. MALOOF *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Leo R. Friedman* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl, Sheldon E. Bernstein, William E. Remy, David London, Samuel Mermin* and *Jacob Rosenthal* for the United States. Reported below: 159 F. 2d 62.

No. 1167. ADOLFSON *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Leo R. Friedman* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 159 F. 2d 883.

Nos. 1168, 1169 and 1170. MCGUIRE ET AL. *v.* EQUITABLE OFFICE BUILDING CORP. ET AL.; and

Nos. 1172, 1173 and 1174. AMOTT ET AL. *v.* DANA ET AL. May 5, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *George T. Barker* for petitioners in Nos. 1168, 1169 and 1170. *Frank R. Bruce, Henry S. Hooker, T. Fergus Redmond, Sidney R. Nussenfeld* and *W. Randolph Montgomery* for petitioners in Nos. 1172, 1173 and 1174. *Charles Green Smith* and *Herbert J. Jacobi* for Dana et al.,

and *T. Roland Berner* for Knight et al., respondents. Reported below: No. 1170, 158 F. 2d 838; No. 1174, 158 F. 2d 982.

No. 609. DANA ET AL. *v.* DUNCAN, TRUSTEE, ET AL.;

No. 610. EQUITABLE OFFICE BUILDING 1913 CO., INC. *v.* DUNCAN, TRUSTEE, ET AL.; and

No. 612. KNIGHT ET AL. *v.* DUNCAN, TRUSTEE, ET AL. May 5, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Herbert J. Jacobi* for petitioners in No. 609. *Stuart McNamara* and *Charles Green Smith* for petitioner in No. 610. *T. Roland Berner* for petitioners in No. 612. *John Gerdes, W. Randolph Montgomery, George T. Barker, Emanuel Redfield, Edward J. Ennis, Frank R. Bruce, Francis J. Quillinan* and *Sidney R. Nussenfeld* for respondents. *Acting Solicitor General Washington, Roger S. Foster, Robert S. Rubin, George Zolotar* and *Myer Feldman* filed a memorandum for the Securities & Exchange Commission.

No. 1175. NEW YORK ET AL. *v.* GEBHARDT ET AL., TRUSTEES. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Nathaniel L. Goldstein,* Attorney General of New York, and *Wendell P. Brown,* Solicitor General, for petitioners. *Jesse E. Waid* for respondents. Reported below: 158 F. 2d 769.

Nos. 1178 and 1179. PHILADELPHIA COMPANY *v.* GUGGENHEIM ET AL. May 5, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Thomas J. Munsch, Jr.* for petitioner. *Acting Solicitor General Washington, Roger S. Foster,*

Robert S. Rubin and *George Zolotar* filed a brief for the Securities & Exchange Commission in opposition. *Maurice J. Dix* for Guggenheim et al., respondents. Reported below: 159 F. 2d 630.

No. 1190. HENWOOD, TRUSTEE, *v.* WALLACE. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *C. Huffman Lewis* and *W. Scott Wilkinson* for petitioner. Reported below: 159 F. 2d 263.

No. 1191. GARLOCK PACKING CO. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *George Link, Jr.* for petitioner. *Acting Solicitor General Washington, William S. Tyson, Bessie Margolin* and *Morton Liftin* for respondent. Reported below: 159 F. 2d 44.

No. 1195. COLUMBIAN NATIONAL LIFE INSURANCE CO. *v.* GOLDBERG. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *C. J. Hoyt* for petitioner. *David C. Haynes* for respondent. Reported below: 158 F. 2d 971.

No. 1199. SHAPIRO, BERNSTEIN & CO., INC. *v.* JERRY VOGEL MUSIC CO., INC. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Charles E. Hughes, Jr., Richard W. Hogue, Jr.* and *Edward A. Niles* for petitioner. *Arthur F. Driscoll* for respondent. Reported below: 161 F. 2d 406.

No. 1207. BLACK DIAMOND LINES, INC. ET AL. *v.* PIONEER IMPORT CORP. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John W. Crandall* and *Arthur M. Boal* for petitioners. *George C. Sprague* for respondent. Reported below: 159 F. 2d 654.

No. 1051. HEALTH-MOR, INC. *v.* PORTER, PRICE ADMINISTRATOR. May 5, 1947. Fleming, Temporary Controls Administrator, substituted as the party respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Arthur Abraham* and *Walter A. Wade* for petitioner. *Acting Solicitor General Washington, William E. Remy, David London* and *Samuel Mermin* for respondent.

No. 1060. KLARE, RECEIVER, *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the Court of Claims denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application. *William Alfred Lucking* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Sonnett, Samuel D. Slade* and *Newell A. Clapp* for the United States. Reported below: 107 Ct. Cl. 310.

No. 1140. STEWART *v.* OHIO. May 5, 1947. The petition for writ of certiorari to the Supreme Court of Ohio 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. *Merritt E. Schlafman* for petitioner. Reported below: 147 Ohio St. 219, 70 N. E. 2d 369.

No. 615. FIFE *v.* ILLINOIS. May 5, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 966. BENNETT *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 158 F. 2d 412.

No. 1034. THOMAS *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Roger Ratcliff* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 81 U. S. App. D. C. 314, 158 F. 2d 97.

No. 1079. HIGGINS *v.* UNITED STATES. May 5, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James J. Laughlin* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 81 U. S. App. D. C. 371, 160 F. 2d 222.

No. 1183. MUNKS *v.* NEW YORK. Petition for writ of certiorari to the County Court of Kings County, New York; and

No. 1213. CANIZIO *v.* NEW YORK. Petition for writ of certiorari to the County Court of Ulster County, New York. May 5, 1947. Denied.

No. 1261. SWAYZE *v.* NIERSTHEIMER, WARDEN; and

No. 1266. DI CHIARA *v.* ILLINOIS. Petitions for writs of certiorari to the Supreme Court of Illinois; and

No. 1269. BARNETT *v.* ILLINOIS. Petition for writ of certiorari to the Circuit Court of Will County, Illinois. May 5, 1947. Denied.

No. 1283. PALMER *v.* RAGEN, WARDEN. May 5, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1284. MCNAUGHTON *v.* RAGEN, WARDEN. May 5, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1346. FRANCIS *v.* RESWEBER, SHERIFF; and

No. 140, Misc. FRANCIS *v.* RESWEBER, SHERIFF, ET AL. See *ante*, p. 786.

No. 1294. DOBBS *v.* MISSISSIPPI. See *ante*, p. 787.

No. 836. ALASKA JUNEAU GOLD MINING CO. *v.* ROBERTSON ET AL. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Wm. E. Colby* for petitioner. *Bertram Edises* for respondents. *Acting Solicitor General Washington*

and *William S. Tyson* filed a brief for the Wage & Hour Administrator, United States Department of Labor, as *amicus curiae,* opposing the petition. Reported below: 157 F. 2d 876.

No. 943. BROWN *v.* TEXAS. May 12, 1947. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Tom M. Miller* and *F. V. Hinson* for petitioner. Reported below: 149 Tex. Crim. Rep. —, 196 S. W. 2d 819.

No. 1063. FISCHER ET UX. *v.* OKLAHOMA CITY. May 12, 1947. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *A. E. Pearson* for petitioners. *A. L. Jeffrey* for respondent. Reported below: 198 Okla. 22, 174 P. 2d 244.

No. 1134. CENTRAL STATES ELECTRIC CO. *v.* FEDERAL POWER COMMISSION. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Jo V. Morgan* for petitioner. *Acting Solicitor General Washington, James C. Wilson, Charles E. McGee, Lambert McAllister* and *Howell Purdue* for respondent.

No. 1180. BROOKS CLOTHING OF CALIFORNIA, LTD. *v.* BROOKS BROTHERS. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Seth W. Richardson, Isaac Pacht, Clore Warne* and *Bernard Reich* for petitioner. *Beekman Aitken* for respondent. Reported below: 158 F. 2d 798.

No. 1194. YOUNG *v.* ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL. May 12, 1947.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Robert M. Rieser* and *John Wattawa* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Bazelon, Roger P. Marquis* and *Fred W. Smith* for respondents. *Greek L. Rice,* Attorney General of Mississippi, filed a brief for that State, as *amicus curiae,* in support of the petition. Reported below: 81 U. S. App. D. C. 379, 160 F. 2d 225.

No. 1197. PETERS *v.* UNITED STATES. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Eugene D. O'Sullivan* and *Hugh J. Boyle* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 160 F. 2d 319.

No. 1206. CLAMITZ *v.* THATCHER MANUFACTURING CO. ET AL. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Meyer Abrams, Joseph Nemerov* and *Maurice J. Dix* for petitioner. *Edward K. Hanlon* for respondents. Reported below: 158 F. 2d 687.

No. 961. BIRTCH ET AL. *v.* HUNTER, WARDEN. May 12, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *J. Raymond Gordon* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 158 F. 2d 134.

No. 1187. JACKSON *v.* TENNESSEE. May 12, 1947. Petition for writ of certiorari to the Supreme Court of

Tennessee denied. *Grover N. McCormick* for petitioner. *Nat Tipton* for respondent.

No. 1242. STOKEY *v.* NEW YORK. May 12, 1947. Petition for writ of certiorari to the Court of General Sessions, New York County, New York, denied.

No. 1250. CASE *v.* THE GOVERNMENT ET AL. May 12, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Petitioner *pro se*. *Acting Solicitor General Washington* for respondents.

No. 1288. STAHL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois;

No. 1289. STAHL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Carroll County, Illinois;

No. 1290. STAHL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois;

No. 1291. OSBORN *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of LaSalle County, Illinois; and

No. 1292. ROSS *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Supreme Court of Illinois. May 12, 1947. Denied.

No. 1301. WEISBERG *v.* ILLINOIS. May 12, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. MR. JUSTICE MURPHY is of the opinion that the petition for certiorari should be granted. *Wm. Scott Stewart* for petitioner.

No. 1214. AMERICAN POWER & LIGHT CO. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *R. A. Henderson* for petitioners. *Acting Solicitor General Washington, Howard E. Wahrenbrock, Roger S. Foster, Robert S. Rubin, David Ferber* and *Myer Feldman* for respondent. Reported below: 158 F. 2d 771.

No. 1215. EAST ET AL., DOING BUSINESS AS L. EAST PRODUCE CO., *v.* PORTER, PRICE ADMINISTRATOR. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Harry S. Pollard* for petitioners. *Acting Solicitor General Washington, William E. Remy, David London, Samuel Mermin* and *Jacob W. Rosenthal* for respondent. Reported below: 158 F. 2d 227.

No. 1217. VIRGINIA DARE TRANSPORTATION CO., INC. *v.* NORFOLK SOUTHERN BUS CORP.; and

No. 1218. NORFOLK SOUTHERN BUS CORP. *v.* VIRGINIA DARE TRANSPORTATION CO., INC. May 19, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *W. R. Ashburn* and *J. C. B. Ehringhaus* for petitioner in No. 1217 and respondent in No. 1218. *S. Burnell Bragg, J. Kenyon Wilson, Arthur J. Winder* and *James G. Martin* for respondent in No. 1217 and petitioner in No. 1218. Reported below: 159 F. 2d 306.

No. 1219. RESER *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. May 19, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Al M. Heck* and *Park Street* for petitioner. *Act-*

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ing Solicitor General Washington, Carl A. Auerbach, Harry H. Schneider and *Josephine H. Klein* for respondent. Reported below: 160 F. 2d 378.

No. 1226. TEXASTEEL MANUFACTURING CO. ET AL. *v.* SEABOARD SURETY CO.; and

No. 1227. ARMSTRONG ET AL. *v.* SEABOARD SURETY CO. May 19, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Alfred McKnight* for petitioners. *William E. Allen* and *Lewis M. Stevens* for respondent. Reported below: 158 F. 2d 90.

No. 1236. JONES & LAUGHLIN STEEL CORP. *v.* UNITED MINE WORKERS OF AMERICA ET AL. May 19, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *John C. Bane, Jr., John J. Wilson, John C. Gall, H. Parker Sharp* and *Alan D. Riester* for petitioner. *Acting Solicitor General Washington, Peyton Ford, John Ford Baecher, Paul A. Sweeney* and *Harry I. Rand* for the government respondents. Reported below: 81 U. S. App. D. C. 361, 159 F. 2d 18.

No. 1239. HURT ET AL. *v.* COTTON STATES FERTILIZER CO. ET AL. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Murray C. Bernays* for Hurt, petitioner. *Charles J. Bloch* for the Cotton States Fertilizer Co. et al., and *Geo. P. Whitman* for Ellis, respondents. Reported below: 159 F. 2d 52.

No. 1246. WALL WIRE PRODUCTS CO. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. May 19, 1947. Petition

for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Samuel B. Fortenbaugh, Jr.* and *John R. Young* for petitioner. *Acting Solicitor General Washington, William S. Tyson, Bessie Margolin* and *Morton Liftin* for respondent. Reported below: 161 F. 2d 470.

No. 1248. BRADFORD *v.* UNITED STATES. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 160 F. 2d 729.

No. 1253. GLOVER *v.* COFFING, TRUSTEE IN BANKRUPTCY, ET AL. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Owen W. Crumpacker* and *Jay E. Darlington* for petitioner. *Alfred P. Draper* for respondents. Reported below: 158 F. 2d 964.

No. 1254. MAYFIELD, ADMINISTRATRIX, *v.* KANSAS CITY LIFE INSURANCE CO. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Owen W. Crumpacker, George Cohan* and *Jay E. Darlington* for petitioner. *Owen Rall* for respondent. Reported below: 158 F. 2d 331.

No. 1318. DAVIS ET AL. *v.* PENN MUTUAL LIFE INSURANCE CO. May 19, 1947. Petition for writ of certiorari to the Supreme Court of Georgia denied. *W. S. Northcutt*

for petitioners. *Grover Middlebrooks* for respondent. Reported below: 198 Ga. 550, 32 S. E. 2d 180.

No. 1097. HAWKINS ET AL. *v.* UNITED STATES. May 19, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Joseph A. McMenamin* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 81 U. S. App. D. C. 376, 158 F. 2d 652.

No. 1186. MEEKS *v.* STEWART, WARDEN. May 19, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 1189. STARR *v.* STATE BOARD OF LAW EXAMINERS FOR THE STATE OF INDIANA ET AL. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 159 F. 2d 305.

No. 1259. SNELL *v.* FLORIDA. May 19, 1947. Petition for writ of certiorari to the Supreme Court of Florida denied. Reported below: 158 Fla. 431, 28 So. 2d 863.

No. 1312. KERN *v.* RAGEN, WARDEN. May 19, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1316. JONES *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County and Circuit Court of Will County, Illinois;

No. 1330. FLEEGER *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois;

No. 1331. SOROSS *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois;

No. 1332. BAXTER *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 1333. BRILL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. May 19, 1947. Denied.

Nos. 1286 and 1370. SPEARS *v.* SPEARS. See *ante*, p. 790.

No. 1139. HEFFRON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Martin Gendel* for petitioners. Acting *Solicitor General Washington, Sewall Key, A. F. Prescott* and *S. Dee Hanson* for the United States. Reported below: 158 F. 2d 657.

No. 1154. UNITED STATES *v.* MODERN REED & RATTAN CO., INC. ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Acting Solicitor General Washington* for the United States. *Philip S. Agar* for respondents. Reported below: 159 F. 2d 656.

No. 1155. BANKERS FARM MORTGAGE CO. *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to

the Court of Claims denied. *A. D. Sutherland* and *Lawrence J. Bernard* for petitioner. *Acting Solicitor General Washington, Peyton Ford* and *Paul A. Sweeney* for the United States. Reported below: 107 Ct. Cl. 540, 69 F. Supp. 197.

No. 1210. FUJIKAWA ET AL. *v.* SUNRISE SODA WORKS CO. ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *R. A. Vitousek, Masaji Marumoto* and *Henry F. Butler* for petitioners. *Kennett B. Dawson* for respondents. Reported below: 158 F. 2d 490.

No. 1237. NEW YORK *v.* UNITED STATES (RELATIVE TO THE CONDEMNATION BY THE UNITED STATES OF CERTAIN EASEMENT RIGHTS IN 220 ACRES OF LAND IN ESSEX AND HAMILTON COUNTIES, NEW YORK). June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Henry S. Manley,* Assistant Attorney General, for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Vanech, Roger P. Marquis* and *Fred W. Smith* for the United States. Reported below: 160 F. 2d 479.

No. 1240. RACKLEY *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 159 F. 2d 702.

No. 1247. LEA *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *M. A. Grace* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 159 F. 2d 939.

No. 1251. FERNANDO QUINONES JIMENEZ *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Benicio F. Sanchez* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 161 F. 2d 79.

No. 1252. EX PARTE BRACK. June 2, 1947. Petition for writ of certiorari to the Court of Appeals of Maryland denied. *F. Regis Noel* for petitioner. Reported below: 50 A. 2d 432.

No. 1260. VICA COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Walter M. Gleason* and *Max Radin* for petitioner. *Acting Solicitor General Washington, Sewall Key, A. F. Prescott* and *Newton K. Fox* for respondent. Reported below: 159 F. 2d 148.

No. 1267. TUNGET *v.* KENTUCKY. June 2, 1947. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *A. E. Funk* for petitioner. *Eldon S.*

Dummit, Attorney General of Kentucky, for respondent. Reported below: 303 Ky. 834, 198 S. W. 2d 785.

No. 1270. ANGLIN & STEVENSON ET AL. *v.* UNITED STATES ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Charles A. Moon* and *Joseph C. Stone* for petitioners. *Acting Solicitor General Washington, Assistant Attorney General Vanech, Roger P. Marquis* and *Fred W. Smith* for the United States, respondent. Reported below: 160 F. 2d 670.

No. 1273. REFRIGERATION PATENTS CORP. *v.* STEWART-WARNER CORP.; and

No. 1274. POTTER REFRIGERATOR CORP. *v.* STEWART-WARNER CORP. June 2, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Leonard A. Watson* and *George A. Chritton* for petitioners. *John D. Black, Albin C. Ahlberg* and *Ross O. Hinkle* for respondent. Reported below: 159 F. 2d 972.

No. 1275. BAILEY ET AL. *v.* PROCTOR ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Samuel H. Kaufman* and *George Trosk* for petitioners. *Robert H. Davison* and *Lewis L. Wadsworth, Jr.* for Minsch et al., respondents. Reported below: 160 F. 2d 78.

No. 1276. BAILEY ET AL. *v.* MCLELLAN ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Samuel H. Kauf-*

man and *George Trosk* for petitioners. *Robert A. B. Cook* for Welch et al., and *George B. Rowlings* and *R. Gaynor Wellings* for Rowlings, respondents. Reported below: 159 F. 2d 1014.

No. 1277. In re Chopak. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Peyton Ford, Paul A. Sweeney* and *Harry I. Rand* filed a brief in opposition. Reported below: 160 F. 2d 886.

No. 1278. Wootten *v.* Wootten; and

No. 1279. Wootten *v.* Wootten. June 2, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *A. M. Fernandez* and *John E. Lyle, Jr.* for petitioner. *J. O. Seth* for respondents. Reported below: 159 F. 2d 567.

No. 1280. Vail Manufacturing Co. *v.* National Labor Relations Board. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Franklin D. Trueblood* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent. Reported below: 158 F. 2d 664.

No. 1282. Gomila *v.* United States. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *L. E. Gwinn* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 159 F. 2d 1006.

No. 1297. MASTERS *v.* NEW YORK CENTRAL RAILROAD CO. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Charles H. Brady* for petitioner. *Harold A. James* for respondent. Reported below: 147 Ohio St. 293, 70 N. E. 2d 898.

No. 1298. ESTATE OF WILKINSON *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Ferdinand Tannenbaum* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Irving I. Axelrad* for respondent. Reported below: 159 F. 2d 167.

No. 1299. STANDARD OIL CO. *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Isador Grossman* for petitioner. *Acting Solicitor General Washington, Sewall Key, A. F. Prescott* and *Helen Goodner* for the United States. Reported below: 158 F. 2d 126.

No. 1302. REPUBLIC OF THE UNITED STATES OF BRAZIL, TRADING AS LLOYD BRASILEIRO, *v.* GREAT ATLANTIC & PACIFIC TEA CO. ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Frank J. McConnell* for petitioner. *Henry N. Longley* and *John W. R. Zisgen* for respondents. Reported below: 159 F. 2d 661.

No. 1308. CREWS ET AL. *v.* OVEN ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Christy Russell* for

petitioners. *Harry O. Glasser, Nathan Scarritt* and *E. S. Champlin* for respondents. Reported below: 159 F. 2d 780.

Nos. 1303, 1304 and 1305. COMMISSIONER OF INTERNAL REVENUE *v.* SINGER SEWING MACHINE CO. June 2, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Acting Solicitor General Washington* for petitioner. *Albert L. Hopkins, Charles J. Nourse, Peter L. Wentz* and *Samuel H. Horne* for respondent. Reported below: 158 F. 2d 982.

No. 1376. STOKES & SMITH CO. *v.* TRANSPARENT-WRAP MACHINE CORP. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Samuel E. Darby, Jr.* and *Virgil E. Woodcock* for petitioner. *R. Morton Adams* for respondent. Reported below: 156 F. 2d 198.

No. 1342. BALOGH *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Hayden C. Covington* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 160 F. 2d 999.

No. 1211. CURLEY *v.* UNITED STATES; and

No. 1235. SMITH *v.* UNITED STATES. June 2, 1947. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY is of the opinion that the petitions for certiorari should be granted. MR. JUSTICE FRANKFURTER

took no part in the consideration or decision of these applications. *William E. Leahy* and *Nicholas J. Chase* for petitioner in No. 1211. *Wm. B. O'Connell* for petitioner in No. 1235. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 81 U. S. App. D. C. 389, 160 F. 2d 229.

No. 1234. HELFEND *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. June 2, 1947. Creedon, Housing Expediter, substituted as the party respondent. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Hiram T. Kellogg* for petitioner. *Acting Solicitor General Washington, Edwin D. Dupree, Jr., Charles P. Liff* and *Philip Travis* for respondent. Reported below: 159 F. 2d 730.

No. 1271. P. DOUGHERTY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Theodore B. Benson* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 159 F. 2d 269.

No. 1296. HOPKINS *v.* COMMISSIONER OF INTERNAL REVENUE. June 2, 1947. 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. *David A. Gaskill* and *Glen O. Smith* for petitioner. *Acting Solicitor General Washington, Sewall Key, Lee A. Jackson* and *Harry Baum* for respondent. Reported below: 157 F. 2d 679.

No. 1315. NEVIUS *v.* OHIO. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Paul M. Herbert, Robert E. Teaford* and *Frank L. Nevius* for petitioner. *Simon L. Leis, Homer C. Corry* and *Stewart L. Tatum* for respondent. Reported below: 147 Ohio St. 263, 71 N. E. 2d 258.

No. 748. CRUSE *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 777. CANNADY *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 956. STORY *v.* HUNTER, WARDEN. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se. Acting Solicitor General Washington* and *Robert S. Erdahl* for respondent. Reported below: 158 F. 2d 825.

No. 1109. UNITED STATES EX REL. BISHOP *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Charles Edwin Wallington* for petitioner. *Acting Solici-*

tor General Washington, Robert S. Erdahl and *Sheldon E. Bernstein* for respondent. Reported below: 159 F. 2d 505.

No. 1111. SETSER *v.* WELCH, SUPERINTENDENT. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 159 F. 2d 703.

No. 1112. CALHOUN *v.* NIERSTHEIMER, WARDEN. June 2, 1947. Petition for writ of certiorari to the Circuit Court of St. Clair County, Illinois, denied. Petitioner *pro se*. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 1177. HIGGINS *v.* UNITED STATES. June 2, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *James J. Laughlin* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 81 U. S. App. D. C. 372, 160 F. 2d 223.

No. 1238. MURPHY *v.* WISCONSIN. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Wisconsin denied.

No. 1287. BLACKWELL *v.* NEW YORK. June 2, 1947. Petition for writ of certiorari to the County Court of Albany County, New York, denied.

No. 1293. WILSON *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Reported below: 160 F. 2d 212.

No. 1343. SHOTKIN *v.* POMEROY ET AL. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 159 F. 2d 78.

No. 1359. JOHNSON *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1364. ROBERTS *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1375. HAYES *v.* RAGEN, WARDEN. June 2, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1379. JOHNSON *v.* CLOW. June 2, 1947. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied.

No. 1381. KRELL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 1387. WILLIAMS *v.* NIERSTHEIMER, WARDEN. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois. June 2, 1947. Denied.

No. 1388. KENNEDY *v.* BURKE, WARDEN. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied.

No. 1390. THOMPSON *v.* INDIANA. June 2, 1947. Petition for writ of certiorari to the Supreme Court of Indiana denied. Reported below: 225 Ind. —, 72 N. E. 2d 744.

No. 1141. ARENAS *v.* UNITED STATES; and

No. 1272. UNITED STATES *v.* ARENAS. June 9, 1947. The petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit are denied. *John W. Preston* and *Oliver O. Clark* for petitioner in No. 1141. *Acting Solicitor General Washington* for the United States. With him on the brief in No. 1141 was *Assistant Attorney General Bazelon.* Reported below: 158 F. 2d 730.

No. 1196. RAGEN, WARDEN, *v.* UNITED STATES EX REL. ROONEY. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for petitioner. *Albert E. Jenner, Jr.* for respondent. Reported below: 158 F. 2d 346.

No. 1281. GRAY ET AL. *v.* COMMODITY CREDIT CORPORATION. June 9, 1947. Petition for writ of certiorari to

the Circuit Court of Appeals for the Ninth Circuit denied. *Denver S. Church* for petitioners. *Acting Solicitor General Washington, Peyton Ford, Paul A. Sweeney* and *Harry I. Rand* for respondent. Reported below: 159 F. 2d 243.

No. 1307. WABASH OIL & GAS ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Edmund A. Whitman* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *S. Dee Hanson* for respondent. Reported below: 160 F. 2d 658.

No. 1310. BUSH TERMINAL RAILROAD CO. *v.* BUSH TERMINAL BUILDINGS CO. June 9, 1947. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, Second Judicial Department, denied. *Arthur Garfield Hays, John Schulman* and *Osmond K. Fraenkel* for petitioner. *Abner J. Grossman, Martin A. Schenck* and *Charles E. Cotterill* for respondent. Reported below: See 294 N. Y. 723, 61 N. E. 2d 454.

No. 1313. KEMPE *v.* UNITED STATES. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Eugene D. O'Sullivan* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Sheldon E. Bernstein* for the United States. Reported below: 160 F. 2d 406.

No. 1326. HENDERSON, EXECUTOR, *v.* ROGAN, EXECUTRIX. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Todd W. Johnson* for petitioner. *Acting Solicitor Gen-*

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eral Washington, Sewall Key, Lee A. Jackson and *Newton K. Fox* for respondent. Reported below: 159 F. 2d 855.

No. 1327. DOOLEY *v.* SCOTT, ADMINISTRATOR, ET AL. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Royal W. Irwin* for petitioner. *Harold A. Smith* for the New York, Chicago & St. Louis Railroad Co., respondent. Reported below: 159 F. 2d 618.

No. 1328. KEEHN, RECEIVER, *v.* BRADY TRANSFER & STORAGE CO. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Ferre C. Watkins* and *William H. Beckman* for petitioner. *Rex H. Fowler* and *David Axelrod* for respondent. Reported below: 159 F. 2d 383.

No. 1337. WARD *v.* UNITED STATES. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Peyton Ford, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 158 F. 2d 499.

No. 1418. NEW YORK CENTRAL RAILROAD CO. ET AL. *v.* NORTON, SUCCESSOR TRUSTEE; and

No. 1419. NEW YORK CENTRAL RAILROAD CO. ET AL. *v.* NEW YORK LIFE INSURANCE CO. ET AL. June 9, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Jacob Aronson, John A. Hartpence* and *Samuel H. Hellenbrand* for the

New York Central Railroad Co. et al., and *Ralph E. Cooper* for the Erie Railroad Co., petitioners. *John M. Harlan, Lyman M. Tondel, Jr.* and *Ralph E. Lum* for Norton, respondent in No. 1418. Reported below: No. 1418, 160 F. 2d 29; No. 1419, 160 F. 2d 34.

No. 1263. TINKOFF *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE. June 9, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Sewall Key, A. F. Prescott* and *Hilbert P. Zarky* for respondent. Reported below: 158 F. 2d 855.

No. 1322. MELLEN *v.* H. B. HIRSCH & SONS ET AL. June 9, 1947. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Petitioner *pro se*. *Lewis Jacobs* for respondents. Reported below: 82 U. S. App. D. C. —, 159 F. 2d 461.

No. 1347. GEISELMAN *v.* NEW YORK. June 9, 1947. Petition for writ of certiorari to the County Court of Nassau County, New York, denied.

No. 1360. HAMMOND *v.* RAGEN, WARDEN. June 9, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1365. CAMPIGLIA *v.* NEW YORK. June 9, 1947. Petition for writ of certiorari to the County Court of Suffolk County, New York, denied.

No. 1398. BAXTER *v.* RAGEN, WARDEN; and

No. 1399. CUNNINGHAM *v.* RAGEN, WARDEN. Petitions for writs of certiorari to the Supreme Court of Illinois; and

No. 1400. MCCOLLISTER *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. June 9, 1947. Denied.

No. 1040. MCCANN *v.* CLARK, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. June 9, 1947. The motion for oral argument and other relief is denied. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is also denied. Petitioner *pro se*. *Acting Solicitor General Washington* for respondents.

No. 1220. JENSEN *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se*. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 160 F. 2d 104.

No. 1311. NELSON *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Court of Claims denied. *Robert A. Littleton* for petitioner. *Acting Solicitor General Washington, Sewall Key, Helen R. Carloss* and *H. S. Fessenden* for the United States. Reported below: 107 Ct. Cl. 477, 69 F. Supp. 336.

No. 1314. SOUTHERN PACIFIC CO. *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Court of Claims denied. *C. O. Amonette* and *Lawrence Cake* for petitioner. *Acting Solicitor General Washington,*

Peyton Ford and *Oscar H. Davis* for the United States. Reported below: 107 Ct. Cl. 525, 69 F. Supp. 208.

No. 1320. CAVE *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Walter F. Maley* and *Charles W. Bowers* for petitioner. *Acting Solicitor General Washington, Sewall Key* and *Ellis N. Slack* for the United States. Reported below: 159 F. 2d 464.

No. 1321. POTEET ET AL. *v.* ROGERS. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Marcy K. Brown, Jr.* for petitioners. *John B. Gage* and *Richard K. Phelps* for respondent. Reported below: 355 Mo. 986, 199 S. W. 2d 378.

No. 1324. J. L. HUDSON CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Archibald Broomfield* for petitioner. *Acting Solicitor General Washington, Gerhard P. Van Arkel, Morris P. Glushien* and *Ruth Weyand* for respondent. Reported below: 160 F. 2d 105.

No. 1329. TODD SHIPYARD CORP. *v.* PULEO, ADMINISTRATRIX, ET AL.; and

No. 1384. H. E. MOSS & CO. *v.* PULEO, ADMINISTRATRIX, ET AL. June 16, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Paul Speer* for petitioner in No. 1329. *Raymond Parmer* and *Vernon Sims Jones* for H. E. Moss & Co., petitioner in No. 1384 and respondent in No. 1329.

Jacob Rassner for Puleo, respondent in No. 1329. Reported below: 159 F. 2d 842.

No. 1338. DE FILIPPIS *v.* CHRYSLER CORPORATION ET AL. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William J. Rapp* and *Samuel Hershenstein* for petitioner. *Max W. Zabel* and *Edward C. Gritzbaugh* for respondents. Reported below: 159 F. 2d 478.

No. 1357. WHITFIELD *v.* PARSONS ET AL. June 16, 1947. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Harry Kalisch* for petitioner. *Theodore D. Parsons* for respondents. Reported below: 139 N. J. Eq. 459, 51 A. 2d 365.

No. 1358. MCALLISTER LIGHTERAGE LINE, INC. *v.* P. DOUGHERTY CO. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Wilbur E. Dow, Jr.* and *William G. Symmers* for petitioner. *Christopher E. Heckman* for respondent. Reported below: 159 F. 2d 486.

No. 1361. MELLOR *v.* UNITED STATES; and

No. 1362. FORD *v.* UNITED STATES. June 16, 1947. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Eugene D. O'Sullivan* and *Hugh J. Boyle* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 160 F. 2d 757.

No. 1373. SMITH *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Sol C. Berenholtz* for petitioner. *Acting Solicitor General Washington, Assistant Attorney General Ford* and *Oscar H. Davis* for the United States. Reported below: 159 F. 2d 247.

No. 1380. YOUNG *v.* TERRITORY OF HAWAII. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Fred Patterson* for petitioner. Reported below: 160 F. 2d 289.

No. 1386. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. *v.* GAUNT, ADMINISTRATRIX. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Wallace W. Brown* for petitioner. *Hugh M. Alcorn* for respondent. Reported below: 160 F. 2d 599.

No. 1392. CHRISTIANSEN ET AL. *v.* CHRISTIANSEN. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Percy W. Phillips* for petitioners. *James F. Gray* for respondent. Reported below: 159 F. 2d 366.

No. 1394. LOWREY *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *C. Floyd Huff, Jr.* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 161 F. 2d 30.

No. 1428. GOLDBAUM *v.* UNITED STATES ET AL. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Manly Fleischmann* for petitioner. Reported below: 160 F. 2d 1017.

No. 1243. NIEWIADOMSKI *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Clare J. Hall* for petitioner. *Acting Solicitor General Washington, Peyton Ford, Searcy L. Johnson, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 159 F. 2d 683.

No. 1430. RED STAR BARGE LINE, INC. ET AL. *v.* FORCE. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Edward Ash* for petitioners. *Leonard Bronner, Jr.* for respondent. Reported below: 160 F. 2d 436.

No. 1431. MODERN MANUFACTURING CO., INC. *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. June 16, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Bertram Bennett* for petitioner. Reported below: 160 F. 2d 892.

No. 1432. AUERBACH *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. June 16, 1947. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Morris Lavine* for petitioner. Reported below: 161 F. 2d 207.

No. 1447. KERSTEN, DOING BUSINESS AS KERSTEN MOTOR CO., *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Ralph Carr* for petitioner. Reported below: 161 F. 2d 337.

No. 1450. FRIEDMAN'S EXPRESS, INC. ET AL. *v.* LOEB, TRUSTEE. June 16, 1947. Petition for writ of certiorari to the Court of Appeals of New York denied. *Emmet L. Holbrook* for petitioners. Reported below: 296 N. Y. 1029, 73 N. E. 2d 906.

No. 987. TWYEFFORT, INC. *v.* WALLING, WAGE & HOUR ADMINISTRATOR. June 16, 1947. McComb substituted as the party respondent. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *William H. Timbers* for petitioner. *Acting Solicitor General Washington, William S. Tyson, Bessie Margolin* and *Morton Liftin* for respondent. Reported below: 158 F. 2d 944.

No. 1020. KROL *v.* RAGEN, WARDEN. June 16, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1022. BOLSTER *v.* MICHIGAN. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied. Petitioner *pro se*. *Eugene F. Black,* Attorney General of Michigan, and *Edmund E. Shepherd,* Solicitor General, for respondent.

No. 1137. WELLS *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 158 F. 2d 833.

No. 1152. YOUNG *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States.

No. 1228. MYERS *v.* HUNTER, WARDEN. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Petitioner *pro se.* *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent.

No. 1245. SMITH *v.* HUDSPETH, WARDEN. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Kansas denied. Reported below: 162 Kan. 361, 176 P. 2d 262.

No. 1323. MCCABE *v.* ARKANSAS. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *William Thomas Harper* for petitioner. *Guy E. Williams,* Attorney General of Arkansas, for respondent. Reported below: 210 Ark. 1076, 199 S. W. 2d 945.

No. 1356. SMITH *v.* CALIFORNIA. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Cali-

fornia denied. *Morris Lavine* for petitioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent.

No. 1366. McDonald *v.* Hunter, Warden. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Howard F. McCue* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 159 F. 2d 861.

No. 1389. Lustig *v.* United States. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Louis Halle* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 159 F. 2d 798.

No. 1397. Fouts et al. *v.* Ohio. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Wm. Scott Stewart* for petitioners. Reported below: 79 Ohio App. 255, 72 N. E. 2d 286.

No. 1406. Thompson *v.* Johnston, Warden. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 160 F. 2d 374.

No. 1407. Hamby *v.* Illinois. Petition for writ of certiorari to the Supreme Court of Illinois;

No. 1408. FICARROTTA *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois;

No. 1409. HESLY *v.* RAGEN, WARDEN; and

No. 1410. TAYLOR *v.* ILLINOIS. Petitions for writs of certiorari to the Supreme Court of Illinois; and

No. 1411. MACHUL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. June 16, 1947. Denied.

No. 1412. RUSNAK *v.* RAGEN, WARDEN. June 16, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1413. QUINN *v.* RAGEN, WARDEN. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1416. EGAN *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois;

No. 1424. MOORE *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Madison County, Illinois;

No. 1425. TENNEY *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois; and

No. 1426. BARONIA *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois. June 16, 1947. Denied.

No. 1429. MYSHOLOWSKY *v.* NEW YORK. June 16, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied. *Jacob Rassner* for petitioner.

No. 1433. RECK *v.* ILLINOIS. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Wm. Scott Stewart* for petitioner. Reported below: 392 Ill. 311, 64 N. E. 2d 526.

Nos. 1434 and 1435. PETERS *v.* ILLINOIS. June 16, 1947. Petition for writs of certiorari to the Supreme Court of Illinois denied. *Wm. Scott Stewart* for petitioner. Reported below: 396 Ill. 345, 71 N. E. 2d 703.

Nos. 1436 and 1437. BUCK *v.* ILLINOIS. June 16, 1947. Petition for writs of certiorari to the Supreme Court of Illinois denied. *Wm. Scott Stewart* for petitioner.

No. 1439. GRIFFIN *v.* RAGEN, WARDEN. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Winnebago County and the Supreme Court of Illinois denied.

No. 1440. LOPEZ *v.* INSULAR POLICE COMMISSION ET AL. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Benicio Sanchez Castano* for petitioner. Reported below: 160 F. 2d 673.

No. 1444. JORDAN *v.* RAGEN, WARDEN. June 16, 1947. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, denied.

No. 1449. BAKER *v.* UTECHT ET AL., AGENTS. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. Petitioner *pro se*. *J. A. A. Burnquist*, Attorney General of Minnesota, and *Ralph A. Stone*, Assistant Attorney General, for Utecht, respondent. Reported below: 161 F. 2d 304.

No. 1453. FRANKLIN *v.* NIERSTHEIMER, WARDEN. Petition for writ of certiorari to the Circuit Court of Randolph County, Illinois;

No. 1454. BALDRIDGE *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Madison County, Illinois;

No. 1455. FLAHERTY *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois; and

No. 1456. KERBECK *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois. June 16, 1947. Denied. Reported below: No. 1455, 396 Ill. 304, 71 N. E. 2d 779.

No. 1461. CAMPBELL *v.* MAYO, CUSTODIAN. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 158 F. 2d 960.

No. 1463. DYKES *v.* NIERSTHEIMER, WARDEN. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1464. HUBBARD *v.* BUSH, WARDEN. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 1465. HAYES *v.* RAGEN, WARDEN;

No. 1466. BALDRIDGE *v.* RAGEN, WARDEN; and

No. 1467. SCHULTZ *v.* ILLINOIS. Petitions for writs of certiorari to the Supreme Court of Illinois. June 16, 1947. Denied.

No. 1471. MOORE *v.* UNITED STATES. June 16, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

No. 1474. SKIBA *v.* MISSOURI. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Missouri denied. Reported below: 355 Mo. 1147, 199 S. W. 2d 913.

No. 1475. CAETANO *v.* CALIFORNIA. June 16, 1947. Petition for writ of certiorari to the Supreme Court of California denied.

No. 1491. SKINNER *v.* ILLINOIS. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Illinois denied. Reported below: 397 Ill. 273, 73 N. E. 2d 427.

No. 1393. MCCORMICK *v.* MICHIGAN. June 16, 1947. Petition for writ of certiorari to the Supreme Court of Michigan denied.

No. 1222. LAGOW *v.* UNITED STATES. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Herbert Zelenko* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 159 F. 2d 245.

No. 1231. FRIED ET AL. *v.* UNITED STATES. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *J. Bertram Wegman* for petitioners. *Acting Solicitor General Washington, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 161 F. 2d 453.

No. 1306. UNITED STATES *v.* HEARNE. June 23, 1947. Petition for writ of certiorari to the Court of Claims denied. *Acting Solicitor General Washington* for the United States. *Herman J. Galloway, Frederick W. Shields* and *John W. Gaskins* for respondent. Reported below: 107 Ct. Cl. 335, 68 F. Supp. 786.

No. 1339. DEGUIRE, EXECUTRIX, *v.* HIGGINS, COLLECTOR OF INTERNAL REVENUE. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *John P. McGrath* and *Denis M. Hurley* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *Fred E. Youngman* for respondent. Reported below: 159 F. 2d 921.

No. 1368. PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD CO. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.; and

No. 1369. INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. June 23, 1947. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Joseph B. Ely* for petitioners in No. 1368. *Henry W. Anderson, Lewis F. Powell, Jr.* and *Curtiss K. Thompson* for petitioners in No. 1369. *John W. Davis, Edwin S. S. Sunderland, Judson C. McLester, Jr., John L. Hall, James Garfield, George E. Beers, Edmund Ruffin Beckwith, Fred N. Oliver, Willard P. Scott, M'Cready Sykes, H. C. McCollom, Edward E. Watts, Jr.* and *Jesse E. Waid* for respondents. With them on the brief in No. 1368 was *John E. Masten. Acting Solicitor General Washington* and *W. Meade Fletcher* filed a memorandum for the Reconstruction Finance Corporation. Reported below: 161 F. 2d 413.

No. 1385. NEWMAN *v.* COMMISSIONER OF INTERNAL REVENUE. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Leonard G. Bisco* for petitioner. *Acting Solicitor General Washington, Sewall Key, Robert N. Anderson* and *Hilbert P. Zarky* for respondent. Reported below: 159 F. 2d 848.

No. 1415. COLLINS ET AL. *v.* UNITED STATES ET AL. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Edward M. Box* for petitioners. *Thos. W. Champion* and *Louis A. Fischl* for Collins, respondent. Reported below: 161 F. 2d 64.

No. 1420. D. M. PICTON & CO., INC. *v.* EASTES ET AL. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *M. A.*

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Grace and *David M. Picton, Jr.* for petitioner. *Major T. Bell* for the Superior Oil Co., respondent. Reported below: 160 F. 2d 189.

No. 1443. BORG-WARNER CORP. ET AL. *v.* GOODWIN ET AL. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Max W. Zabel, Edward C. Gritzbaugh* and *Benton Baker* for petitioners. *Raymond L. Greist* for respondents. Reported below: 157 F. 2d 267.

No. 1462. CONSUMERS HOME EQUIPMENT CO. ET AL. *v.* UNITED STATES. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Louis M. Hopping* and *William L. Fitzgerald* for petitioners. Reported below: 161 F. 2d 360.

No. 1470. WILSON *v.* UNITED STATES. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Harry K. Cuthbertson* and *Walter J. Bixler* for petitioner. Reported below: 160 F. 2d 745.

No. 1058. SMITH *v.* COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. MR. JUSTICE BLACK is of the opinion that the petition should be granted. *Owen W. Crumpacker* and *Jay E. Darlington* for petitioner. *L. L. Bomberger* and *John W. Morthland* for respondent. Reported below: 158 F. 2d 65.

No. 1396. HARRIS *v.* OHIO. June 23, 1947. Petition for writ of certiorari to the Supreme Court of Ohio denied.

No. 1404. COUNSELMAN *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR. June 23, 1947. Clark, Director, Liquidation Division, Department of Commerce, substituted as the party respondent. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Michael F. Keogh, J. Robert Carey* and *Richard H. Love* for petitioner. *Acting Solicitor General Washington, Stanley M. Silverberg* and *Harry H. Schneider* for respondent. Reported below: 161 F. 2d 203.

No. 688. JORDAN *v.* NEW YORK. June 23, 1947. Petition for writ of certiorari to the Supreme Court, Tompkins County, New York, denied.

No. 1166. PETERSON *v.* CALIFORNIA. June 23, 1947. Petition for writ of certiorari to the Supreme Court of California denied. *James M. Hanley* for petitioner. Reported below: 29 Cal. 2d 69, 173 P. 2d 11.

No. 1367. BOWKER *v.* HUNTER, WARDEN. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Howard F. McCue* for petitioner. *Acting Solicitor General Washington, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 158 F. 2d 854.

No. 1483. RYAN *v.* NEW YORK. June 23, 1947. Petition for writ of certiorari to the County Court of Kings County, New York, denied.

No. 1484. SPENCER *v.* ILLINOIS. Petition for writ of certiorari to the Supreme Court of Illinois;

No. 1485. PISANI *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois;

No. 1492. GAVALIS *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Will County, Illinois;

No. 1493. LYONS *v.* RAGEN, WARDEN; and

No. 1494. WOODWARD *v.* NIERSTHEIMER, WARDEN. Petitions for writs of certiorari to the Supreme Court of Illinois. June 23, 1947. Denied. Reported below: No. 1484, 397 Ill. 121, 73 N. E. 279; No. 1494, 394 Ill. 433, 69 N. E. 2d 181.

No. 1495. REMINE *v.* UNITED STATES. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

No. 1497. SMITH *v.* RAGEN, WARDEN. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1498. WRIGHT *v.* RAGEN, WARDEN. June 23, 1947. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied.

No. 1507. SMALL *v.* NEW YORK. June 23, 1947. Petition for writ of certiorari to the Court of General Sessions, County of New York, New York, denied.

No. 1508. SWANSON *v.* NEBRASKA. June 23, 1947. Petition for writ of certiorari to the Supreme Court of Nebraska denied. Reported below: 148 Neb. 155, 26 N. W. 2d 595.

ORDERS GRANTING REHEARING, FROM APRIL 8, 1947, THROUGH JUNE 23, 1947.

No. 836. ALASKA JUNEAU GOLD MINING CO. *v.* ROBERTSON ET AL. See *ante*, p. 793.

ORDERS DENYING REHEARING, FROM APRIL 8, 1947, THROUGH JUNE 23, 1947.*

No. 888. LUCAS *v.* UNITED STATES. April 14, 1947. 330 U. S. 841.

No. 991. CANNON ET AL. *v.* UNITED STATES. April 14, 1947. 330 U. S. 839.

No. 1045. COOK *v.* INDIANA. April 14, 1947. 330 U. S. 841.

No. 111, Misc. EX PARTE HOUGHTON. April 28, 1947. 330 U. S. 801.

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*See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 127, Misc. Ex parte Lewis et al. April 28, 1947. 330 U. S. 812.

No. 49. Haupt *v.* United States. April 28, 1947. 330 U. S. 631.

No. 291. Kotch et al. *v.* Board of River Port Pilot Commissioners et al. April 28, 1947. 330 U. S. 552.

No. 866. Wagner *v.* United States. April 28, 1947. 330 U. S. 846.

No. 993. Bell et al. *v.* Porter et al. April 28, 1947. 330 U. S. 813.

No. 994. Rokey et al. *v.* Day & Zimmermann, Inc. April 28, 1947. 330 U. S. 842.

No. 995. Bowers et al. *v.* Remington Rand, Inc. April 28, 1947. 330 U. S. 843.

No. 1016. Peyton *v.* Railway Express Agency, Inc. April 28, 1947. 330 U. S. 846.

No. 1090. Gavalis *v.* Illinois. April 28, 1947. 330 U. S. 845.

No. 1110. Grand Lodge Hall Association, I. O. O. F. of Indiana, et al. *v.* Moore, Auditor of Marion County, et al. April 28, 1947. 330 U. S. 808.

No. 253. UNITED STATES *v.* PULLMAN COMPANY ET AL.;
No. 254. OTIS & CO. *v.* UNITED STATES ET AL.; and
No. 255. CHESAPEAKE & OHIO RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. April 28, 1947. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications. 330 U. S. 806.

No. 453. PENFIELD COMPANY OF CALIFORNIA ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. May 5, 1947. 330 U. S. 585.

No. 999. DURRETT *v.* UNITED STATES. May 5, 1947.

No. 218. WOLTER *v.* SAFEWAY STORES, INC. May 5, 1947. The motion for leave to file a second petition for rehearing is denied. 329 U. S. 829.

No. 990. FRIEDMAN *v.* SCHWELLENBACH, SECRETARY OF LABOR, ET AL. May 5, 1947. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, having originally voted to grant the petition for certiorari, believe that the petition for rehearing should be granted. 330 U. S. 838.

No. 106, Misc. EX PARTE PEPLOWSKI. May 12, 1947. 330 U. S. 801.

No. 1085. PERNICIARO *v.* UNITED STATES. May 12, 1947.

No. 1100. UNITED STATES *v.* PALLETZ. May 12, 1947. 330 U. S. 812.

No. 1016. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. May 12, 1947. Second petition for rehearing denied.

No. 126, Misc. EX PARTE STERBA. May 19, 1947. 330 U. S. 812.

No. 878. ROGERS *v.* SQUIER, WARDEN. May 19, 1947. 330 U. S. 840.

No. 912. DAVIS *v.* JOHNSTON, WARDEN. May 19, 1947.

No. 1250. CASE *v.* THE GOVERNMENT ET AL. May 19, 1947.

No. 1301. WEISBERG *v.* ILLINOIS. May 19, 1947.

No. 953. SANITARY DISTRICT OF CHICAGO *v.* ACTIVATED SLUDGE, INC. ET AL. May 19, 1947. Second petition for rehearing denied. 330 U. S. 856.

No. 343. NEW YORK ET AL. *v.* UNITED STATES ET AL.; and

No. 344. HILDRETH, GOVERNOR, ET AL. *v.* UNITED STATES ET AL. June 9, 1947.

No. 575. GORUM ET AL. *v.* LOUDENSLAGER ET AL. June 9, 1947.

No. 1026. RUBEN *v.* WELCH, SUPERINTENDENT. June 9, 1947.

No. 1096. SMITH *v.* JEFFERSON COUNTY ET AL. June 9, 1947. 330 U. S. 808.

No. 1106. ARNSTEIN *v.* PORTER. June 9, 1947. 330 U. S. 851.

No. 1127. AMAYA ET AL. *v.* STANOLIND OIL & GAS CO. ET AL. June 9, 1947.

No. 1128. HEFLER ET AL. *v.* UNITED STATES. June 9, 1947.

No. 1133. BENNION *v.* NEW YORK LIFE INSURANCE CO. June 9, 1947.

No. 1138. HENSLEY *v.* UNITED STATES. June 9, 1947.

No. 1142. SMALL *v.* NEW YORK. June 9, 1947.

No. 1233. WILKERSON *v.* ILLINOIS. June 9, 1947.

No. 127, Misc. EX PARTE LEWIS ET AL. June 9, 1947. Leave to file a second petition for rehearing is denied.

No. 34. HARRIS *v.* UNITED STATES. June 9, 1947.

No. 217. MISHAWAKA RUBBER & WOOLEN MANUFACTURING CO. *v.* PANTHER-PANCO RUBBER CO., INC. June 9, 1947. The motion for leave to file a second petition for rehearing is denied. 329 U. S. 826.

No. 300. EVERETT *v.* DOWNING. June 9, 1947. The motion for leave to file a second petition for rehearing is denied. 329 U. S. 827.

No. 1016. PEYTON *v.* RAILWAY EXPRESS AGENCY, INC. June 9, 1947. Leave to file a third petition for rehearing is denied.

No. 1187. JACKSON *v.* TENNESSEE;

No. 1194. YOUNG *v.* ANDERSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.; and

No. 1294. DOBBS *v.* MISSISSIPPI. June 9, 1947. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 754, October Term, 1945. SEWELL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. See *ante*, p. 794.

No. 143, Misc. MALOYAN *v.* UNITED STATES CONGRESS. June 16, 1947.

No. 418. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP. June 16, 1947.

No. 419. NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & Co. June 16, 1947.

No. 715. OKLAHOMA ET AL. *v.* UNITED STATES. June 16, 1947.

No. 1237. NEW YORK *v.* UNITED STATES (RELATIVE TO THE CONDEMNATION BY THE UNITED STATES OF CERTAIN EASEMENT RIGHTS IN 220 ACRES OF LAND IN ESSEX AND HAMILTON COUNTIES, NEW YORK). June 16, 1947.

No. 1293. WILSON *v.* RAGEN, WARDEN. June 16, 1947.

No. 1097. HAWKINS ET AL. *v.* UNITED STATES;

No. 1219. RESER *v.* FLEMING, TEMPORARY CONTROLS ADMINISTRATOR;

No. 1226. TEXASTEEL MANUFACTURING CO. ET AL. *v.* SEABOARD SURETY CO.; and

No. 1227. ARMSTRONG ET AL. *v.* SEABOARD SURETY CO. June 16, 1947. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 1211. CURLEY *v.* UNITED STATES. June 16, 1947. MR. JUSTICE MURPHY is of the opinion the petition should be granted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application.

No. 144. CALVERT *v.* SMITH ET AL. June 16, 1947. The motion for leave to file a petition for rehearing is denied. 329 U. S. 718.

No. 700. BORG-WARNER CORP. ET AL. *v.* GOODWIN ET AL. June 23, 1947. 329 U. S. 835; 331 U. S. 796.

No. 1177. HIGGINS *v.* UNITED STATES. June 23, 1947.

No. 1365. CAMPIGLIA *v.* NEW YORK. June 23, 1947.

No. 1282. GOMILA *v.* UNITED STATES. June 23, 1947.

No. 501. OKONITE COMPANY *v.* COMMISSIONER OF INTERNAL REVENUE. June 23, 1947. The motion for leave to file a second petition for rehearing is denied. 329 U. S. 829.

No. 741. QUINN *v.* UNITED STATES. June 23, 1947. 330 U. S. 822.

No. 909. MEYER *v.* HENWOOD, TRUSTEE, ET AL. June 23, 1947. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. 330 U. S. 836.

No. 940. HILL PACKING CO. *v.* CITY OF NEW YORK ET AL.; and

No. 1189. STARR *v.* STATE BOARD OF LAW EXAMINERS FOR THE STATE OF INDIANA ET AL. June 23, 1947. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these applications.

No. 1235. SMITH *v.* UNITED STATES. June 23, 1947. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this application. MR. JUSTICE MURPHY is of the opinion the petition for rehearing should be granted.

AMENDMENTS OF GENERAL ORDERS IN BANKRUPTCY AND THE OFFICIAL FORMS

PROMULGATED BY THE

SUPREME COURT OF THE UNITED STATES

JUNE 23, 1947

AMENDMENTS OF GENERAL ORDERS IN BANKRUPTCY AND THE OFFICIAL FORMS

ORDER

IT IS ORDERED, on this 23d day of June, 1947, that General Orders Nos. 1, 10, 13, 24, 26, 27, 35 (4), 46, 50 (12) and 56 and Forms in Bankruptcy Nos. 1, 12, 15, 17, 46, 47, 59, 70, 71, and 72 be, and they are hereby, amended and established to read as hereinafter set forth.

IT IS FURTHER ORDERED that this order shall take effect on Tuesday, July 1, 1947, and shall govern all proceedings then pending to which its provisions are applicable except to the extent that in the opinion of the court its application to such proceedings would not be practicable or work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply.

GENERAL ORDER No. 1

DOCKETS

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon; of the reference of the case, if any reference is made, to the referee; of the transmission by the referee to the clerk of all bonds, orders and reports, and of the referee's certified record of the proceedings; and of all proceedings in the case except those duly entered on the referee's docket. The clerk's docket shall be arranged in a manner convenient for reference, and shall at all times be open

to public inspection. If the proceeding is brought under sections 75 or 77, or under Chapters IX, X, XI, XII, or XIII, of the Act, the docket shall so indicate.

The referee, in all cases referred to him shall keep a docket of all proceedings before him substantially in the manner indicated by Form No. 70. Such docket shall at all times be open to public inspection. The original referee's docket or a certified copy thereof shall be transmitted to the clerk for preservation by him when the case is closed.

General Order 10

Indemnity for Expenses

Before incurring any expense in procuring the attendance of witnesses or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money advanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same.

General Order 13

Appointment and Removal of Trustee

(Abrogated, Feb. 13, 1939, 305 U. S. following p. 676)

General Order 24

List of Proved Claims and Interests

The person with whom proofs of claim or of interest are filed shall maintain open to inspection a list of the claims and interests proved against the estate, with the names and addresses of the owners thereof, as given by them. The list of claims or of interests shall be maintained substantially in the manner indicated by Form

No. 71. The original list or a certified copy thereof shall be transmitted to the clerk for preservation by him when the case is closed.

General Order 26

Accounts of Referee

Every referee shall maintain, substantially in the manner indicated by Form No. 46, a cash book or a record in which he shall keep an accurate and itemized account showing (1) all moneys received by him in his official capacity as referee in bankruptcy and the case number of the proceeding to which each receipt is credited; and (2) the disposition made of such moneys, showing the case number of the proceeding, if any, on account of which each sum is disbursed. All moneys received as aforesaid shall be deposited forthwith to the credit of the referee in his official capacity in a depository designated by the court for the purpose, and shall be disbursed only by checks signed by the referee in his official capacity. Within thirty days after the expiration of each six months period ending June thirtieth and December thirty-first of each year, each referee shall submit to the district court a report substantially in the manner indicated by Form No. 47 containing (1) a financial statement showing all moneys received and disbursed in his official capacity as referee in bankruptcy during the period covered by the report; (2) an analysis of the unexpended balance in his official account at the end of the period; (3) a statement showing the number of cases handled during the period; and (4) a list of the proceedings referred to him which have remained open for more than eighteen months, giving the reasons in each instance why they have not been closed. The statements so submitted shall be in duplicate and verified; and one copy shall be transmitted by the clerk, forthwith upon its receipt, to the Administrative Office of the United States Courts.

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General Order 27

Review by Judge

(Abrogated, Feb. 13, 1939, 305 U. S. following p. 676)

General Order 35

Paragraph 4

(4) The petition in a voluntary proceeding under Chapters I to VII or Chapter XIII of the Act may be accepted for filing by the clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and cannot obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three months.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court may dismiss the proceeding for failure to pay costs as provided in Section 59g of the Act. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed, shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any,

in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full.

General Order 46

Banking Institution as Custodian, Receiver or Trustee

(Abrogated, Feb. 13, 1939, 305 U. S. following p. 676)

General Order 50

Paragraph 12

Proceedings Under Section 75 of the Act

(12) The twenty-five dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Director of the Administrative Office of the United States Courts.

General Order 56

Rules by Courts of Bankruptcy

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be furnished to the Supreme Court of the United States and the Administrative Office of the United States Courts.

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AMENDMENTS OF FORMS IN BANKRUPTCY

Form No. 1

Schedule B–4 re Attorney's Fees

Amounts Paid to Attorney

Sum or sums paid to counsel, and to whom, for filing fees or costs and for services rendered or to be rendered in this bankruptcy .....

Form No. 12

Appointment and Oath of Appraiser

....., of ....., a disinterested person, is hereby appointed appraiser, forthwith to appraise, after having been duly sworn, all the items of real and personal property belonging to the estate of said bankrupt, and to prepare and file with the court a report of said appraisal.

[Here set out the amount of compensation or the rate or measure thereof to be paid and such instructions as may be deemed appropriate for the appraisal of the property of the particular estate.]

Dated at ....., this ..... day of ....., 19...

....,
Referee in Bankruptcy.

United States of America }
..... District of ..... } *ss.*

I, ..., the person above named, do hereby make solemn oath that I will fully and fairly appraise the aforesaid property according to my best skill and judgment.

....

Subscribed and sworn to before me this ..... day of ....., 19...

....,
....
[*Official character.*]

FORM No. 15

OATH OF OFFICE FOR REFEREES IN BANKRUPTCY

I, ..., do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ....., according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD.

....

Subscribed and sworn to (or affirmed) before me this ..... day of ....., 19...

....., ...

FORM No. 17

NOTICE OF FIRST MEETING OF CREDITORS

(Caption as in Form No. 1)

To the creditors of ...., of ....., a bankrupt:

Notice is hereby given that said .... has been duly adjudged a bankrupt on a petition filed by [or against] him on ....., 19.., and that the first meeting of his creditors will be held at ....., in ....., on ....., 19.., at .. o'clock ... m., at which place and time the said creditors may attend, prove their claims, appoint a trustee, appoint a committee of creditors, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated at ....., ..., 19...

....., ...,

Referee in Bankruptcy.

FORM NO. 46

REFEREE'S CASH BOOK

RECEIPTS							DISBURSEMENTS									
Date	Title of Case and Case No.	From Whom Received	Indemnity for Witnesses and Testimony	Moneys Collected for Clerk	Moneys Held in Trust	Misc. Receipts	Date	Payee	Check No.	Title of Case and Case No.	Witnesses	Testimony	Moneys Disbursed to Clerk	Refunds	Moneys Held in Trust	Misc. Disbursements
Amounts brought forward ----------							Amounts brought forward ----------									
Amounts carried forward ----------							Amounts carried forward ----------									

FORM NO. 47

REFEREE'S SEMI-ANNUAL REPORT

In the District Court of the United States

..... District of .....

To the Honorable ....., Judge of said court:

I, ..., Referee in Bankruptcy of said court, beg to submit herewith, in duplicate, my report in compliance with General Order No. 26 of the Supreme Court, covering the period from ..... to ....., inclusive.

Attached hereto and made a part of this report are the following exhibits:

1. A financial statement showing all moneys received and disbursed during the period covered by this report.

2. An analysis of the unexpended balance in my official account at the end of the period.

3. Statement of the number of cases handled during the period.

4. A list of proceedings referred to me which have remained open for more than eighteen months, giving the reason in each instance why they have not been closed.

Respectfully submitted, this ..... day of ....., 19...

....

State of .....
County of..... } ss.

Before me, the undersigned authority, on this day personally appeared ...., known to me to be the person whose name is subscribed to the foregoing instrument, who after being sworn by me, upon his oath states that the statements contained in the foregoing instrument, and all exhibits thereto attached, are true and correct, to the best of his knowledge and belief.

....

Subscribed and sworn to before me by ...., this the ..... day of ....., 19...

....

FORM NO. 59

NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XIII

To the creditors of ...., of .....:

Notice is hereby given that on ....., 19.., the said .... filed a petition in this court stating that he desires to effect a composition or an extension of time to pay his debts out of his future earnings in accordance with the provisions of chapter XIII of the Bankruptcy Act; and that a meeting of his creditors will be held at ....., in ....., on ....., 19.., at .. o'clock ... m., at which place and time the said debtor shall submit his plan for a composition or extension, and the said creditors may attend, prove their claims, examine the debtor, present written acceptances of the plan proposed by him, and transact such other business as may properly come before said meeting.

[If appropriate, the following may be added]

Notice is also hereby given that the application to confirm said plan shall be filed with this court on or before ....., 19..; and that the hearing on the confirmation and objections thereto, if any, will be held at ....., in ....., on ....., 19.., at ... m.

Dated this ..... day of ....., 19...

....,
Referee in Bankruptcy.

FORM NO. 70

BANKRUPTCY DOCKET OF | REFEREE | CAUSE NO.

In the matter of

Address
Occupation
Employer

Receiver
Addr
Trustee
Addr

Attorneys for

Pet. Cr
Addr

Bkpt
Addr

Recvr
Addr

Trustee
Addr

Petition Filed
Adjudicated
1st Meeting
Last Day Filing Claims
Discharge

Vol
Pov
Inv
Ch
Sec

Is Any Interest in Real Estate Involved?

Dividends Paid (Date and Percent)

Other Items

Date	Proceedings	Receipts		Disbursements	

FORM NO. 71

REFEREE'S CLAIM REGISTER RE ..... CAUSE NO. .....

Date Filed	No.	Name and Address of Claimant and Attorney	Amount Filed and Allowed	Remarks
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	
			Filed	
			Allowed	

FORM No. 72

ORDER ALLOWING CLAIMS

At ..... in said district on ....., 19...

Upon the proofs of claim of the creditors hereinafter set out, duly filed herein, no objection having been filed to the allowance thereof by parties in interest, and it appearing that the said claims have been duly proven and should be allowed, and no adverse interest being represented, now it is ORDERED that said claims be and the same hereby are allowed as unsecured claims in the respective sums set opposite the several names, as follows, to wit:

..... $.....
..... $.....
..... $.....
..... $.....
..... $.....

....
Referee in Bankruptcy.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1944, 1945 AND 1946

	ORIGINAL			APPELLATE			TOTALS			MISCELLANEOUS		
Terms	1944	1945	1946	1944	1945	1946	1944	1945	1946	1944	1945	1946
Number of cases on dockets	11	12	12	1,382	1,317	1,512	1,393	1,329	1,524	------	131	154
Cases disposed of during terms	0	0	0	1,249	1,161	1,366	1,249	1,161	1,366	------	131	154
Number remaining on dockets	11	12	12	133	156	146	144	168	158	------	0	0

	TERMS		
	1944	1945	1946
Distribution of cases disposed of during terms:			
Original cases	0	0	0
Appellate cases on merits	278	218	260
Petitions for certiorari	971	943	1,106
Miscellaneous cases	------	131	154

	TERMS		
	1944	1945	1946
Distribution of cases remaining on dockets:			
Original cases	11	12	12
Appellate cases on merits	86	102	95
Petitions for certiorari	47	54	51
Miscellaneous cases	------	0	0

JUNE 23, 1947.

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