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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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ERRATA.

1. 299 U. S. 16, line 6, "4 Fed." should be "46 Fed."
2. 326 U. S. 546, line 17, "Ch. IX" should be "Ch. X".
3. 329 U. S. 289, line 24, "§ 8 (6)" should be "§ 8a (6)".

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.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

In Memory of Mr. Chief Justice Stone[1]

WEDNESDAY, MARCH 31, 1948[2]

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

MR. SOLICITOR GENERAL PERLMAN addressed the Court as follows:

May it please this Honorable Court: At a meeting of members of the Bar of the Supreme Court, held on November 12, 1947,[3] resolutions expressing their profound sorrow at the death of Chief Justice Harlan Fiske Stone were offered by a committee, of which the Honorable Dean Acheson was chairman.[4] Addresses on the resolu-

[1] MR. CHIEF JUSTICE STONE was stricken on the bench on April 22, 1946, and died during the evening of the same day. See 327 U. S. III, V.

[2] Proceedings in memory of MR. JUSTICE MCREYNOLDS were held on the same day; but limitations of space prevent their publication in this volume. They will be published in 334 U. S.

[3] The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Philip B. Perlman, Chairman, Mr. John Lord O'Brian, Mr. Pierce Butler, Mr. John Spalding Flannery, and Mr. Roger Robb.

[4] The Committee on Resolutions consisted of Mr. Dean G. Acheson, Chairman, Mr. Sidney S. Alderman, Judge Florence E. Allen, Mr. James Crawford Biggs, Mr. Bennett Boskey, Mr. William Marshall

tions were made by the Honorable John J. Parker, senior judge of the Fourth Circuit Court of Appeals; Luther Ely Smith, Esquire, of St. Louis, Mo., and the Honorable Herbert Wechsler, of New York.[5] The resolutions, adopted unanimously, are as follows:

RESOLUTIONS

Chief Justice Stone died in Washington, D. C., on April 22, 1946, while in his twenty-second year of active service as a Justice of the Supreme Court. The members of the Bar of this Court have met in the Supreme Court Building on November 12, 1947, to offer affectionate tribute to his memory and to record with due solemnity their respect for the man and for his distinguished services to his profession and to his Nation.

Bullitt, Mr. Charles C. Burlingham, Mr. James F. Byrnes, Miss Helen R. Carloss, Mr. Sterling Douglas Carr, Mr. Henry P. Chandler, Mr. Robert F. Cogswell, Mr. Alexis Coudert, Mr. John W. Davis, Mr. Duane R. Dills, Mr. Francis X. Downey, Mr. Charles D. Drayton, Mr. Allison Dunham, Mr. Charles Fahy, Mr. John S. Flannery, Mr. Edward L. Friedman, Mr. Wilbur Friedman, Mr. William L. Frierson, Mr. Warner W. Gardner, Mr. Lloyd K. Garrison, Mr. Walter Gellhorn, Chief Justice D. Lawrence Groner, Mr. Milton Handler, Mr. Thomas E. Harris, Mr. Francis R. Kirkham, Mr. Daniel W. Knowlton, Mr. Adrien C. Leiby, Mr. Monte M. Lemann, Mr. Harold Leventhal, Mr. Louis Lusky, Mr. William P. MacCracken, Jr., Mr. Edward F. McClennen, Mr. Alfred McCormack, Mr. J. Howard McGrath, Mr. Oliver B. Merrill, Jr., Mr. Earl C. Michener, Mr. William D. Mitchell, Mr. George Maurice Morris, Mr. James L. Morrison, Mr. C. Roger Nelson, Mr. Eugene Nickerson, Mr. George Wharton Pepper, Mr. Herbert Prashker, Mr. Donald R. Richberg, Mr. George Rublee, Mr. Eustace Seligman, Mr. Morrison Shafroth, Mr. Young B. Smith, Mr. Robert Stone, Mr. Hatton W. Sumners, Mr. William A. Sutherland, Judge Thomas D. Thacher, Mr. William R. Vallance, Mr. George T. Washington, Mr. Howard C. Westwood, Mr. Alexander Wiley, and Mrs. Mabel Walker Willebrandt.

[5] It is regretted that limitations of space prevent the publication of these addresses in this volume. It is understood that they will be published privately in a memorial volume to be prepared under the supervision of Mr. Charles Elmore Cropley, Clerk of the Court.

Harlan Fiske Stone was born in Chesterfield, N. H., on October 11, 1872. His youth was spent in Amherst, Mass., where he attended the public schools. Perhaps in consequence of these early years, he has always seemed the embodiment of the traditional New England virtues—frugal in habits, careful in his conduct and sturdy in his judgment. He entered Amherst College as a member of the class of 1894. His undergraduate record was enviable, both as a scholar and as a leader of his fellows, and he maintained throughout his life a lively interest in the College, serving as trustee for many years. Following his graduation he was for one year principal and science instructor of the Newburyport High School. In September, 1895, he entered Columbia Law School.

Columbia soon became one of the absorbing interests of his life. As a student there he maintained a high scholastic record, notwithstanding the necessity of earning his expenses by tutoring and by teaching history at Adelphi Academy. He had abiding love for teaching, which requires equally the learning of the scholar and the sympathy and understanding necessary to lead the student. He was delighted, therefore, about a year after receiving his LL. B. in 1898, to be appointed a part-time lecturer at Columbia Law School. During the next six years he taught a great variety of subjects and thus laid the foundation for that intimate familiarity with the law which was so richly to be reflected in the learning of his judicial opinions and the solidity of his judgments.

Concurrently with the satisfaction he achieved as a teacher, he was winning rapid recognition at the New York Bar. In 1903 he had become a partner in Wilmer, Canfield and Stone. Two years later he resigned from the Columbia faculty to devote his time exclusively to practice as a member of Satterlee, Canfield and Stone. He found many attractions in private practice. He enjoyed working out concrete legal problems by reducing complex matters to their simpler fundamentals. As a

practicing lawyer his vast analytical talents and the wisdom of his counsel could be put to the immediate practical benefit of the client who asked his help.

Without relinquishing his work in the law firm, Harlan Stone returned to Columbia in 1910 to become Dean of the Law School. He continued active teaching throughout his thirteen years as Dean. His penetrating writings established him as a leading authority on the law of equity and trusts. In these fields he found his favorite paths, since here above all other branches the law showed its magnificent capacity for flexible adaptation to changing circumstances and to ends broader than the claims of particular litigants. The law of equity, in particular, showed with much clarity that the great role of judge is, as he later put it, to apply "all the resources of the creative mind to the perpetual problem of attuning the law to the world in which it is to function."

Columbia Law School flourished under the wise guidance of Harlan Stone. He had firm ideas as to the importance of the legal profession and the high obligation of the law schools to their students and through them to society. He lent vigorous support to reforms in legal education, but was careful that these should not be made at the sacrifice of a thorough training in the basic groundwork of the law. He took a lively interest in his students, and won their life-long affection by his kindness, his unpretentiousness and his invariable willingness to lend a helping hand. His impartiality and common sense were combined with a self-assurance that encouraged others to draw upon his strength.

During the First World War Harlan Stone served as a member of a very active Board of Inquiry which disposed of the cases of drafted men who had refused on grounds of conscientious objection to perform military service. The problem of the conscientious objector was far less understood by the country in 1918 than it is today, and the difficult task called for the highest degree of patience,

tolerance, and common sense. Shortly after the Board had completed its assignment, Harlan Stone summarized its work and gave account of his own views: "However rigorous the state may be in repressing the commission of acts which are regarded as injurious to the state, it may well stay its hand before it compels the commission of acts which violate the conscience." This was the same scrupulous regard for the rights of conscience which later moved him to write his dissenting opinion in the flag-salute case, perhaps the most dramatically successful dissent in the Court's history.

In 1923 he decided once again to devote his full time to private practice and resigned from Columbia to become a member of Sullivan and Cromwell. But he was not to remain there long. When changes became necessary in the Department of Justice, President Coolidge called upon Harlan Stone, whom he had known since their days at Amherst, to accept the appointment as Attorney General. His name was sent to the Senate on April 2, 1924. The remainder of his life was devoted wholly to the public service. At the Department of Justice he acquired at first-hand a knowledge and appreciation of the hazards and the skills involved in the successful management of a large government agency.

Harlan Stone had thus achieved singular eminence as a lawyer, as a teacher, and as a public servant when President Coolidge, on January 5, 1925, nominated him to the place on the Supreme Court left vacant by the retirement of Justice McKenna. The nomination nevertheless met some opposition in the Senate because of the fear of some, who did not know the man, that his representation of large financial interests during his law practice was evidence of bias and undue conservatism. Those who expressed those fears were glad, in later years, to admit their lack of foundation. Harlan Stone took his seat as an Associate Justice on March 2, 1925. He served on the courts of Taft and Hughes, and on the lat-

ter's retirement was nominated by President Roosevelt to be Chief Justice, taking the oath as Chief Justice on July 3, 1941. His vigorous, single-minded devotion to the work of the Court continued until the moment of his death.

The opinions of Justice Stone number nearly 600, and will be found from the 268th to the 328th United States. They cover the entire range of the Court's business and there is no part of it which has not been shaped by the solid craftsmanship of Harlan Stone. Many branches of the Supreme Court's work were already familiar to him, but many were new. His rapid mastery of patent, admiralty, and public land law, for example, is striking evidence of the adaptability of his learning and skill. Here, as in all of his work, one may see the impressive results of the combination of a forthright character and a powerful intellect. He was able to meet issues squarely because he understood them well.

The accidents of national and legal history served, however, to project into sharper focus the work of Justice Stone in the field of constitutional law. He was peculiarly suited by temperament and by training to discharge the delicate and awesome responsibilities of the judge who must measure an act of the legislature against the organic charter of the Nation. His talents and his wisdom were made available at a time in which they were to prove of especial benefit, for his span of service was to cover a period more critical in the history of the Court than any since the outbreak of the Civil War.

When Justice Stone came to the bench there had already developed within the Court a substantial divergency of views on constitutional issues of high importance to the Nation. Justice Stone brought to the Court an abiding faith in the power of reason and in the historic function of the judiciary. He was hopeful that the differences among his brethren might diminish through the process of deliberation and adjudication. During his first

decade on the Court, however, as the constitutional issues pressed more heavily on the Court, he discovered that the differences were too deeply rooted for such adjustment. More and more often he found himself, in the company of Justices Holmes and Brandeis (and later Justice Cardozo), unable to accept the rigid interpretations and applications of the Constitution to which the majority of the Court adhered with staunch conviction.

Justice Stone took as his bench-mark the words of Chief Justice Marshall, and viewed the Constitution as a broad charter of government "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Its provisions, he has said, were to be read "not with the narrow literalness of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government." His opinions are the solid product of that basic philosophy. His approach to a constitutional issue was essentially pragmatic, with attentive regard to the lessons of experience, and he was wary of generalizations not anchored to the circumstances of particular cases. He was always mindful that judicial interpretations of the Constitution, since they are beyond the power of the legislature to correct, must in the first instance be confined to the case at hand, and, in the second, be open to reconsideration in the light of new experience and greater knowledge and wisdom.

With the shift in constitutional doctrine which occurred during the service of Chief Justice Hughes, Justice Stone had the satisfaction of seeing one after another of his dissenting opinions in constitutional cases become the law of the Court. This, in at least substantial part, was a tribute to his good judgment and sense of proportion and to the persuasiveness of his opinions. Interstate commerce, taxation, and the public regulation of business are among the many fields in which his careful develop-

ment of constitutional limitations and powers has provided a firm basis for continuity and progress. He was ever faithful to his conviction that the Constitution had not adopted any particular set of social and economic ideas, to the exclusion of others which, however wrong they seemed to him, fair-minded men yet might hold. He had a full appreciation of the role of the law in making accommodations between conflicting interests; and he was sensitive to the unique responsibility which our federal system places upon the Supreme Court to work out such accommodations between the national government and the states.

Along with his broad tolerance for economic development and experimentation Justice Stone carried a firm belief that the Supreme Court, together with all other branches of the national and local governments, must exercise constant vigilance to ensure that the rights of the person be preserved inviolate. His opinions reflect his vivid realization of the unceasing responsibility of the courts in helping to assure that our society remain the self-government of free people which the Constitution established.

When he succeeded to the Chief Justiceship, in his sixty-ninth year, Harlan Stone still had the tremendous vitality and the capacity for work that had contributed so much to the fruitfulness of his career as a lawyer, teacher, and judge. The burdens of the office were heavy. Yet he never slackened his pace, and continued to maintain an exemplary record in the prompt dispatch of the Court's business. Some of his most important opinions were those written for the Court on novel questions arising out of the Second World War, where he gave due recognition both to the wartime necessities of the government and to the principles of civil liberty which must be maintained, in war as in peace, by a free society.

Throughout his life Harlan Stone maintained an active interest in the arts. He found an enormous satisfaction

in music, painting, and sculpture. As Chief Justice he became ex officio Chairman of the Board of Trustees of the National Gallery of Art and Chancellor of the Smithsonian Institution; he also served as Chairman of the Folger Shakespeare Library. To these tasks he brought not only wisdom but enthusiasm.

No comment on the career of Harlan Stone can adequately reflect the esteem in which the Bar held him as a man, nor the depth of the affection felt for him by all who knew him. He had a fundamental contentment which reflected the happy family life he shared with his wife, Agnes Harvey Stone, and their two sons. He was genial in manner, delightful in conversation, and always accessible to any who came. He was considerate and tolerant of the opinions of others, though he resisted loose thinking even when it was directed toward a philanthropic purpose.

It is accordingly

Resolved, That we, the Bar of the Supreme Court of the United States, express our profound sorrow at the death of Chief Justice Harlan Fiske Stone and our thankfulness for the enduring contributions which this great man and wise judge has made to our profession and to our national life: It is further

Resolved, That the Attorney General be asked to present these resolutions to the Court, and to request that they be inscribed upon its permanent records.

Mr. Attorney General Clark addressed the Court as follows:

May it please this Honorable Court: We are gathered here today to pay tribute to the memory of Chief Justice Harlan Fiske Stone, a man whose life and works exemplified the highest traditions of our profession. Truly, the law, in actuality, was to this great American and distinguished jurist "a human institution for human needs." He did much to make it so.

Born on October 11, 1872, when Ulysses S. Grant was President of the United States and Salmon P. Chase was Chief Justice presiding over this Court, Harlan Stone rose from the humble surroundings of his birthplace at Chesterfield, New Hampshire, to the highest judicial post in the Nation. Seventy-three years later, on April 22, 1946, he died in the service of his Nation as Chief Justice of the United States. Those three-score and thirteen years were measured by a continuous devotion to the best interests of his fellow man.

From his birthplace in New Hamphsire, young Stone moved early with his parents to northern Massachusetts, and it was there that he grew to manhood. His early interest seemed to be farming, and for a while he attended Massachusetts Agricultural College. It is reported—authoritatively—that he was asked to depart from that college for some boisterous pranks. Soon thereafter he entered Amherst College. The change was a fortuitous one—at least insofar as the law has become the beneficiary of his talents. After completing his studies at Amherst, he enrolled at the School of Law of Columbia University. In 1898 he was awarded the degree of Bachelor of Laws, with very high honors, notwithstanding that throughout his law studies he supported himself by teaching and by tutoring. For him, characteristically, it was no more than normal routine to carry responsibilities that would ordinarily require the full time of two men.

He stayed on to teach at the law school. The maturing influence of study in a great diversity of legal subjects marked this important period of his life. For five years subsequent to 1905, he gave up teaching and occupied himself entirely in private practice in New York City. He returned on the call to become Dean of the Columbia University Law School. There he became recognized as one of the great legal educators of his day.

He left the Deanship on the call of the President of the United States to enter Government Service as the At-

torney General of the United States. In the next year, on March 2, 1925, President Coolidge elevated him to Associate Justice of this Court, succeeding to the vacancy left by the retirement of Mr. Justice Joseph McKenna. To this post he brought a wealth of knowledge both in the law and in the affairs of man.

On June 12, 1941, on the retirement of Chief Justice Charles Evans Hughes, President Franklin D. Roosevelt appointed him Chief Justice of the United States—an appointment which was received with universal acclaim. And foremost among those who praised his elevation was the late Senator Norris who had opposed his nomination in 1925 as Associate Justice. "In the years that have passed I became convinced, and am now convinced, that in my opposition to the confirmation of his nomination I was entirely in error," the late Senator confessed in a speech on the floor of the Senate, and added, "I am now about to perform one of the most pleasant duties that has ever come to me in my official life when I cast a vote in favor of his elevation to the highest judicial office in our land."

Harlan Stone had served as Associate Justice for sixteen years, and was to serve as Chief Justice for five more; these twenty-one eventful years of service on this bench covered fully one-eighth of the history of the Court itself. He met the many problems brought to the Court with a judicial tact and fairness that won him universal acclaim as one of the outstanding champions of the dignity of man. This Court was faced again and again with the task of redefining the power of the Government in its relation to persons and property. Crisis after crisis was met giving this Nation the necessary strength to surmount economic chaos and to defeat the armed might of totalitarianism. And all this while fully preserving and enlarging the individual liberties of our people. Harlan Stone played a leading part in the development of this continuous growth of the law. He would have felt, and we know he did feel,

that his effort was only a part of that of a team. He performed his job as did every other good American citizen.

This common touch, this feeling of friendship and brotherhood with every human being, regardless of his station in life, was perhaps the most noteworthy facet of the character of the late Chief Justice. His ability was indeed superb and outstanding, but it was by no means overweening; his character was in truth righteous and determined, but it was not domineering. His was an outlook fundamentally healthy, for throughout his life he had maintained himself in trim—physically, mentally, and spiritually. He was a man who encompassed a wide and diversified field of interests and who was capable of mastering and appreciating each one. Though partisan of all that he considered right and good, yet when he sat in judgment he held himself strictly to a lofty concept of the nature of the judicial function. A judge by the nature of his calling must needs be thus impartial, but the well-nigh perfect detachment of Harlan Stone may serve as a model to all who may follow him.

I shall not attempt a full evaluation of the contribution made by Harlan Fiske Stone to the law, nor can I here do adequate justice to his character or personality. Such an effort, indeed, would be as injudicious here as it would be impossible of attainment, for the progress which the law has made through his efforts is immeasurable in its vast extent. It touches the full field of legal development. The six hundred opinions of which he was the author are milestones along the pathway of legal advancement. With outstanding independence of thought, they have enriched the product of a Court always justly renowned for its independence.

Basically, I think one may say that the feeling that moved him most in his judicial life was one of humility, accompanied by a clear understanding of what he conceived his task to be and a faith in his ability to accomplish it. The law to him was not an absolute; he was not one of those who felt that the work of a Judge con-

sisted, like that of a tailor, simply in taking the measure of legislative enactment to constitutional provision and determining whether the size of the one was too large to fit the other. On the contrary, the law had a direct relationship to changing economic and social needs. It was not a rigid bar or strait-jacket to bind the limbs of man in his development; its function was to assist and not to hinder man's progress.

He did not feel that it was the function of a Judge or of the Court, as he put it, "to sit as a superlegislature, or as triers of the facts on which a legislature is to say what shall or shall not" be done. In dealing, for example, with the complicated question of what instrumentalities of state or federal government might be taxed by the other, he insisted that "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other."

His own approach to the judicial function in construing the validity of legislation was stated simply: "Some presumption should be indulged that the [state] legislature had an adequate knowledge of . . . local conditions . . . . On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, for the validity of a regulation turns "upon the existence of conditions, peculiar to the business under consideration." . . . Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals . . . . But even if the presumption is not to be indulged, and the burden no longer to be cast on him who attacks the constitutionality of a law, we need not close our eyes to available data throwing light on the problem with which the legislature had to deal."

Often, indeed, during his incumbency on this Bench, it must have given him satisfaction to see that the passing years had proved his point, that many of his dissenting

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opinions had come to express the law in the eyes of the majority of the Court. But his feeling was not merely pride because views which he had stated contrary to the majority had finally been proclaimed to be right; it was rather a sense of gratification that the Court had functioned in accordance with what he considered to be a judiciousness necessary and appropriate to it.

His last words from this Bench were, as we all know, fully characteristic of his judicial philosophy. Fifteen years earlier, the Court had decided that admission to citizenship had to be denied an alien who because of religious scruples was unwilling to bear arms in this country's defense. He had dissented from this view, for he felt that the alien's willingness to take the oath of allegiance and to serve the Nation as a noncombatant was sufficient to satisfy the statutory requirements for naturalization. The cases were much discussed, and legislation effecting Stone's views of the matter was several times proposed in the Congress, but was never enacted. Finally, in 1940 and 1942, new statutes on naturalization were passed, but they retained unchanged the language which had been earlier construed by the Court. Stone felt that this amounted to an acceptance by Congress of the Court's previous interpretation, and for him in this field that determination was conclusive. When, in 1946, the question was once more presented to the Supreme Court, although the views of the majority had come to accord with those which Stone had held in his earlier dissent, he felt his former position no longer tenable. In his dissent he said:

"With three other Justices of the Court I dissented in the *Macintosh* and *Bland* cases, for reasons which the Court now adopts as ground for overruling them. Since the Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has like-

wise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the *Schwimmer* case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization laws. For that reason alone I think that the judgment should be affirmed."

This was his last pronouncement as Chief Justice of the United States. It was dramatically characteristic that this last act was consistent with all the others of his life, that he died as he had lived—courageously and honestly, with the dignity and humility of a man who is at peace with himself and whose philosophy embraces all men in the scheme of government and of life.

Words are inadequate in my effort to express the high esteem and affection in which the late Chief Justice was held as a man, and the very real respect with which his accomplishments as a Judge and his contribution to justice and law must be regarded. The courts, he felt, "are concerned only with the power to enact statutes, and not with their wisdom" and, "while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint, we should remember that the only check upon our exercise of power is our own sense of self-restraint." His abiding faith in the people was expressed in his statement that "For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

Mr. Chief Justice of the United States and Associate Justices of this Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you this morning memorializing the life of the late Chief Justice Harlan Fiske Stone be accepted by you, and that it,

together with the chronicle of these proceedings, be ordered to be kept for all time to come in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General: The Court receives with deep gratification the Resolutions expressing tribute to the memory and service of the late Chief Justice. He was taken from us in the active performance of duty. No tribute would have been more highly prized by him than this tribute from the Bar of this Court, which he loved and served so well.

The task of accurately epitomizing, in a few short paragraphs, the life and character of any man is always a difficult one. Human personality is a too richly varied and subtle thing to be captured within the confines of a formula. But in dealing with the career of Harlan Fiske Stone, the magnitude of the task is immeasurably enhanced. For few men have possessed the versatility of the late Chief Justice. Not only did he become one of the great figures in the history of this Court, but his distinguished career included service as a practicing attorney, educator, scholar, and statesman. Nor were his energies and talents confined to his professional activities. His intellectual interests were many and varied; and he was well versed in the arts of friendship.

Harlan Fiske Stone was born at Chesterfield, New Hampshire, in the year 1872. Shortly after his birth, his parents moved to northern Massachusetts; and there he grew to maturity. The childhood of Harlan Fiske Stone was that of a typical New England farm boy. It was at times a rigorous and demanding life, but it was also a life full of satisfactions and one well-calculated to develop independence and self-sufficiency.

After a period of attendance at the Massachusetts Agricultural College, he entered Amherst College in the class of 1894. The wide breadth of his interests and talents

was apparent even at this early period. While at Amherst, he made an enviable academic record and was elected to Phi Beta Kappa. But he was also a campus leader, being three times elected president of his class, and, during his junior and senior years, was a star member of the varsity football team.

In 1895, Harlan Stone entered the Columbia Law School, an institution to which he was to dedicate much of his interests and talents in years to come. He graduated with high honors in 1898, despite the fact that during the period he was required to support himself by such outside activities as teaching and tutoring.

From the time he received his law degree until he entered the service of the Government, some twenty-six years later, Harlan Stone engaged in the active private practice of the law either on a part-time or on a full-time basis. For the six years following his graduation he supplemented his activities as a private practitioner by serving as an instructor at the Columbia Law School. In 1910 he returned to the Law School as Dean, a position which he retained until 1923. The thirteen years in which he served as Dean were years of great constructive development for the Law School. It was also during this period that he established his reputation as an outstanding legal scholar. His work in the law of equity and related subjects remains, even with the passage of the years, the definitive scholarship in those fields.

Following the termination of his academic duties, Harlan Stone engaged in the full-time practice of law in New York City. In April, 1924, he was appointed Attorney General in the cabinet of his former classmate, President Calvin Coolidge. On January 5, 1925, he was nominated Associate Justice of the Supreme Court of the United States.

The appointment of Harlan Stone to the Court was viewed with misgivings in some quarters. Because of the nature of his law practice, he was suspected by some of

possessing the point of view of the large financial interests of the nation to the exclusion of all others. Some criticized his participation in the case of *Ownbey* v. *Morgan,* 256 U. S. 94 (1921). In that case he had successfully argued in this Court in defense of the constitutionality of a Delaware rule of procedure, relating to attachment cases involving nonresident defendants, which conditioned the defendant's right to appear and contest the merits of the plaintiff's demand upon the defendant's first giving special security, even where the defendant was unable to furnish such security. On February 5, 1925, the Senate confirmed his nomination, however, with only six votes cast in opposition.

After sixteen years of distinguished service on this Court, he was appointed Chief Justice by President Franklin Roosevelt. The appointment was universally acclaimed; and the Senate confirmed the nomination without a dissenting voice being raised. Of the six members who had opposed his confirmation in 1925, two remained in the Senate in 1941 when his nomination as Chief Justice was presented. One of these was Senator George Norris, who stated: "In the years that have passed I became convinced, and am now convinced, that in my opposition to the confirmation of his nomination I was entirely in error."

Harlan Stone served on this Court for twenty-one years—sixteen years as an Associate Justice and five years as Chief Justice. He served during one of the most significant periods in the history of this Court. It was a period of great social readjustment in the nation as a whole. Movement and change were the order of the day. The trend toward a new social equilibrium was felt in every aspect of the nation's life. Inevitably, the impact of the times was felt on this Court. No man played a more vital role in the development of the law during this crucial period than Harlan Stone. Some slight understanding of the importance of the part he played may be

gained by observing that in the entire history of this Court probably no other member lived to see so many views expressed in dissent subsequently accepted by the majority of the Court as the law of the land.

To Harlan Stone, the great hazard to the perpetuation of constitutional government was narrow and illiberal construction of constitutional provisions. As a corollary to that basic proposition, he believed a judge, confronted with constitutional issues, to be under the continuing obligation of guarding against the tendency to confuse his own personal feelings as to the wisdom and expediency of legislation with the question of the constitutionality of that legislation. Self-restraint in the exercise of judicial power was to him an essential prerequisite to the successful functioning of our system of government.

But although insisting that the exercise of judicial power be confined to its proper sphere, he did not hesitate to exert that power fully in cases where it appeared to him that basic safeguards of the fundamental charter had been overstepped. Most frequently, those were cases involving contentions that civil liberties had been denied; and in those opinions some of his most eloquent writing appears. He gave much thought to the problem of preserving individual freedom in the complexities of modern society and under a system of dual sovereignty which characterizes our form of government. He was well aware that the problem is not a simple one and is not one which may be solved by mechanical application of a convenient formula. The "perpetual question of constitutional law," he wrote, is to determine "where the line is to be drawn which marks the boundary between the appropriate field of individual liberty and right and that of government action for the larger good, so as to insure the least sacrifice of both types of social advantage."

But Harlan Stone's contributions were not confined to the field of constitutional law. His written opinions deal with the whole range of problems which come before this

Court; and in considering his contributions in these diverse fields, one cannot but be impressed with the scope of his capacities and the influence of his thought.

As Chief Justice, Harlan Stone displayed the same energy and conscientious devotion to duty which had characterized his earlier service on the Court. He presided over the Court in the dark years of war. Difficult problems arising from the conduct of total war by a democratic nation frequently were presented for adjudication. The period was marked, also, by the continuing development of the Conference of the Senior Circuit Judges and other devices contributing to the improvement of standards of judicial administration in the federal courts.

Harlan Stone was a man of warm human qualities. His broad interests, genial personality, and lack of pretension won for him the respect and affection of his brethren on the Court and an unusually wide circle of friends off the bench. At home, he enjoyed the happy comradeship of his gracious and gifted life's partner and their two worthy sons. I recall with pleasure my own associations with him. I will ever cherish the honor of receiving his designation to serve as Chief Justice of the Emergency Court of Appeals. Our personal and official relations were marked by his never-failing cordiality and his high sense of public responsibility.

While not absorbed by his official duties, he was able to pursue his deep interest in literature and the arts. His intellectual curiosity was insatiable. Few men attain so well-rounded a development of their capacities.

The high place of Harlan Stone in the history of this Court and of this nation is well assured. American jurisprudence has been enriched by his creative touch. His life and character were in complete accord with the finest of democratic traditions.

THE CHIEF JUSTICE directed that the resolutions be spread upon the minutes of the Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1947.

LE MAISTRE *v.* LEFFERS ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 362. Argued January 7, 1948.—Decided February 2, 1948.

1. Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, tolls the running of the time granted under state law to redeem land sold or forfeited for taxes for so long as the owner was in military service after October 6, 1942, and gives him a period in which to redeem after his discharge equal to that portion of the state statutory period which did not run because it was suspended by this provision of the Federal Act. P. 3.
2. It is not limited to cases where the state law provides for transfer of title to a purchaser at a tax sale subject to defeasance by redemption, but applies as well to cases in which the tax sale results in the issuance of a certificate entitling the holder to apply for a tax deed after the lapse of a specified time. Pp. 3–4.
3. It applies to all kinds of land and is not limited by § 500 to "real property owned and occupied for dwelling, professional, business, or agricultural purposes." Pp. 4–6.
4. The Act must be read with an eye friendly to those who dropped their affairs to answer their country's call. P. 6.

159 Fla. 122, 31 So. 2d 155, reversed.

The Supreme Court of Florida affirmed a judgment denying relief under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. 159 Fla. 122, 31 So. 2d 155. This Court granted certiorari. 332 U. S. 814. *Reversed,* p. 6.

W. B. Shelby Crichlow and *Dewey A. Dye* argued the cause for petitioner. With them on the brief was *Robert E. Willis.*

James Alfred Franklin argued the cause for respondents. With him on the brief was *R. A. Henderson, Jr.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, as amended, 56 Stat. 769, 770, 50 U. S. C. App. Supp. V, § 525, provides in part that no portion of the period of military service [1] which occurs after October 6, 1942,[2] shall be included "in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

Petitioner owned land in Florida on which taxes became delinquent April 1, 1940. Under Florida statutory procedure [3] the tax collector after notice sells the land at public sale and issues a tax certificate to the purchaser. At any time after two years from the date of the certificate the holder thereof may apply for a tax deed. Notice is given, a public sale is had, and a tax deed is issued. The owner may redeem the land at any time after issuance of the certificate and before issuance of the tax deed.

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[1] The term is defined in § 101 (2) of the Act as follows:

"For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force."

[2] That was the effective date of the amendment which added this provision to § 205.

[3] Fla. Stats. cc. 193, 194 (1941).

In accordance with this procedure a tax certificate on petitioner's lands was issued August 5, 1940. Petitioner was on active duty in the Navy from August 18, 1942, until his discharge on December 18, 1945. Application for a tax deed was made by one Conrod in January, 1943, and the deed issued to him on March 1, 1943. It is through him that respondents claim by mesne conveyances.

Petitioner filed this suit in equity on March 25, 1946, seeking to set aside the tax deed by reason of § 205 of the Soldiers' and Sailors' Civil Relief Act. The Florida Supreme Court affirmed a judgment denying the relief, 159 Fla. 122, 31 So. 2d 155, on the authority of its earlier decision in *De Loach* v. *Calihan,* 158 Fla. 639, 30 So. 2d 910. The case is here on a petition for a writ of certiorari which we granted because the construction given to the federal Act seemed to us not only a dubious one but also at variance with *Illinois Nat. Bank* v. *Gwinn,* 390 Ill. 345, 61 N. E. 2d 249.

Under Florida law petitioner concededly could have redeemed any time between August 5, 1940, when the certificate was issued, and March 1, 1943, when the tax deed was issued. The provision of the federal Act with which we are here concerned became effective during that period—October 6, 1942. At that time petitioner was in the Navy and at once became a beneficiary of it. That means that the running of the time granted him under Florida law to redeem was tolled as long as he was in the military service. Since he would have had from October 6, 1942, to March 1, 1943, to redeem, the effect of the Act was to give him the same length of time after his discharge for that purpose. His present action being timely, there is thus no barrier to his recovery so far as the Act is concerned.

Two reasons, however, are advanced against it. First, it is argued that § 205 applies only where state law provides for transfer of title to the purchaser subject to de-

feasance by redemption. The Florida procedure is said to be not covered by § 205 since title passes only on issuance of the deed, which ends the period of redemption. We do not think § 205 deserves such a technical reading. The provision in question was added in 1942 to remedy what this Court had held to be a *casus omissus* in a preceding Act.[4] *Ebert* v. *Poston,* 266 U. S. 548, 554. Its language does not compel the narrow reading that is suggested; and the spirit of the amendment repels any such restriction. It covers "any period . . . provided by any law for the redemption of real property sold or forfeited," etc. We see neither in that language nor in the legislative history of the provision any purpose to restrict its application to cases where redemption follows passage of title.

The second reason urged against petitioner is the one adopted by the Supreme Court of Florida in *De Loach* v. *Calihan, supra.* It held that § 205 is limited by § 500. The latter section gives added protection to a person in military service by providing that no sale for taxes or assessments shall be made except upon leave of court "in respect of . . . real property owned and occupied for dwelling, professional, business, or agricultural purposes," and by granting a given period for redemption.[5] The

[4] The purpose was stated as follows: "The running of the statutory period during which real property may be redeemed after sale to enforce any obligation, tax, or assessment is likewise tolled during the part of such period which occurs after the enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942. Although the tolling of such periods is now within the spirit of the law, it has not been held to be within the letter thereof (I. R. 1269 C. B., June 1922, p. 311; *Ebert* v. *Poston,* 266 U. S. 549)." Sen. Rep. No. 1558, 77th Cong., 2d Sess., p. 4.

[5] Section 500 reads in part:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service,

Supreme Court of Florida held that § 500 describes the class of real property on which a soldier or sailor is granted indulgence, while § 205 indicates the period of the indulgence. Under that view petitioner would fail because the property in question does not appear to be land "owned and occupied for dwelling, professional, business, or agricultural purposes."

We do not, however, read the Act so restrictively. The two sections—205 and 500—supplement each other. Section 500, applicable to restricted types of real property, gives greater protection than § 205. It restrains the sale for taxes or assessments of specified types of real property except upon leave of court and prescribes for them a specified time within which the right to redeem may be exercised if the property is sold. Section 205

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in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person."

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption."

extends in terms to all land and only tolls the time for redemption for the period of military service. The other construction attributes to Congress a purpose to protect only certain classes of real property owned by those in the armed services. We cannot do that without drastically contracting the language of § 205 and closing our eyes to its beneficent purpose. But as we indicated on another occasion, the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call. *Boone* v. *Lightner,* 319 U. S. 561, 575.

Reversed.

FONG HAW TAN *v.* PHELAN, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 370. Argued January 8–9, 1948.—Decided February 2, 1948.

1. Section 19 (a) of the Immigration Act of 1917, as amended, which provides that an alien who is "sentenced more than once" to imprisonment for a term of one year or more because of conviction of a crime involving moral turpitude committed after entry shall be deported, does not apply to an alien who, in a single trial, has been convicted on two different counts of a single indictment for murdering two different persons and sentenced to life imprisonment. Pp. 7–10.
2. This provision of the statute authorizes deportation only where an alien, having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it. P. 9.
3. Because deportation is a drastic penalty equivalent to banishment or exile, this section should be given the narrowest of several possible meanings of the words used. P. 10.

162 F. 2d 663, reversed.

A District Court denied an alien's petition for a writ of habeas corpus challenging the legality of his detention

pending deportation. The Circuit Court of Appeals affirmed. 162 F. 2d 663. This Court granted certiorari. 332 U. S. 814. *Reversed,* p. 10.

Lambert O'Donnell argued the cause for petitioner. With him on the brief was *William J. Chow.*

Beatrice Rosenberg argued the cause for respondent. With her on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, W. Marvin Smith* and *Robert S. Erdahl.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

An alien who is "sentenced more than once" to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude committed after his entry shall, with exceptions not material here, be deported. Section 19 (a)[1] of the Immi-

[1] Section 19 (a) so far as material here provides:

". . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment . . . ."

gration Act of February 5, 1917, 39 Stat. 889, as amended 54 Stat. 671, 8 U. S. C. § 155 (a). It appears that petitioner, a native of China, was convicted of murder under each of two counts of an indictment, one count charging the murder of one Lai Quan, the other charging the murder on or about the same date of one Ong Kim.[2] The jury fixed the punishment for each murder at life imprisonment. He was thereupon sentenced to prison for the period of his natural life by one judgment, construed by the Circuit Court of Appeals to impose that sentence on him for each of the convictions. Sometime thereafter a warrant for his deportation to China issued. Later he was paroled, released from prison, and taken into the custody of the Immigration Service. He then filed a petition for a writ of habeas corpus challenging the legality of his detention. The District Court denied the petition on the authority of *Nishimoto* v. *Nagle,* 44 F. 2d 304. The Circuit Court of Appeals affirmed. 162 F. 2d 663. The case is here on a petition for a writ of certiorari which we granted because of the contrariety of views among the circuits concerning the meaning of the statutory words, "sentenced more than once."

The Ninth Circuit view is that a conviction and sentence for more than one offense, whether at the same or different times and whether carrying concurrent or consecutive sentences, satisfy the statute. That was the position taken in *Nishimoto* v. *Nagle, supra,* and followed below. The Second Circuit holds that an alien who is given consecutive sentences is sentenced more than once, while an alien who is given concurrent sentences is not, even though the crimes are distinct. *Johnson* v. *United States,* 28 F. 2d 810; *United States ex rel. Mignozzi* v. *Day,* 51 F. 2d 1019. The Fourth Circuit takes the position that the statute is satisfied whether or not the

[2] Whether the two murders resulted from one act or from two does not appear.

sentences imposed run concurrently or consecutively provided that the two crimes which are committed and for which separate sentences are imposed arise out of separate transactions. *Tassari* v. *Schmucker,* 53 F. 2d 570. The Fifth Circuit takes the view that an alien is "sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again." *Wallis* v. *Tecchio,* 65 F. 2d 250, 252. That view is an adaptation of the position taken earlier by a District Court in the same circuit that Congress by this provision aimed to deport "repeaters," *viz.* "persons who commit a crime and are sentenced, and then commit another and are sentenced again." *Opolich* v. *Fluckey,* 47 F. 2d 950.

The latter is the reading we give the statute. There is a trace of that purpose found in its legislative history. Congressman Sabath who proposed the provision as an amendment said it was aimed at the alien "who is a criminal at heart, a man who is guilty of a second offense involving moral turpitude and for the second time is convicted." 53 Cong. Rec. 5167. Congressman Burnett, who was in charge of the bill on the floor of the House, gave the same emphasis when he said that the amendment proposed "that those who committed a second crime involving moral turpitude showed then a criminal heart and a criminal tendency, and they should then be deported." *Id.,* p. 5168. The Committee Report in the Senate put the matter into sharper focus when it stated that the provision was "intended to reach the alien who after entry shows himself to be a criminal of the confirmed type." S. Rep. No. 352, 64th Cong., 1st Sess., p. 15. Perhaps the plainest "confirmed type" of criminal is the repeater. We give expression to that view by reading this provision of the statute to authorize deportation only

where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it.

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael,* 332 U. S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Reversed.

JOHNSON *v.* UNITED STATES.

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

No. 329. Argued December 18, 1947.—Decided February 2, 1948.

1. Where officers detected the odor of burning opium emanating from a hotel room, entered without a search warrant and without knowing who was there, arrested the only occupant, searched the room and found opium and smoking apparatus, the search violated the Fourth Amendment to the Federal Constitution; and a conviction for a violation of the federal narcotic laws based on the evidence thus obtained cannot be sustained. Pp. 11–17.
2. As a general rule, the question when the right of privacy must reasonably yield to the right of search must be decided by a judicial officer, not by a policeman or government enforcement agent. Pp. 13–14.
3. There were no exceptional circumstances in this case sufficient to justify the failure of the officer to obtain a search warrant. Pp. 14–15.

4. It being conceded that the officer did not have probable cause to arrest petitioner until he entered the room and found her to be the sole occupant, the search cannot be sustained as being incident to a valid arrest. Pp. 15–16.
5. The Government cannot at the same time justify an arrest by a search and justify the search by the arrest. Pp. 16–19.
6. An officer gaining access to private living quarters under color of his office and of the law must then have some valid basis in law for the intrusion. P. 17.

162 F. 2d 562, reversed.

Petitioner was convicted in a Federal District Court on evidence obtained by a search made without a warrant. The Circuit Court of Appeals affirmed. 162 F. 2d 562. This Court granted certiorari. 332 U. S. 807. *Reversed,* p. 17.

James Skelly Wright argued the cause, and *John F. Garvin* filed a brief, for petitioner.

Robert S. Erdahl argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn* and *Irving S. Shapiro.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner was convicted on four counts charging violation of federal narcotic laws.[1] The only question which brings the case here is whether it was lawful, without a warrant of any kind, to arrest petitioner and to search her living quarters.

[1] Two counts charged violation of § 2553 (a) of the Internal Revenue Code (26 U. S. C. § 2553 (a)) and two counts charged violation of the Narcotic Drugs Import and Export Act as amended (21 U. S. C. § 174).

Taking the Government's version of disputed events, decision would rest on these facts:

At about 7:30 p. m. Detective Lieutenant Belland, an officer of the Seattle police force narcotic detail, received information from a confidential informer, who was also a known narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. Belland communicated with federal narcotic agents and between 8:30 and 9 o'clock went back to the hotel with four such agents. All were experienced in narcotic work and recognized at once a strong odor of burning opium which to them was distinctive and unmistakable. The odor led to Room 1. The officers did not know who was occupying that room. They knocked and a voice inside asked who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said, "I want to talk to you about this opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room." The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. This evidence the District Court refused to suppress before trial and admitted over defendant's objection at the trial. Conviction resulted and the Circuit Court of Appeals affirmed.[2]

The defendant challenged the search of her home as a violation of the rights secured to her, in common with others, by the Fourth Amendment to the Constitution.

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[2] 162 F. 2d 562.

The Government defends the search as legally justifiable, more particularly as incident to what it urges was a lawful arrest of the person.

I.

The Fourth Amendment to the Constitution of the United States 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."

Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right. Cf. *Amos* v. *United States,* 255 U. S. 313.

At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant's contention, erroneously made, on the strength of *Taylor* v. *United States,* 286 U. S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law en-

forcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[3] Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.[4] Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the

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[3] In *United States* v. *Lefkowitz*, 285 U. S. 452, 464, this Court said: ". . . the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. 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. . . ."

[4] "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States*, 269 U. S. 20, 33.

right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

II.

The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.[5]

[5] This is the Washington law. *State* v. *Symes,* 20 Wash. 484, 55 P. 626; *State* v. *Lindsey,* 192 Wash. 356, 73 P. 2d 738; *State* v. *Krantz,* 24 Wash. 2d 350, 164 P. 2d 453; *State* v. *Robbins,* 25 Wash. 2d 110, 169 P. 2d 246. State law determines the validity of arrests without warrant. *United States* v. *Di Re,* 332 U. S. 581.

The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant.[6] It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den." And it says, ". . . that when the agents were admitted into the room and found only petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic." Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.[7]

Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by

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[6] The Government brief states that the question presented is "Whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for the contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room."

[7] The Government also suggests that "In a sense, the arrest was made in 'hot pursuit.' . . ." However, we find no element of "hot pursuit" in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape. Nor would these facts seem to meet the requirements of the Washington "Uniform Law on Fresh Pursuit." Session Laws 1943, ch. 261.

the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers, and effects," [8] and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE BURTON dissent.

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[8] In *Gouled* v. *United States*, 255 U. S. 303, 304, this Court said: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two [Fourth and Fifth] Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they 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,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

UNITED STATES *v.* BROWN.

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

No. 100. Argued January 5–6, 1948.—Decided February 2, 1948.

1. Under the Federal Escape Act, a sentence for escape or attempt to escape while serving one of several consecutive sentences is to be superimposed upon all prior sentences service of which has not been completed and is to begin upon the expiration of the last of the prior sentences. Pp. 18–27.
2. The canon in favor of strict construction of penal statutes is not an inexorable command to override common sense and evident statutory purpose. P. 25.

160 F. 2d 310, reversed.

Respondent's motion for correction of a sentence imposed upon him for an offense under the Federal Escape Act was overruled by the District Court. 67 F. Supp. 116. The Circuit Court of Appeals reversed and remanded the cause to the District Court. 160 F. 2d 310. This Court granted certiorari. 332 U. S. 755. *Reversed*, p. 27.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, W. Marvin Smith, Robert S. Erdahl* and *Philip R. Monahan.*

Elmo B. Hunter argued the cause and filed a brief for respondent.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The Federal Escape Act requires that a sentence for escape or attempt to escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of" the escape or

attempt.[1] The narrow question is whether the Act requires that a sentence for attempt to escape shall begin upon the expiration of the particular sentence being served when the attempt occurs or at the expiration of the aggregate term of consecutive sentences then in effect, of which the one being served is the first.

The facts are these. Respondent was charged under two indictments in the District Court for the Western District of Arkansas. One contained two counts, the first charging conspiracy to escape, the second attempt to escape. The other indictment was for violation of the National Motor Vehicle Theft Act. 41 Stat. 324, 59 Stat. 536. Respondent pleaded guilty to all three charges.

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[1] The Act is as follows: "Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody or institution, shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; and if the custody or confinement is by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, the offense of escaping or attempting to escape therefrom shall constitute a misdemeanor and any person convicted thereof shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape." 49 Stat. 513, 18 U. S. C. § 753h.

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On October 26, 1945, he was sentenced as follows: under the first indictment charging the escape offenses, imprisonment for one year on the second count, and for two years on the first count, the sentences to run consecutively in that order; under the motor vehicle theft indictment, imprisonment for two years, to run consecutively to the other two. Thus the aggregate of the three consecutive sentences was five years.

On November 2, 1945, respondent was serving the one-year term of the first sentence as ordered by the court. On that date he was being transported in custody of a United States marshal from an Arkansas jail to Leavenworth Penitentiary in Kansas.[2] During the journey's progress through Missouri he attempted to escape. This resulted in another indictment, in the Western District of Missouri, to which also respondent pleaded guilty. The District Court sentenced him to imprisonment for five years, the term "to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date . . . ."

Respondent filed a motion to correct this last sentence. He contended that at the time of the last attempt he was being "held," within the meaning of the last sentence of the Federal Escape Act, only under the one-year sentence pronounced in the Western District of Arkansas, and that the Act required the five-year sentence under the indictment returned in Missouri to commence at the expiration of that one-year term.

The District Court overruled the motion. It held that under the statute the sentencing court could order that the sentence begin to run after the service of any one or all of respondent's three prior sentences. 67 F. Supp. 116. The Circuit Court of Appeals, however, reversed

[2] The sentence began to run as of the time respondent was committed to jail to await transportation to the Leavenworth Penitentiary. 47 Stat. 381, 18 U. S. C. § 709a.

the judgment. Relying on the canon of strict construction of criminal statutes, it equated the statutory word "held" to "serving," and concluded that a sentence for escape or attempt to escape must begin at the expiration of the particular sentence which the prisoner is serving at the time the escape or attempt occurs. Accordingly the court remanded the cause to the District Court with directions to correct the five-year sentence so that it would begin upon expiration of or legal release from the one-year sentence. 160 F. 2d 310. We granted certiorari because of the importance of the question in the administration of the Federal Escape Act.

Although prison breach or other escape by prisoners from custody was a crime under the common law,[3] there was no federal statute proscribing such conduct prior to the enactment of the original Federal Escape Act in 1930, 46 Stat. 327. That Act dealt only with escape or attempted escape while under sentence. It was enacted as part of a program sponsored by the Attorney General for the reorganization and improved administration of the federal penal system. H. R. Rep. No. 106, 71st Cong., 2d Sess. The Act took its present form in 1935, when it was broadened at the Attorney General's request[4] to cover escape while in custody on a federal charge prior to conviction.[5]

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[3] Miller, Criminal Law 463–465.

[4] H. R. Rep. No. 803, 74th Cong., 1st Sess.; S. Rep. No. 1021, 74th Cong., 1st Sess.

[5] The Government's brief aptly summarizes some of the more serious considerations leading to adoption of the original and amended acts, as follows: "Escapes and attempted escapes from penal institutions or from official custody present a most serious problem of penal discipline. They are often violent, menacing, as in the instant case, the lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons and transportation and upon resisting recapture."

The legislation reflects an unmistakable intention to provide punishment for escape or attempted escape to be superimposed upon the punishment meted out for previous offenses. This appears from the face of the statute itself. It first provides that persons escaping or attempting to escape while in custody, whether before or after conviction, shall be guilty of an offense. Then follow provisions for determining whether the offense shall be a felony or a misdemeanor, with corresponding prescriptions of penalties.

At this point the statute had no need to go further if the intention had been merely to leave to the court's discretion whether the penalties, within the limits prescribed, should run concurrently or consecutively in accordance with the generally prevailing practice. On that assumption the statute was complete, without addition of the last two sentences. But in that form the Act would have left the court with discretion to make the sentence run concurrently or consecutively with the other sentences previously in effect or put into effect in the case or cases pending when the escape occurred.

Precisely to avoid this more was added, in the explicit provisions that "the sentence imposed hereunder *shall be in addition to and independent of any* sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. If such person be under sentence at the time of such offense, the sentence imposed hereunder *shall begin upon the expiration of, or upon legal release from, any* sentence under which such person is held at the time of such escape or attempt to escape." (Emphasis added.)

These sentences foreclosed, and were intended to foreclose, what the earlier portions of the Act had left open, namely, the court's power to make the escape sentence run concurrently with the other sentences.[6] Whether the

[6] But see *Rutledge* v. *United States*, 146 F. 2d 199.

escape was before or after conviction, additional punishment was made mandatory, in the one case by the explicit requirement, "in addition to and independent of" any sentence imposed; in the other by the command that the escape sentence "shall begin upon the expiration of, or upon legal release from, any sentence," etc. The differing verbal formulations were necessary to meet the different "before" and "after" conviction situations. But the two provisions had one and the same purpose, to require additional punishment for the escape offense. The idea of allowing the escape sentences to run concurrently with the other sentences was completely inconsistent with this common and primary object, as well as with the wording of the two concluding clauses. In many cases such concurrent sentences would nullify the statutory purpose altogether; in others, they would do so partially.[7]

Moreover, imposition of such additional punishment had been the prime object, indeed the only one, of the original Escape Act, which was applicable only to escapes after conviction. It made such escapes or attempts "offenses," punishable by imprisonment for not more than five years, "such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined." [8] This provision, though

[7] Depending on whether the term of the sentence for escape, as of the time of its imposition, is shorter or longer than the periods of the other sentences remaining unserved.

[8] The Act was as follows: "Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense and upon apprehension and conviction of any such offense in any United States court shall be punished by imprisonment for not more than five years, such sentence to begin upon the expiration of or upon legal release from the sentence for which said person was originally confined." 46 Stat. 327.

differing from the wording of the last sentence of the present Act, had the same prime object. Concurrent sentences were as inconsistent with its terms as with those of the present Act, for in many cases like this one they would have added no further punishment in fact.

Congress, it is true, did not cast the original Act in terms specifically relating to a situation comprehending consecutive sentences existing at the time of the escape or attempt, as more careful drafting of the Act would have required to insure achieving the object of adding independent punishment in all cases. Its concentration upon that main aspect of the legislation apparently led it to reduced emphasis upon and care in the definition of the situations to which the Act would apply.

Nevertheless in view of the Act's broad purpose, it would be difficult to conclude that the original phrasing, "the sentence for which said person was originally confined," was intended to apply only to the sentence, one of several consecutive ones, which the prisoner happened to be serving when the escape or the attempt occurred, or that the Act would be effective only where the prisoner was serving time under a single sentence, which was perhaps the more common of the situations which Congress had in mind. The same basic reasons which require rejection of either of those views of the present Act would apply to the original one.

But, in any event, Congress changed the wording of the "after expiration or release" clause in the original statute when enacting the amended one. "The sentence for which said person was originally confined" became "any sentence under which such person is held at the time of such escape or attempt to escape." This change is not without significance. For use of the words "*any* sentence under which such person is *held*" means something more than the narrowest possible construction of "*the* sentence

for which said person *was originally confined,*" unless the change is to be taken as meaningless. We think it was intended, as were the other amendments made at the same time, to broaden the Act's coverage or to assure its broad coverage,[9] and therefore to include situations where the prisoner was being "held" under more than one sentence. Otherwise there would be no reason for or meaning in the change.

We think therefore that the Act contemplates "additional" and "independent" punishment in both the concluding clauses in a practical sense, not merely in the technical sense of concurrent sentences having no effect to confine the prisoner for any additional time. In a very practical sense, a person in custody under several consecutive sentences is being "held" under the combined sentences. And the legislative language is a natural, though not nicely precise, way of stating the purpose that the sentence for escape shall begin upon the expiration of the aggregate of the terms of imprisonment imposed by earlier sentences. Granted that the present problem could have been obviated by even more astute draftsmanship, the statute on its face and taken in its entirety sufficiently expresses the congressional mandate that the sentence for escape is to be superimposed upon all prior sentences.

We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require mag-

[9] Either by eliminating the original wording's ambiguity by rejecting the narrow construction or, if that construction were thought valid, by changing the Act's terms to insure a different result.

nified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin,* 320 U. S. 527, 530, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States* v. *Raynor,* 302 U. S. 540, 552; *United States* v. *Giles,* 300 U. S. 41, 48; *Gooch* v. *United States,* 297 U. S. 124, 128; *United States* v. *Corbett,* 215 U. S. 233, 242.

To accept the decision of the Circuit Court of Appeals would lead to bizarre results. The congressional purpose would be frustrated, in part at least, in every situation where an escape is effected or attempted during the prisoner's service of any but the last of two or more consecutive sentences, possibly even in that instance. Barring intervention of executive clemency, it would be completely nullified in all cases where the consecutive sentences which the prisoner has not yet begun to serve aggregate five years or more. In the latter situation the prisoner could attempt any number of jail breaks with impunity. A court would be powerless to impose added confinement for violation of the Escape Act.

The holding of the Circuit Court of Appeals thus places it beyond the power of the judge to superimpose additional imprisonment for escape in those instances where such punishment is most glaringly needed as a deterrent.[10] There is also this further striking incongruity. The judge

[10] The $5,000 fine that could be imposed for each escape attempt, see note 1 *supra,* would be no deterrent to an impecunious offender, and little more than an empty threat to the long-incarcerated one whose all-consuming interest is freedom.

is completely interdicted from imposing an additional sentence for escape or attempt to escape, the one type of offense which Congress unmistakably intended to be subject to separate and added punishment, although he may direct that a sentence for any other federal offense shall begin at the expiration of consecutive sentences theretofore imposed.

No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences. And the absence of any significant legislative history, other than has been related, may be indicative that Congress considered that there was no such problem as is now sought to be injected in the statutory wording or that by the 1935 amendment it had cured the previously existing one. The liberty of the individual must be scrupulously protected. But the safeguards of cherished rights are not to be found in the doctrinaire application of the tenet of strict construction. Neither an ordered system of liberty nor the proper administration of justice would be served by blind nullification of the congressional intent clearly reflected in the Federal Escape Act.

The judgment of the Circuit Court of Appeals is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.

BOB-LO EXCURSION CO. *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 374. Argued December 16–17, 1947.—Decided February 2, 1948.

1. Appellant, a Michigan corporation engaged chiefly in the round-trip transportation of passengers from Detroit to Bois Blanc Island, Canada, was convicted in a criminal prosecution under the Michigan Civil Rights Act for refusing passage to a Negro solely because of color. *Held:* In view of the special local interest attaching to appellant's business in the particular circumstances of this case, such application of the state Act to the appellant, although engaged in foreign commerce, did not contravene the Commerce Clause of the Federal Constitution. Pp. 29–40.
2. A decision of the highest court of the State that, as a matter of local law, the state statute was applicable to appellant's business is binding here upon review. P. 33.
3. Appellant's transportation of passengers between Detroit, Michigan, and Bois Blanc Island, Canada, is foreign commerce within the scope of Art. I, § 8 of the Federal Constitution. P. 34.
4. *Hall* v. *DeCuir,* 95 U. S. 485, and *Morgan* v. *Virginia,* 328 U. S. 373, distinguished. Pp. 39–40.

317 Mich. 686, 27 N. W. 2d 139, affirmed.

Appellant's conviction in a criminal prosecution for violation of the Michigan Civil Rights Act was affirmed by the Supreme Court of the State. 317 Mich. 686, 27 N. W. 2d 139. Upon appeal to this Court, *affirmed,* p. 40.

Wilson W. Mills argued the cause and filed a brief for appellant.

Edmund E. Shepherd, Solicitor General of Michigan, argued the cause for appellee. With him on the brief were *Eugene F. Black,* Attorney General, and *Daniel J. O'Hara,* Assistant Attorney General.

Briefs of *amici curiae* in support of appellee were filed by *William Maslow, Shad Polier, Jerome C. Eisenberg*

and *Jerome R. Hellerstein* for the American Jewish Congress; and *Thurgood Marshall, Osmond Fraenkel, O. John Rogge* and *Marian Wynn Perry* for the National Association for the Advancement of Colored People et al.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Bois Blanc Island is part of the Province of Ontario, Canada. It lies just above the mouth of the Detroit River, some fifteen miles from Michigan's metropolis upstream. The island, known in Detroit by the corruption "Bob-Lo," has been characterized as that city's Coney Island.

Appellant owns almost all of Bois Blanc in fee.[1] For many years it has operated the island, during the summer seasons, as a place of diverse amusements for Detroit's varied population. Appellant also owns and operates two steamships for transporting its patrons of the island's attractions from Detroit to Bois Blanc and return. The vessels engage in no other business on these trips.[2] No freight, mail or express is carried; the only passengers are the patrons bent on pleasure, who board ship at Detroit;

[1] A small fenced-off tract at one end is reserved for lighthouse purposes, and three small cottage lots. Appellant is a Michigan corporation, authorized by its charter to "lease, own and operate amusement parks in Canada, and to charter, lease, own and operate excursion steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto," as well as to acquire, own, use and dispose of real and personal property "as may be necessary or convenient in connection with the aforesaid business of the company."

[2] The record shows that at times during the season appellant uses these ships to provide excursion trips for residents of the Province of Ontario, but these excursions are kept entirely separate from those between Detroit and Bois Blanc and we are concerned with no question relating to them.

they go on round-trip one-day-limit [3] tickets which include the privilege of landing at Bois Blanc and going back by a later boat.[4] No intermediate stops are made on these excursions.

In conducting this business of amusement and transportation, appellant long has followed the policy, by advertisement and otherwise, to invite and encourage all comers, except two classes. One is the disorderly; the other, colored people.[5] From the latter exclusion this case arises.

In June of 1945 Sarah Elizabeth Ray, the complaining witness, was employed by the Detroit Ordnance District. She and some forty other girls were also members of a class conducted at the Commerce High School under the auspices of the ordnance district. The class planned an excursion to Bois Blanc for June 21 under the district's sponsorship.

On that morning thirteen girls with their teacher appeared at appellant's dock in Detroit to go on the outing. All were white except Miss Ray. Each girl paid eighty-five cents to one of the group, who purchased round-trip tickets and distributed them. The party then passed

[3] Apparently no facilities are provided at the island for overnight guests.

[4] The company fixes its own rates. The usual round-trip charge is 85¢, except for Saturday nights and Sundays when a higher rate applies. Special excursions at times are arranged for churches, Sunday schools, clubs, lodges, etc., for which the regular charge is paid by the passenger but the company allows the organization a discount which permits it to make a profit. The discounts are not uniform.

[5] Appellant's assistant general manager, Devereaux, testified: "The defendant adopted the policy of excluding so-called 'Zoot-suiters,' the rowdyish, the rough and the boisterous and it also adopted the policy of excluding colored."

Appellant printed on the back of each ticket: "Right reserved to reject this ticket by refunding the purchase price." The record contains no evidence of any exclusion or policy of exclusion of others than disorderly or colored persons.

through the gate, each member giving in her ticket without question from the ticket taker. They then checked their coats, went to the upper decks and took chairs.

Shortly afterward Devereaux, appellant's assistant general manager, and a steward named Fox appeared and stated that Miss Ray could not go along because she was colored. At first she remonstrated against the discrimination and refused to leave. But when it appeared she would be ejected forcibly, she said she would go. Devereaux and Fox then escorted her ashore, saying the company was a private concern and could exclude her if it wished. They took her to the ticket office and offered to return her fare. She refused to accept it, took their names, and left the company's premises. There is no suggestion that she or any member of her party was guilty of unbecoming conduct. Nor is there any dispute concerning the facts.

This criminal prosecution followed in the Recorder's Court for Detroit, for violation of the Michigan civil rights act [6] in the discrimination practiced against Miss Ray. Jury trial being formally waived, the court after hearing evidence and argument found appellant guilty as charged and sentenced it to pay a fine of $25.[7] On appeal the Supreme Court of Michigan affirmed the judgment, holding the statute applicable to the circumstances presented by the case and valid in that application, as against the constitutional and other objections put forward. 317 Mich. 686. In due course probable jurisdiction was noted here. Judicial Code § 237 (a).

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[6] Mich. Penal Code §§ 146–148, as amended by Act No. 117, Mich. Pub. Acts 1937; Mich. Comp. Laws (Supp. 1940) §§ 17115–146 to 17115–148; Mich. Stat. Ann. (1946 Cum. Supp.) §§ 28.343–28.346. These sections of the Penal Code reenacted and broadened the application of Act No. 130, Mich. Pub. Acts 1885. See notes 8 and 10.

[7] Appellant's motion for "directed" verdict of not guilty was denied, as was also its motion after judgment for a new trial. The trial court filed a written opinion which is unreported.

The Michigan civil rights act, § 146, enacts:

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices." [8]

By § 147, any owner, lessee, proprietor, agent or employee of any such place who directly or indirectly withholds any accommodation secured by § 146, on account of race, creed or color, becomes guilty of a misdemeanor, punishable as the section states, and liable to a civil action for treble damages.[9]

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[8] The appropriate statutory citations are set forth in note 6.

[9] Section 147 is as follows: "Any person being an owner, lessee, proprietor, manager, superintendent, agent or employe of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color is not welcome, objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars or imprisoned for not less than fifteen days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent

The Michigan statute is one of the familiar type enacted by many states before and after this Court's invalidation of Congress' similar legislation in the *Civil Rights Cases,* 109 U. S. 3.[10] The Michigan Supreme Court held the statute applicable to appellant's business over its objection that as a matter of local law it is not a "public conveyance" within the meaning of § 146.[11] We accept this conclusion of the state court as a matter of course. That court also impliedly rejected appellant's

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or employe of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: *Provided, however,* That any right of action under this section shall be unassignable."

No suggestion is made that the phrase "on account of race, creed or color" does not apply to the withholding and denying provisions of the section as well as those relating to publishing, etc., the notices or advertisements specified.

Section 148 of the Act forbids discrimination because of race, creed or color in selecting grand and petit jurors.

[10] These cases were decided in 1883. The Michigan statute was enacted originally in 1885. Seventeen other states have similar, and in many instances substantially identical, legislation. The statutory citations are given in *Morgan* v. *Virginia,* 328 U. S. 373, 382, n. 24.

[11] Appellant urged that it was not a common carrier, a public utility, or a "public conveyance" within the specific terms of § 146. The state supreme court said: "There is no escape from the conclusion that defendant herein is engaged in the business of operating 'public conveyances' by water, and the Michigan statute provides: 'All persons within the jurisdiction of this State shall be entitled to full and equal accommodations' afforded by such conveyances. The Michigan enactment has been held constitutional. *Bolden* v. *Grand Rapids Operating Corp.,* 239 Mich. 318 (53 A. L. R. 183). Our conclusion is . . . that the Michigan civil rights act . . . is applicable to the business carried on by defendant . . . ." 317 Mich. 686, 695.

The court distinguished *Meisner* v. *Detroit, Belle Isle & Windsor Ferry Co.,* 154 Mich. 545, in which appellant's corporate predecessor was held not liable in tort for breach of an alleged duty as a common carrier of passengers, by pointing out that no right apparently had been asserted in that case grounded on the state civil rights act. 317 Mich. 686, 696.

constitutional objections based upon alleged denial of due process of law and equal protection of the laws under the Fourteenth Amendment, issues now eliminated from the case.[12]

We have therefore only to consider the single and narrow question whether the state courts correctly held that the commerce clause, Art. I, § 8, of the Federal Constitution, does not forbid applying the Michigan civil rights act to sustain appellant's conviction. We agree with their determination.

There can be no doubt that appellant's transportation of its patrons is foreign commerce within the scope of Art. I, § 8.[13] *Lord* v. *Steamship Co.*, 102 U. S. 541; cf. *Edwards* v. *California,* 314 U. S. 160. Appellant's vessels sail to and from a port or place in foreign territory wholly under another nation's sovereignty. They cross the international boundary, which is the thread of the Detroit River, several times in the course of each short

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[12] The jurisdictional statement sought review of these Fourteenth Amendment questions, as well as the commerce clause issue. But appellant's reply brief states: "The cause before us is a business case arising under the Michigan Civil Rights Act and the Commerce Clause; *not* one arising under the [federal] Civil Rights Act and the 14th Amendment." And we were given to understand at the oral argument, in response to specific inquiry, that the only issue on which decision was sought as of that time was the commerce clause question.

The Michigan Supreme Court did not refer explicitly in its opinion to appellant's Fourteenth Amendment contentions, but the record shows they were presented to that court in the assignments of error on appeal and were therefore necessarily rejected by its affirmance of the judgment of the Recorder's Court.

[13] Until the case reached this Court, apparently, the state had maintained that foreign commerce was not involved and the trial court so held, although the ruling was hedged with the further one that, if it was erroneous, still the state's power to apply the civil rights act was not nullified by the commerce clause.

trip. Appellant necessarily complies with federal regulations applicable to foreign commerce, including those governing customs, immigration and navigation matters. It likewise satisfies similar regulations of the Canadian authorities.[14]

Of course we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safeguarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substantial business touching foreign soil of more highly local concern. Except for the small fenced-off portion reserved for the lighthouse and three cottage sites,[15] the island is economically and socially, though not politically, an amusement adjunct of the city of Detroit. Not only customs and immigrations regulations of both countries, but physical barriers prevent intercourse, both commercial and social, between Canadians and appellant's patrons, except as the former may come first by other means to Detroit, then go to the island from American soil on appellant's vessels, and return from the holiday by the same roundabout route.

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[14] *E. g.*, on arrival at Bois Blanc all passengers who land pass through Canadian customs and immigration inspection. Prior to the late war, on returning to Detroit, similar inspections were made by United States authorities. During the war the latter inspection was suspended, appellant filing a bond to indemnify the Treasury against loss of revenue and expenses arising from any free importation of dutiable goods from Bois Blanc or Canada and an agreement with the Immigration Service not to bring in aliens ineligible for entry.

[15] It does not appear whether these sites are inhabited, but presumably a keeper of the lighthouse occupies some part of the reserved premises.

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The record indicates there are no established means of access from the Canadian shore to the island. There is no evidence of even surreptitious entry from the Canadian mainland. Appellant's vessels not only are the sole means of transportation to and from the island, but carry only its own patrons of Bois Blanc's recreational facilities. These travel exclusively on round-trip tickets for passage beginning and ending on American soil. They are principally residents of Detroit and vicinity. All go aboard there and return the same day. None go from the island to the Canadian bank of the river. The only business conducted at the island is the operation of appellant's recreational and accessory facilities, which apparently do not include provision for overnight guests. No other persons than appellant's patrons come to the island, or have a right to come, from Canada's mainland or elsewhere, or go from the island to Detroit.

The sum of these facts makes Bois Blanc an island in more than the geographic sense. They insulate it and appellant's business done in connection with it from all commercial or social intercourse and traffic with the people of another country usually characteristic of foreign commerce, in short from the normal flow and incidents of such commerce. Since the enterprise is conducted in this highly closed and localized manner with Canada's full consent, no detraction whatever from that friendly neighbor's sovereignty is implied by saying that the business itself is economically and socially an island of local Detroit business, although so largely carried on in Canadian waters. As now conducted, apart from presently applicable Canadian and federal regulations and until Canada or Congress or both countries by treaty see fit to add others, the business is of greater concern to Detroit and the State of Michigan than to Dominion or Ontario interests or to those of the United States in regulating our foreign commerce.

The regulation in this application contains nothing out of harmony, much less inconsistent, with our federal policy in the regulation of commerce between the two countries; nor, so far as we are advised, with Canadian law and policy.[16] Appellant urges, however, that Canada might adopt regulations in conflict with Michigan's civil rights act, thus placing it in an inescapable dilemma if that act may be applied to its operations. Conceding the possibility, we think the state is right in viewing it as so remote that it is hardly more than conceivable. The same thing, we think, is true of the possibility that Congress might take conflicting action.

If therefore in any case a state may regulate foreign commerce, the facts here would seem clearly to justify Michigan's application of her civil rights act. It is far too late to maintain that the states possess no regulatory powers over such commerce. From the first meeting of Congress they have regulated important phases of both foreign and interstate commerce, particularly in relation to transportation by water, with Congress' express con-

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[16] The Province of Ontario enacted in 1944 its Racial Discrimination Act, Session Laws 1944, c. 51.

Federal legislation has indicated a national policy against racial discrimination in the requirement, not urged here to be specifically applicable in this case, of the Interstate Commerce Act that carriers subject to its provisions provide equal facilities for all passengers, 49 U. S. C. § 3 (1), extended to carriers by water and air, 46 U. S. C. § 815; 49 U. S. C. §§ 484, 905. Cf. *Mitchell* v. *United States,* 313 U. S. 80. Federal legislation also compels a collective bargaining agent to represent all employees in the bargaining unit without discrimination because of race. 45 U. S. C. §§ 151 *et seq. Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210. The direction of national policy is clearly in accord with Michigan policy. Cf. also *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214; *Ex parte Endo,* 323 U. S. 283.

sent.[17] And without such consent for nearly a hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley* v. *Board of Wardens,* 12 How. 299.[18] See *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202; *Kelly* v. *Washington,* 302 U. S. 1 and authorities cited in both cases. Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states that it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce.[19]

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[17] It is hardly necessary to recall again that by the Act of August 7, 1789, the First Congress declared that pilotage in bays, inlets, rivers, harbors and ports of the United States should continue to be regulated in conformity with existing state laws or others thereafter enacted until further action by Congress. 1 Stat. 54. Congress on occasion has modified such state legislation, *e. g.,* by the Act of March 2, 1837, 5 Stat. 153, making it lawful for vessels navigating waters constituting the boundary between two states to take on pilots qualified under the laws of either.

[18] In *Olsen* v. *Smith,* 195 U. S. 332, the Court sustained a Texas statute regulating pilotage of a British vessel coming from a foreign port. The contention that the state was without power to legislate in this field was disposed of in one sentence. "The unsoundness of this contention is demonstrated by the previous decisions of this court, since it has long since been settled that even although state laws concerning pilotage are regulations of commerce, 'they fall within that class of powers which may be exercised by the States until Congress has seen fit to act upon the subject.' [citing the *Cooley* and other cases]." 195 U. S. 341. Other cases upholding state regulation of foreign commerce are to the same effect. *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Wilson* v. *McNamee,* 102 U. S. 572; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187. Cf. *Clyde Mallory Lines* v. *Alabama,* 296 U. S. 261, and cases cited; *Pigeon River Co.* v. *Cox Co.,* 291 U. S. 138, 158–159.

[19] The Court's opinion in that case deals expressly but indiscriminately with both types of commerce. And from the record and arguments of counsel it seems clear that both were actually involved. There were two cases relating to two different vessels, the Consul,

Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall* v. *DeCuir,* 95 U. S. 485, supplemented by *Morgan* v. *Virginia,* 328 U. S. 373, and *Pryce* v. *Swedish-American Lines,* 30 F. Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties. None involved so completely and locally insulated a segment of foreign or interstate commerce.[20] In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The *Pryce* case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the

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which was engaged in coastwise trade between Philadelphia and New York, and the Undine, which appears to have been engaged exclusively in foreign commerce. The destination, whether foreign or domestic, of the Undine is not shown by the record, which merely states that it sailed "from the port of Philadelphia to a certain port not within the river Delaware . . . ." But from the specific "addition" by counsel for argumentative purposes, 12 How. at 302–303, of the facts that the Consul held a federal coasting license and was bound from one domestic port to another, plus the omission of any reference in argument or in the record to a similar license for the Undine (when such a reference would have supported the additional argument), the inference seems justified that the Undine had sailed for a foreign port. Moreover counsel argued that both ships were engaged in foreign commerce, although only the Consul was engaged in coastwise trading.

[20] Cf. *Port Richmond Ferry* v. *Hudson County,* 234 U. S. 317, 331–332.

Mississippi River, such as the *Hall* case comprehended, and of interstate motor carriage of passengers by common carriers like that in the *Morgan* case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here.

It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practiced here. And, in view of these facts, the ruling would be strange indeed, to come from this Court, that Michigan could not apply her long-settled policy against racial and creedal discrimination to this segment of foreign commerce, so peculiarly and almost exclusively affecting her people and institutions.

The Supreme Court of Michigan concluded "that holding the provisions of the Michigan statute effective and applicable in the instant case results only in this, defendant will be required in operating its ships as 'public conveyances' to accept as passengers persons of the negro race indiscriminately with others. Our review of this record does not disclose that such a requirement will impose any undue burden on defendant in its business in foreign commerce." 317 Mich. 686, 694. Those conclusions were right.

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

The case is, I think, controlled by a principle which cuts deeper than that announced by the Court and which is so important that it deserves to be stated separately.

Hall v. *DeCuir,* 95 U. S. 485, and *Morgan* v. *Virginia,* 328 U. S. 373, presented phases of the problem of segregation. The former held unconstitutional a Louisiana law forbidding steamboats (which plied the Mississippi) from segregating passengers according to race. The latter held unconstitutional a Virginia law requiring segregation of passengers on interstate motor buses. It was held that diverse regulations of that character by the several States through which the traffic moved would be an undue or unreasonable burden on interstate commerce. But the question here is a simpler one. It is whether a State can prevent a carrier in foreign commerce from denying passage to a person because of his race or color. For this is a case of a discrimination against a Negro by a carrier's complete denial of passage to her because of her race.

It is unthinkable to me that we would strike down a state law which required all carriers—local and interstate—to transport all persons regardless of their race or color. The common-law duty of carriers was to provide equal service to all, a duty which the Court has held a State may require of interstate carriers in the absence of a conflicting federal law. *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612, 619, 623–624. And the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color. *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88. Moreover, in this situation there is no basis for saying that the Commerce Clause itself defeats such a law. This regulation would not place a burden on interstate commerce within the meaning of our cases. It does not impose a regulation which discriminates against interstate commerce or which, by specifying the mode in which it shall be conducted, disturbs the uniformity essential to its proper functioning. See *Southern*

Pacific Co. v. *Arizona,* 325 U. S. 761; *Morgan* v. *Virginia, supra.* I see nothing in the Commerce Clause which places foreign commerce on a more protected level.

There is in every case, of course, a possibility that Congress may pass laws regulating foreign or interstate commerce in conflict with regulations prescribed by a State. Or in the case of foreign commerce the national government might act through a treaty. Inconsistent State law would then give way to any exercise of federal power within the scope of constitutional authority. But I am aware of no power which Congress has to create different classes of citizenship according to color so as to grant freedom of movement in the channels of commerce to certain classes only. Cf. *Edwards* v. *California,* 314 U. S. 160, 177–181. The federal policy reflected in Acts of Congress indeed bars any such discrimination (see *Mitchell* v. *United States,* 313 U. S. 80) and so is wholly in harmony with Michigan's law. And no treaty reveals a different attitude.

Moreover, there is no danger of burden and confusion from diverse state laws if Michigan's regulation is sustained. If a sister State undertook to bar Negroes from passage on public carriers, that law would not only contravene the federal rule but also invade a "fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." *Mitchell* v. *United States, supra,* p. 94. Nothing short of at least "equality of legal right" (*Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 350) in obtaining transportation can satisfy the Equal Protection Clause. Hence I do not see how approval of Michigan's law in any way interferes with the uniformity essential for the movement of vehicles in commerce. The only constitutional uniformity is uniformity in the Michigan pattern.

If a State's law made a head-on collision with the policy of a foreign power whose shores were reached by our vessels, a different problem might be presented. But no such conflict is present here.

MR. JUSTICE BLACK, who joins in the opinion of the Court, concurs also in this opinion.

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

This Michigan statute undoubtedly is valid when applied to Michigan intrastate commerce, just as a Congressional enactment of like tenor would undoubtedly be valid as to commerce among the states and with foreign countries. The question here, however, is whether the Michigan statute can validly be applied to that commerce which is set apart by the Constitution for regulation by the Congress.

The sphere of a state's power has not been thought to expand or contract because of the policy embodied in a particular regulation. A state statute requiring equality of accommodations for white and Negro passengers was held invalid as applied to interstate commerce. *Hall* v. *DeCuir,* 95 U. S. 485. On the same principle a state statute requiring segregation was held invalid as applied to interstate commerce. *Morgan* v. *Virginia,* 328 U. S. 373. Heretofore the Court steadily has held that the failure of Congress to enact a law on this specific subject does not operate to expose interstate commerce to the burden of local rules, no matter what policy in this highly controversial matter a state sought to advance. It would seem to me that the constitutional principles which have been so apparent to the Court that it would not permit local policies to burden national commerce, are even more obvious in relation to foreign commerce.

Certainly if any state can enforce regulations concerning embarkation and landing, it can in effect control much that pertains to the foreign journey. To determine what persons and commodities shall be taken abroad is to control what persons and commodities may become the subject of foreign commerce, and that is to control the life-blood of the commerce itself. These are identical with matters in which this commerce is subject to control by federal and foreign governments. The Federal Government takes active control of the inbound movement of goods by virtue of its customs service and of the movement of persons by virtue of its immigration service across these boundaries. The Canadian government does the same on the outbound crossing of the international line. It does so in this case, and it does so even if the bulk of the travelers do not go very far or stay very long and are merely amusement bent.

The wholesome and amiable situation detailed in the Court's opinion is made possible only by international relations wholly controlled by the Federal Government. It alone can effectively protect or foster this kind of commerce, and it alone should be allowed to burden it. If we are to concede this power over foreign commerce to one state, it would seem that it could logically be claimed by every state which has a port, border, or landing field used by foreign commerce.

The Court admits that the commerce involved in this case is foreign commerce, but subjects it to the state police power on the ground that it is not very foreign. It fails to lay down any standard by which we can judge when foreign commerce is foreign enough to become free of local regulation. The commerce involved here is not distinguishable from a great deal of the traffic across our Canadian and Mexican borders, except perhaps in volume. Communities have sprung up on either side, whose social

and economic relations are interdependent, but are conducted with scrupulous regard for the international boundary. Localities on either side of the line may develop in reliance on a certain reciprocity and stability of policy which has characterized two nations for years, when they cannot rely on similar stability or farsightedness in local policy.

It seems to me no adequate protection of foreign commerce from a multitude and diversity of burdening and capricious local regulations that this Court may stand ready, as in this case, to apply itself to an analysis of the traffic involved and determine in each case whether the local interest in it is sufficiently strong and the foreign element is sufficiently weak so that we will permit the regulation to stand. We do not and apparently cannot enunciate any legal criteria by which those who engage in foreign commerce can predict which classification we will impose upon any particular operation and we lay down no rule other than our passing impression to guide ourselves or our successors. All is left to case-by-case conjecture. The commerce clause was intended to promote commerce rather than litigation.

I believe that once it is conceded, as it is in this case, that the commerce involved is foreign commerce, that fact alone should be enough to prevent a state from controlling what may, or what must, move in the stream of that commerce.

JOHNSON *v.* UNITED STATES.

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

No. 138. Argued December 10, 1947.—Decided February 9, 1948.

1. While two seamen were working together, a block held by one fell and injured the other. The uncontradicted evidence was sufficient to support a finding that the injured seaman was not negligent. There was no proof as to the actual cause of the accident, though the testimony of the fellow seaman was available and was not put in evidence. *Held:* The trial court was warranted under the rule of *res ipsa loquitur* in finding that the injury resulted from the negligence of the fellow seaman and that the shipowner was liable under the Jones Act of March 4, 1915, as amended by the Merchant Marine Act of 1920. Pp. 46–50.
2. The rule of *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference. P. 48.
3. It is applicable to the acts of a fellow servant. P. 49.
4. No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked, since the rule deals only with permissible inferences from unexplained events. P. 49.
5. The Jones Act of March 4, 1915, as amended by the Merchant Marine Act of 1920, makes the standard of liability of the Federal Employers' Liability Act applicable to suits by seamen for personal injuries suffered in the course of their employment, so that the shipowner becomes liable for injuries to a seaman resulting in whole or in part from the negligence of another employee. P. 49.
6. There being ample evidence to support the findings of the two lower courts that a seaman injured in the course of his employment had incurred no expense or liability for his care and support at the home of his parents, denial of his claim for maintenance and cure while living with his parents is sustained. P. 50.

160 F. 2d 789, affirmed in part and reversed in part.

In a suit by a seaman under the Jones Act of March 4, 1915, as amended, the District Court awarded him damages for pain and suffering and loss of wages resulting from personal injuries suffered in the course of employment but denied recovery for maintenance and cure after

a certain date. The Circuit Court of Appeals reversed the judgment for pain and suffering and loss of wages and affirmed the denial of maintenance and cure. 160 F. 2d 789. This Court granted certiorari. 332 U. S. 754. *Affirmed in part and reversed in part*, p. 50.

David A. Fall and *Silas Blake Axtell* argued the cause for petitioner. With them on the brief was *Myron Scott*.

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Herbert A. Bergson, W. Leavenworth Colby, John R. Benney* and *Alvin O. West*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari which we granted because of the seeming misapplication by the court below of *Jesionowski* v. *Boston & Maine R. Co.*, 329 U. S. 452.

Petitioner was a seaman on S. S. Mission Soledad, a steam tanker owned and operated by the United States. He was on the main deck rounding in two blocks, an operation which followed the cradling of the boom. One block was attached to the outer end of the boom by a wire rope. The other block was being held by a shipmate, one Dudder, who stood above petitioner on the meccano deck, a structure of beams which had been erected on the main deck. Petitioner was taking in the slack by pulling on the free end of the rope which ran through the two blocks. As he pulled on the rope the two blocks were brought together. When that was done Dudder had to walk forward with the block he held at a rate of speed controlled by petitioner. The operation went forward smoothly. Petitioner would pull on the rope, Dudder would walk forward, and then petitioner would stop to coil the accu-

mulated free line. Petitioner and Dudder had worked harmoniously, neither one jerking on the line nor interfering with the other's function. There was no fouling of the lines; the rope was taut and ran free.

We have only a partial account of how the injury to petitioner occurred. Dudder was not called. The only testimony we have is from petitioner and his version of the episode is uncontradicted. The block which it was Dudder's duty to hold (and which weighed 25 or 30 pounds) was permitted to fall; it hit petitioner on the head and caused the injury for which this libel *in personam* (see 41 Stat. 525, 46 U. S. C. § 742) was filed under the Jones Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. § 688. Dudder, as we have said, was standing above petitioner. It is not certain why the block fell. Petitioner was hit without warning. When hit, he was bending over coiling the line on the deck.

The rule of *res ipsa loquitur* applied in *Jesionowski* v. *Boston & Maine R. Co., supra,* means that "the facts of the occurrence warrant the inference of negligence, not that they compel such an inference." *Sweeney* v. *Erving,* 228 U. S. 233, 240. We need not determine what the result would be if it were shown that petitioner was pulling on the rope when the accident happened. For the uncontradicted evidence is that he was not pulling on the rope but was bending over coiling it on the deck. A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. But where, as here, the injured person is not implicated (*Jesionowski* v. *Boston & Maine R. Co., supra*), the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder alone remains implicated, since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible.

The Jones Act makes applicable to these suits the standard of liability of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. § 51. Thus the shipowner becomes liable for injuries to a seaman resulting in whole or in part from the negligence of another employee. See *De Zon* v. *American President Lines,* 318 U. S. 660, 665. And there is no reason in logic or experience why *res ipsa loquitur* is not applicable to acts of a fellow servant. See *Lejeune* v. *General Petroleum Corp.,* 128 Cal. App. 404, 18 P. 2d 429; *Johnson* v. *Metropolitan Street R. Co.,* 104 Mo. App. 588, 592–593, 78 S. W. 275, 276. True, the doctrine finds most frequent application in cases of injuries arising from instruments or properties under the employer's exclusive control. *San Juan Light & Transit Co.* v. *Requena,* 224 U. S. 89; *Jesionowski* v. *Boston & Maine R. Co., supra; Lukon* v. *Pennsylvania R. Co.,* 131 F. 2d 327; *Sweeting* v. *Pennsylvania R. Co.,* 142 F. 2d 611. Inherent, however, in the negligence inferred in that type of case is an act or failure to act by an individual. While the acts of negligence underlying such accidents may reach higher into the management hierarchy than the one involved here, the Federal Employers' Liability Act compels us to go no higher than a fellow servant. See *Terminal R. Assn.* v. *Staengel,* 122 F. 2d 271.

No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2d 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that, although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused

a lapse of memory which antedated the actual injury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act.

Petitioner presses here his claim for maintenance and cure which was rejected by both courts below. He was hospitalized by respondent for a number of weeks following the accident. He was then found unfit for sea duty and doctors of the Public Health Service recommended that he enter various government hospitals. He refused and went instead to live on the ranch of his parents. We need not decide whether an agreement between petitioner and the government doctors for out-patient treatment and rest at his home might be inferred. Cf. *Rey* v. *Colonial Navigation Co.*, 116 F. 2d 580; *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840. For there is ample evidence to support the findings of the two lower courts that petitioner had incurred no expense or liability for his care and support at the home of his parents. See *Field* v. *Waterman S. S. Corp.*, 104 F. 2d 849. On that issue we affirm the Circuit Court of Appeals. On the issue of negligence we reverse it.

So ordered.

MR. JUSTICE FRANKFURTER dissenting in part.

What is this case? It is a suit by the petitioner, a seaman, for an injury sustained while working on a vessel owned and operated by the United States. Under existing law the United States is liable only if it failed in its duty of exercising reasonable care in safeguarding its employees—the United States is liable, that is, only if it was negligent. And it is up to the plaintiff to prove such negligence.

What is the plaintiff's claim here? It is that while the petitioner and a fellow seaman named Dudder were working together in an operation known as "rounding in" blocks to bring two blocks of a block and tackle together, somehow or other a block fell and struck the petitioner, who was operating on a deck below Dudder, on the head. The claim is that the block which hit petitioner was negligently released by Dudder and that the United States is responsible for Dudder's negligence. (The "fellow servant rule" is not a defense under the Jones Act which authorizes this suit. 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. § 688.) There were no witnesses to this happening besides Dudder and Johnson. The only sources of knowledge for ascertaining what actually happened—whether fault lay with Dudder or Johnson or with nobody, as the law determines fault—were the accounts which Dudder and Johnson might furnish and such inferences as human experience could reasonably draw from the occurrence itself.

What evidence does the record disclose? Of the two available witnesses only one testified. That was the petitioner. It is accurate to state, therefore, that his version of what immediately preceded the injury was uncontradicted. But it is no less true that he was unable to furnish any evidence bearing on the cause of the happening.[1] His testimony has not established that it was the carelessness of Dudder that caused the block to fall out

[1] Petitioner testified:

"Q. Now, when you were standing there just before the accident, in the last thing you knew before the accident happened, what were you doing?

"A. I was coiling the line on the well deck or the Maccano [*sic*] deck.

"Q. Standing up or leaning over?

"A. I was bending over.

"Q. Then what happened?

"A. That is all I remember."

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of Dudder's hand rather than a careless jerk of the rope by himself which caused such release. Dudder was available as a witness but he was not called. The United States in fact had Dudder's deposition taken before the trial, and it was placed at Johnson's disposal. Neither party, for reasons of its own, called Dudder as a witness or introduced his deposition.

What conclusions are to be drawn from the facts as they were developed at the trial? It is not the business of this Court to conduct the trial of a case or, even where a case is technically open here on the facts, to sit in independent judgment on the facts. If a case like this is to be allowed to come here at all, we sit in judgment on the proceedings in their entirety. This is a proceeding in Admiralty tried by a judge and not a jury. The trial judge, who heard the testimony and who was in the best possible position to weigh what he heard and saw, died before he gave his view of the testimony. By agreement, the cause was then submitted for judgment by another district judge on the basis of the cold record. He decided for the petitioner. The United States then appealed to the Circuit Court of Appeals for the Ninth Circuit. Three other judges on the basis of the same dead record reversed the district judge. 160 F. 2d 789. The result is that on the issue whether the United States is liable because one of its employees was negligent—that is, whether Dudder in fact carelessly let the block slip out of his hands—one judge said yes, and three judges said no.

What is the applicable law? My brethren say the circumstances speak for themselves in establishing Dudder's negligence. This means that the three judges below should have found, and this Court must now find, that the record proves that the injury can only be explained by Dudder's carelessness—for the petitioner, it deserves repeating, must have established Dudder's carelessness in

order to hold the United States liable. I agree that if the rule of *res ipsa loquitur* determines this case, the scope of that rule is found in *Sweeney* v. *Erving,* 228 U. S. 233, reaffirmed last term as a "decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur.*" *Jesionowski* v. *Boston & Maine R. Co.,* 329 U. S. 452, 457. But these two sentences are a vital part of the *Sweeney* case: "*Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." 228 U. S. at 240. Therefore, even if the rule of *res ipsa loquitur* is here relevant, it should not by itself sustain a finding for the petitioner, "for the reason that in cases where that rule does apply, it has not the effect of shifting the burden of proof." 228 U. S. at 238. Since we cannot tell from the record how the injury to the petitioner occurred—it certainly was not established why the block fell—I cannot escape the conclusion that petitioner failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to the respondent's negligence. Cf. the *Jesionowski* case, *supra* at p. 454.

But I do not believe that *res ipsa loquitur* is applicable here. It is, after all, a "rule of necessity to be invoked only when necessary evidence is absent and not readily available." See Cooley, Torts (4th ed.) § 480. Here the evidence as to the cause of petitioner's injuries was admittedly available, and it would seem to follow that since what actually happened could have been adjudicated, it should have been adjudicated. Therefore, I would affirm the judgment of the court below but modify its mandate so that there may be a new trial on this issue and an adjudication based upon an adequate determination.

While a court room is not a laboratory for the scientific pursuit of truth, a trial judge is surely not confined to

an account, obviously fragmentary, of the circumstances of a happening, here the meagre testimony of Johnson, when he has at his command the means of exploring them fully, or at least more fully, before passing legal judgment. A trial is not a game of blind man's buff; and the trial judge—particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law—need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, choose to withhold his testimony.

Federal judges are not referees at prize-fights but functionaries of justice. See *Herron* v. *Southern Pacific Co.,* 283 U. S. 91, 95; *Quercia* v. *United States,* 289 U. S. 466, 469. As such they have a duty of initiative to see that the issues are determined within the scope of the pleadings, not left to counsel's chosen argument. See *New York Central R. Co.* v. *Johnson,* 279 U. S. 310, 318. Just as a Federal judge may bring to his aid an auditor, without consent of the parties, to examine books and papers, hear testimony, clarify the issues, and submit a report, in order to "render possible an intelligent consideration of the case by court and jury," *Ex parte Peterson,* 253 U. S. 300, 306, and in so doing has the power to tax the expense as costs "necessary to the true understanding of the cause on both sides," *Whipple* v. *Cumberland Cotton Co.,* 3 Story 84, 86, he has the power to call and examine witnesses to elicit the truth. See *Glasser* v. *United States,* 315 U. S. 60, 82. He surely has the duty to do so before resorting to guesswork in establishing liability for fault.

Dudder's account of what happened surely could supplement Johnson's as a basis for recreating the events which led to Johnson's injury. Neither party saw fit to use his available testimony. Instead of entering judgment for the party who had the burden of proof and did not meet it, the trial judge should at least have called

Dudder as the court's witness. As Judge Sibley observed in a case where witnesses who knew what actually happened had not been called to testify: "We think the interests of justice would be served by a new and more orderly trial, which can easily be managed . . . . Williams and Batson [the witnesses] certainly know the truth of the things in dispute. If neither party will risk calling a witness who knows important facts, it is in the power of the court to call and examine such a witness, in the interest of truth and justice, allowing both parties the right of cross-examination and impeachment." *Chalmette Petroleum Corp.* v. *Chalmette Oil Distributing Co.*, 143 F. 2d 826, 828–9.

Three courts and thirteen judges have now passed on this case when in good reason a situation like this ought never to get into court at all. The crux of the difficulty is that an industrial injury such as the petitioner suffered is as to interstate railroad employees and seamen still determined by the archaic law of negligence instead of by a just system of workmen's compensation. Occurrences like the one now in controversy are inherent in industrial employment and to make liability depend on a finding of "negligence" is to pursue unreality. England abolished negligence as the basis of liability fifty years ago. The States, long laggards in making law conform to the actualities of industry, have now, with only a single exception, supplanted the outmoded liability for fault by a rational system of workmen's compensation laws, and Congress has enacted compensation laws for the District of Columbia, federal employees, and for longshoremen and harbor workers. "It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production." Holmes, J., in *Arizona Employers' Liability Cases*, 250 U. S. 400, 433. But so long as Congress sees fit to have liability for injuries by railroad employees

and seamen based solely on proof of fault, it is not for this Court to torture and twist the law of negligence so as to make it in result a law not of liability for fault but a law of liability for injuries.

One cannot be unmindful that "the radiating potencies of a decision may go beyond the actual holding." *Hawks v. Hamill,* 288 U. S. 52, 58. Lower courts read the opinions of this Court with a not unnatural alertness to catch intimations beyond the precise *ratio decidendi.* A decision like this exerts an influence, however unwittingly, well calculated to lead lower court judges to avoid reversals by deciding compassionately for the plaintiff in these negligence cases confident that such decisions are not likely to be reviewed here.

I would have the cause remanded to the District Court for further proceedings in conformity with this opinion.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON join in this dissent.

MAGGIO *v.* ZEITZ, TRUSTEE IN BANKRUPTCY.

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

No. 38. Submitted October 13, 1947.—Decided February 9, 1948.

1. In a civil contempt proceeding against a bankrupt for failure to comply with an order to turn over to the trustee assets of the estate found to be in his possession or under his control at the time such order was issued (20 months earlier in this case), the bankruptcy court should not adjudge the bankrupt in contempt and commit him to jail to coerce compliance if it appears that he is presently unable to comply—even though the previous finding that he had possession of the property when the turnover order was issued has become *res judicata.* Pp. 69–78.
2. Courts of bankruptcy have no authority to compensate for any neglect or lack of zeal in applying the criminal sanctions prescribed by the Bankruptcy Act by perversion of civil remedies to ends of punishment. P. 62.

3. The summary turnover procedure, fashioned by bankruptcy courts as a means of retrieving concealed assets or books of account, is essentially a proceeding for restitution of property rather than indemnification; and the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. Pp. 62–63.
4. Resort to a turnover proceeding is not appropriate when the property and its proceeds have already been dissipated, no matter when that dissipation occurred. Pp. 63–64.
5. In a turnover proceeding, the burden is upon the trustee to prove by clear and convincing evidence that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded against. *Oriel* v. *Russell*, 278 U. S. 358. P. 64.
6. The presumption that possession of property of a bankrupt, once proven, continues until the possessor explains when and how possession ceased is not a rule of law to be applied in all cases, but a rule of evidence to be applied only when the time element and other factors make that a fair and reasonable inference. Pp. 64–66.
7. A turnover order should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one-time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. Pp. 66–67.
8. When a turnover proceeding is completed and terminated in a final order, it becomes *res judicata* and is not subject to collateral attack in a subsequent proceeding in civil contempt to coerce obedience. Pp. 68–69.
9. Even though a turnover order has become *res judicata* as to the issue of possession of the goods in question at the time of the turnover proceedings, a subsequent proceeding in civil contempt to coerce compliance tenders the issue as to present wilful disobedience, which must be tried like any other issue; and the Court is entitled to consider all evidence relevant to it. Pp. 74–75.
10. In a civil contempt proceeding to coerce compliance with a turnover order, the bankrupt may not challenge the previous adjudication of possession made when the turnover order was issued; but he may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate such denial. Pp. 75–76.
11. In a civil contempt proceeding to enforce a turnover order, a trial court is obliged to weigh not merely the facts that a turnover order has issued and has not been obeyed but also all other evidence

properly before it, in determining whether or not there is actually a present ability to comply and whether failure to do so constitutes deliberate defiance which a jail term will break. Pp. 76–77.

12. This Court regards turnover and contempt orders, and petitions for certiorari to review them, as usually raising only questions of fact to be solved by a careful analysis of evidence, which should take place in the lower courts; and this Court is loath to review particular cases, especially where the order carries approval of the referee, the district court, and the circuit court of appeals. P. 70.

13. When a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the district court for further proceedings consistent with the principles laid down in this Court's opinion. P. 77.

157 F. 2d 951, judgments vacated and case remanded.

A referee in bankruptcy found the bankrupt in contempt for failure to comply with a turnover order previously affirmed by the District Court and the Circuit Court of Appeals. The District Court affirmed and ordered the bankrupt committed to jail until he complied or until further order of the court. The Circuit Court of Appeals affirmed, although it said it knew that the bankrupt could not comply with the turnover order. 157 F. 2d 951. This Court granted certiorari. 330 U. S. 816. *Judgments vacated and case remanded to the District Court,* p. 78.

Max Schwartz submitted on brief for petitioner.

Joseph Glass and *Sidney Freiberg* submitted on brief for respondent.

Mr. Justice Jackson delivered the opinion of the Court.

Joseph Maggio, the petitioner, was president and manager of Luma Camera Service, Inc., which was adjudged bankrupt on April 23, 1942. In January of 1943 the

trustee asked the court to direct Maggio to turn over a considerable amount of merchandise alleged to have been taken from the bankrupt concern in 1941, and still in Maggio's possession or control. After hearing, the referee found that "the Trustee established by clear and convincing evidence that the merchandise hereinafter described, belonging to the estate of the bankrupt, was knowingly and fraudulently concealed by the respondent [Maggio] from the Trustee herein and that said merchandise is now in the possession or under the control of the respondent." A turnover order issued and was affirmed by the District Court and then unanimously affirmed by the Circuit Court of Appeals, Second Circuit, without opinion other than citation of its own prior cases. *Zeitz* v. *Maggio,* 145 F. 2d 241. Petition for certiorari was denied by this Court. 324 U. S. 841.

As Maggio failed to turn over the property or its proceeds, the Referee found him in contempt. After hearing, the District Court affirmed and ordered Maggio to be jailed until he complied or until further order of the court. Again the Circuit Court of Appeals affirmed. 157 F. 2d 951.

But in affirming the Court said: "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio 'to do an impossibility, and then punish him for refusal to perform it.' " Whether this is to be read literally as its deliberate judgment of the law of the case or is something of a decoy intended to attract our attention to the problem, the declaration is one which this Court, in view of its supervisory power over courts of bankruptcy, cannot ignore. Fraudulent bankruptcies probably present more difficulties to the courts in the Second Circuit than they do elsewhere. These conditions are reflected in conflicting views within the Court of Appeals, which we need not detail as they are

already set out in the books: *In re Schoenberg,* 70 F. 2d 321; *Danish* v. *Sofranski,* 93 F. 2d 424; *In re Pinsky-Lapin & Co.,* 98 F. 2d 776; *Seligson* v. *Goldsmith,* 128 F. 2d 977; *Rosenblum* v. *Marinello,* 133 F. 2d 674; *Robbins* v. *Gottbetter,* 134 F. 2d 843; *Cohen* v. *Jeskowitz,* 144 F. 2d 39; *Zeitz* v. *Maggio,* 145 F. 2d 241.

The problem is illustrated by this case. The court below says that in the turnover proceedings it was sufficiently established that, towards the end of 1941, a shortage occurred in this bankrupt's stock of merchandise. It seems also to regard it as proved that Maggio personally took possession of the corporation's vanishing assets. But this abstraction by Maggio occurred several months before bankruptcy and over a year before the turnover order was applied for. The only evidence that the goods then were in the possession or control of Maggio was the proof of his onetime possession supplemented by a "presumption" that, in the absence of a credible explanation by Maggio of his disposition of the goods, he continues in possession of them or their proceeds. Because the Court of Appeals felt constrained by its opinions to adhere to this "presumption" or "fiction" it affirmed the turnover order. Now it says it is convinced that in reality Maggio did not retain the goods or their proceeds up to the time of the turnover proceedings and that the turnover order was unjust. But it considers the turnover order *res judicata* and the injustice beyond reach on review of the contempt order.

The proceeding which leads to commitment consists of two separate stages which easily become out-of-joint because the defense to the second often in substance is an effort to relitigate, perhaps before another judge, the issue supposed to have been settled in the first, and because while the burden of proof rests on the trustee, frequently evidence of the facts is entirely in possession of his adversary, the bankrupt, who is advantaged by nondisclosure.

Because these separate but interdependent turnover and contempt procedures are important to successful bankruptcy administration, we restate some of the principles applicable to each, conscious however of the risk that we may do more to stir new than to settle old controversies.

I.

The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity.

The courts of bankruptcy are invested "with such jurisdiction in law and in equity as will enable them" to "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto . . . ." 11 U. S. C. § 11 (a) (7). And the function to "collect and reduce to money the property of the estates" is also laid upon the trustee. 11 U. S. C. § 75 (a) (1). A correlative duty is imposed upon the bankrupt fully and effectually to turn over all of his property and interests, and in case of a corporation the duty rests upon its officers, directors or stockholders. 11 U. S. C. § 25.

To compel these persons to discharge their duty, the statute imposes criminal sanctions. It denounces a comprehensive list of frauds, concealments, falsifications, mutilation of records and other acts that would defeat or obstruct collection of the assets of the estate, and prescribes heavy penalties of fine or imprisonment or both. 11 U. S. C. § 52 (b). It also confers on the courts power to arraign, try and punish persons for violations, but "in accordance with the laws of procedure" regulating trials of crimes. 11 U. S. C. § 11 (a) (4). And it specifically provides for jury trial of offenses against the Bankruptcy

Act. 11 U. S. C. § 42 (a), (c). Special provisions are also made to induce vigilance in prosecuting such offenses. It is the duty of the referee and trustee to report any probable grounds for believing such an offense has been committed to the United States Attorney, who thereupon is required to investigate and report to the referee. In a proper case he is directed to present the matter to the grand jury without delay, and if he thinks it not a proper case he must report the facts to the Attorney General and abide his instructions. 11 U. S. C. § 52 (e).

Courts of bankruptcy have no authority to compensate for any neglect or lack of zeal in applying these prescribed criminal sanctions by perversion of civil remedies to ends of punishment, as some judges of the Court of Appeals suggest is being done.

Unfortunately, criminal prosecutions do not recover concealed treasure. And the trustee, as well as the Court, is commanded to collect the property. The Act vests title to all property of the bankrupt, including any transferred in fraud of creditors, in the trustee, as of the date of filing the petition in bankruptcy, 11 U. S. C. § 110, which puts him in position to pursue all plenary or summary remedies to obtain possession.

To entertain the petitions of the trustee the bankruptcy court not only is vested with "jurisdiction of all controversies at law and in equity" between trustees and adverse claimants concerning property acquired or claimed by the trustee, 11 U. S. C. § 46, but it also is given a wide discretionary jurisdiction to accomplish the ends of the Act, or in the words of the statute to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title." 11 U. S. C. § 11 (a) (15).

In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one

necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by "clear and convincing evidence," the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel* v. *Russell,* 278 U. S. 358; *Cooper* v. *Dasher,* 290 U. S. 106. See also *Farmers & Mechanics National Bank* v. *Wilkinson,* 266 U. S. 503.

But this procedure is one primarily to get at property rather than to get at a debtor. Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession—detinue for unlawful detention of chattels and replevin for their unlawful taking—as distinguished from actions in trespass or trover to recover damages for the withholding or for the value of the property. Of course the modern remedy does not exactly follow any of these ancient and often overlapping procedures, but the object—possession of specific property—is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding *in rem;* the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.

The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds,

and possession thereof by the defendant at the time of the proceeding. While some courts have taken the date of bankruptcy as the time to which the inquiry is directed, we do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property and its proceeds have already been dissipated, no matter when that dissipation occurred. Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

II.

It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by "clear and convincing evidence," *Oriel* v. *Russell,* 278 U. S. 358, and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded against. It is the burden of the trustee to produce this evidence, however difficult his task may be.

The trustee usually can show that the missing assets were in the possession or under the control of the bankrupt at the time of bankruptcy. To bring this past possession down to the date involved in the turnover proceedings, the trustee has been allowed the benefit of what is called a presumption that the possession continues until the possessor explains when and how it ceased. This inference, which might be entirely permissible in

some cases, seems to have settled into a rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case.

However, no such presumption, and no such fiction, is created by the bankruptcy statute. None can be found in any decision of this Court dealing with this procedure.[1] Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason.

Since no authority imposes upon either the Court of Appeals or the Bankruptcy Court any presumption of law, either conclusive or disputable, which would forbid or dispense with further inquiry or consideration of other evidence and testimony, turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference.[2] Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession. Such a process,

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[1] The Court of Appeals itself said: ". . . the Supreme Court has never decided in favor of the fictitious 'presumption' here invoked. . . ." 157 F. 2d 951, 954.

[2] Other circuits have treated the presumption of continued possession as one which "grows weaker as time passes, until it finally ceases to exist" (C. C. A. 8th in *Marin* v. *Ellis*, 15 F. 2d 321) and as one "only as strong as the nature of the circumstances permits" and which "loses its force and effect as time intervenes and as circumstances indicate that the bankrupt is no longer in possession of the missing goods or their proceeds" (C. C. A. 4th in *Brune* v. *Fraidin*, 149 F. 2d 325). See also Comments in 95 U. of Pa. L. Rev. 789 (1947) and 42 Ill. L. Rev. 396 (1947).

sometimes characterized as a "presumption of fact," is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.

Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another. With what kind of property do we deal? Was it salable or consumable? The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand. Such an inference is one thing when applied to a thrifty person who withdraws his savings account after being involved in an accident, for no apparent purpose except to get it beyond the reach of a tort creditor, see *Rosenblum* v. *Marinello,* 133 F. 2d 674; it is very different when applied to a stock of wares being sold by a fast-living adventurer using the proceeds to make up the difference between income and outgo.

Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as onetime possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this Court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And

there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement.

III.

Unlike the judicially developed turnover proceedings, contempt proceedings for disobedience of a lawful order are specifically authorized by two separate provisions of the Act and are of two distinct kinds. The court is authorized to "enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment." 11 U. S. C. § 11 (a) (13). This creates the civil contempt proceeding to coerce obedience, now before us. There is also provision for a criminal contempt proceeding whose end is to penalize contumacy, the court also being authorized to "punish persons for contempts committed before referees." 11 U. S. C. § 11 (a) (16). These contempts before referees are defined to include disobedience or resistance to a lawful order, and the statute provides for a summary proceeding before the District Judge who, if the evidence "is such as to warrant him in so doing," may punish the accused or commit him upon conditions. 11 U. S. C. § 69.

The proceeding before us sought only a coercive or enforcement sanction. The petition asked commitment "until he shall have complied with the aforesaid turnover order." The commitment was only until he "shall have

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purged himself of such contempt by complying with said turnover order, or until the further order of this Court." Thus no punishment whatever was imposed for past disobedience, and every penalty was contingent upon failure to obey. This is a decisive characteristic of civil contempt and of the truly coercive commitment for enforcement purposes, which, as often is said, leaves the contemnor to "carry the key of his prison in his own pocket." *Penfield Co.* v. *Securities & Exchange Commission,* 330 U. S. 585. We thus have before us now a civil contempt of the same kind that was before the Court in *Oriel* v. *Russell,* 278 U. S. 358, 363. What we say, therefore, is not applicable to criminal contempt proceedings designed solely for punishment and vindication of the court's flouted authority, such, for example, as a proceeding to sentence one for destroying or mutilating books of account or property in his possession which the court had ordered him to turn over.

The question now arises as to whether, in this contempt proceeding, the Court may inquire into the justification for the turnover order itself. It is clear however that the turnover proceeding is a separate one and, when completed and terminated in a final order, it becomes *res judicata* and not subject to collateral attack in the contempt proceedings. This we long ago settled in *Oriel* v. *Russell,* 278 U. S. 358, and, we think, settled rightly.

The court order is increasingly resorted to, especially by statute,[3] to coerce performance of duties under sanction

[3] For examples of statutory provisions, see Interstate Commerce Act, 49 U. S. C. § 12 (3); Securities Exchange Act of 1934, 15 U. S. C. § 78 (u) (c); Public Utility Holding Company Act of 1935, 15 U. S. C. § 79 (r) (d); Communications Act of 1934, 47 U. S. C. § 409 (d); National Labor Relations Act, 29 U. S. C. § 161 (2); Federal Trade Commission Act, 15 U. S. C. § 49; Administrative Procedure Act of 1946, 5 U. S. C. 1946 ed. § 1005 (c); and Atomic Energy Act of 1946, 42 U. S. C. A. (1947 Supp.) § 1816 (d).

of contempt. It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. *United States* v. *United Mine Workers,* 330 U. S. 258; *Oriel* v. *Russell,* 278 U. S. 358. Counsel appears to recognize this rule, for the record in the case now before us does not include the evidence on which the turnover order was based. We could learn of it only by going outside of the present record to that in the former case, which would be available only because an application was made to this Court to review that earlier proceeding.

We therefore think the Court of Appeals was right insofar as it concluded that the turnover order is subject only to direct attack, and that its alleged infirmities cannot be relitigated or corrected in a subsequent contempt proceeding.

IV.

But does this mean that the lower courts "must thus affirm orders which first direct a bankrupt 'to do an impossibility, and then punish him for refusal to perform it' "?

Whether the statement by the Court of Appeals that it knows Maggio cannot comply with the turnover order

is justified by the evidence in this record, we do not stop to inquire. We have regarded turnover and contempt orders, and petitions for certiorari to review them, as usually raising only questions of fact to be solved by the careful analysis of evidence which we expect to take place in the two lower courts. The advantage of the referee and the District Court in having the parties and witnesses before them, instead of judging on a cold record, is considerable. The Court of Appeals for each circuit also has the advantage of closer familiarity with the capabilities, tendencies, and practices of the referee and District Judge. Both lower courts better know the fruits of their course of decision in actual practice than can we. Consequently, we have been loath to venture a review of particular cases, especially where the turnover order carries approval of the referee, the District Court and the Court of Appeals.

However, the court below appears to have affirmed the order for commitment in this case by relying on the earlier finding of previous possession to raise a presumption of wilful disobedience continuing to the time of commitment, even though that conclusion is rejected by the court's good judgment. While the court protests that such a presumed continuance of possession from the time of bankruptcy to the time of the turnover order is unrealistic, it seems to have affirmed the contempt order by extending the presumption from the time of the turnover order to the time of the contempt proceedings, although persuaded that Maggio had overcome the presumption if it were rebuttable.

The fact that the contempt proceeding must begin with acceptance of the turnover order does not mean that it must end with it. Maggio makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. But time

has elapsed between issuance of that order and initiation of the contempt proceedings in this case. He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings possessed any real or personal property which could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question.

It is clear that the District Court in the contempt proceeding attached little or no significance to Maggio's evidence or testimony, although the Court gave no indication that the evidence was incredible. The District Court in its opinion cites only *In re Siegler,* 31 F. 2d 972, in which the Court of Appeals reversed a District Judge who, because he believed the bankrupt's testimony, had refused to commit him for contempt. The *Siegler* case and other cases decided by the Court of Appeals apparently led the District Judge to conclude that no decision other than commitment of Maggio would be approved by that court.

Nor did the Court of Appeals reject this view. Indeed it affirmed the commitment for contempt because it considered either that present inability to comply is of no relevance or that there is an irrebuttable presumption of continuing ability to comply even if the record establishes present inability in fact. It seems to be of the view that this presumption stands indefinitely, if not permanently, and can be overcome by the accused only when he affirmatively shows some disposition of the property by him subsequent to the turnover proceedings. We do not believe these views are required by *Oriel* v. *Russell,* 278 U. S. 358, despite some conflicting statements in the opinion,

which the Court of Appeals construed as compelling affirmance of the contempt decree.

This Court said in the *Oriel* case that "a motion to commit the bankrupt for failure to obey an order of the Court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty." 278 U. S. 358 at 363.

Of course, to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the bankrupt estate. That this Court in the *Oriel* case contemplated no such result appears from language which it borrowed from a Circuit Court of Appeals opinion which, after pointing out that confinement often failed to produce the money or goods, said, " 'Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he can not obey.' " [4] Moreover, the authorities relied upon in Chief Justice Taft's opinion [5] make it clear that his decision did not contemplate that a coercive contempt order should issue when it appears that there is at that

[4] 278 U. S. 358, 366, quoting from *In re Epstein* (cited as *Epstein* v. *Steinfeld*), 206 F. 568, 570.

[5] 278 U. S. 358, 364.

time no wilful disobedience but only an incapacity to comply.[6] Indeed, the quotation from *In re Epstein,* cited *supra* (note 4), also stated at p. 569: "In the pending case,

[6] The late Chief Justice said ". . . the following seem to us to lay down more nearly the correct view," and cited *Toplitz* v. *Walser,* 27 F. 2d 196, a contempt case in which it is said (at p. 197) "The sole question is whether the bankrupt is presently able to comply with the turnover order previously made and, accordingly, whether he is disobeying that order . . . ."; *Epstein* v. *Steinfeld,* 210 F. 236, a turnover proceeding, in which the Court delineates both turnover and contempt procedures and states that a contempt order should not be issued unless there is present ability to comply; *Schmid* v. *Rosenthal,* 230 F. 818, a turnover case, citing *Epstein* v. *Steinfeld, supra; Frederick* v. *Silverman,* 250 F. 75, a contempt case, reciting the necessity for present ability to comply; *Reardon* v. *Pensoneau,* 18 F. 2d 244, a contempt case, holding the evidence there insufficient to establish present inability to comply; *United States ex rel. Paleais* v. *Moore,* 294 F. 852, involving a commitment for contempt, stating ". . . the court should be satisfied of the present ability of the bankrupt to comply . . . ."; *In re Frankel,* 184 F. 539, a contempt case in which the evidence was held insufficient to show present inability to comply; *Drakeford* v. *Adams,* 98 Ga. 722, 25 S. E. 833, a State contempt case requiring present ability to comply to be "clearly and satisfactorily established"; and Collier, Bankruptcy (Gilbert's ed., 1927) 652. The cumulative effect of these authorities seems clearly to be that, while a bankrupt's denial of present possession, standing alone, may not be sufficient to establish his inability to produce the property or its proceeds, if the Court is satisfied, from all the evidence properly before it, that the bankrupt has not the present ability to comply, the commitment order should not issue.

Other decisions are to the same effect. See, for example, *American Trust Co.* v. *Wallis,* 126 F. 464; *Samel* v. *Dodd,* 142 F. 68, *cert. den.* 201 U. S. 646; *In re Nisenson,* 182 F. 912; *In re Holden,* 203 F. 229, *cert. den.* 229 U. S. 621; *In re McNaught,* 225 F. 511; *Dittmar* v. *Michelson,* 281 F. 116; *In re Davison,* 143 F. 673; *In re Marks,* 176 F. 1018; *In re Elias,* 240 F. 448; *Freed* v. *Central Trust Co. of Illinois,* 215 F. 873; *In re Nevin,* 278 F. 601; *Johnson* v. *Goldstein,* 11 F. 2d 702; *In re Magen,* 14 F. 2d 469; *id.,* 18 F. 2d 288; *In re Walt,* 17 F. 2d 588; *Clark* v. *Milens,* 28 F. 2d 457; *Berkower* v. *Mielziner,* 29 F. 2d 65, *cert. den.* 279 U. S. 848;

or in any other, the court may believe the bankrupt's assertion that he is not now in possession or control of the money or the goods, and in that event the civil inquiry is at an end . . . ." [7]

The source of difficulties in these cases has been that in the two successive proceedings the same question of possession and ability to produce the goods or their proceeds is at issue, but as of different points of time. The earlier order may not be impeached, avoided or attacked in the later proceedings and no relief can be sought against its command. But when the trustee institutes the later proceeding to commit, he tenders the issue as to present wilful disobedience, against which the court is asked to direct its sanctions. The latter issue must be tried just as any other issue, and the court is entitled to consider all evidence relevant to it. The turnover order

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In re Tabak, 34 F. 2d 209; *In re Weisberger,* 43 F. 2d 258. See also Collier, Bankruptcy (14th ed.) pp. 244–249; 2 *id.* pp. 535–542; 5 Remington, Bankruptcy (4th ed.) pp. 624–681; 8 C. J. S. pp. 681–686; 6 Am. Jur. § 369, pp. 752–753.

[7] Similarly, the following cases involving contempt orders for failure to pay alimony were cited (278 U. S. at 365) as illustrating rules of evidence concerning ability to comply, "much the same as are here laid down for bankruptcy": *Smiley* v. *Smiley,* 99 Wash. 577, 169 P. 962, affidavit as to lack of ability to comply being undenied, commitment for contempt by failure to pay held erroneous; *Barton* v. *Barton,* 99 Kan. 727, 163 P. 179, evidence held sufficient to justify commitment although it is said ". . . The defendant can not, of course, be committed for the failure to do something which is beyond his power. . . ."; *In re Von Gerzabek,* 58 Cal. App. 230, 208 P. 318, a showing of inability to comply said to be "the most effectual answer" to a contempt order; *Hurd* v. *Hurd,* 63 Minn. 443, 65 N. W. 728, *Heflebower* v. *Heflebower,* 102 Ohio St. 674, 133 N. E. 455, and *Fowler* v. *Fowler,* 61 Okla. 280, 161 P. 227, defendant's evidence insufficient to establish inability to comply which would have prevented commitment.

adjudges the defendant to be in possession at the date of its inquiry, but does it also cut off evidence as to non-possession at the later time? Thus, the real problem concerns the evidence admissible in the contempt proceeding. Of course we do not attempt to lay down a comprehensive or detailed set of rules on this subject. They will have to be formulated as specific and concrete cases present different aspects of the problem.

In *Oriel's* case, this Court said: ". . . on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." This language the Court of Appeals has construed to mean that the accused can offer no evidence to show that he does not now have the goods if that evidence, in the absence of an affirmative showing of when and how he disposed of the goods, might tend to indicate that he never had them and hence to contradict findings of the turnover order itself. We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks. But application of that rule in these civil contempt cases means only that the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his inability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by

evidence or by his own denials which the court finds incredible in context.[8]

But the bankrupt may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the goods. The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the type of evidence mentioned above, to convince the court that his is not a wilful disobedience which will yield to coercion.

The trial court is obliged to weigh not merely the two facts, that a turnover order has issued and that it has not been obeyed, but all the evidence properly before it in the contempt proceeding in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance which a jail term will break.

This duty has nowhere been more clearly expressed than in the *Oriel* case:[9] ". . . There is a possibility, of course, of error and hardship, but the conscience of judges in weighing the evidence under a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from

[8] These conclusions are supported by the cases cited in the *Oriel* case as laying down "more nearly the correct view." See note 6, *supra*. Of course cases such as *Gompers* v. *United States* (233 U. S. 604), *Michaelson* v. *United States* (266 U. S. 42), *Pendergast* v. *United States* (317 U. S. 412) and *Cooke* v. *United States* (267 U. S. 517), all involving criminal contempt charges, are of no relevance here, as we deal only with civil contempts. See text, p. 10.

[9] 278 U. S. at 364.

recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other. . . ."

Such a careful balancing was said to be required in turnover proceedings because "coercive methods by imprisonment are probable and are foreshadowed." [10] Certainly the same considerations require as careful and conscientious weighing of the evidence relevant in the contempt proceeding. At that stage, imprisonment is not only probable and foreshadowed—it is imminent. And, without such a weighing, it becomes inevitable.

V.

We deal here with a case in which the Court of Appeals was persuaded that the bankrupt's disobedience was not wilful. It appears, however, that the District Court did not, in the contempt proceedings, weigh and evaluate the evidence before it but felt bound almost automatically to order Maggio's commitment in deference to clear precedents established by the Court of Appeals. Moreover, the Court of Appeals affirmed the commitment order although it was convinced that Maggio was not deliberately disobeying but had established his contention that he was unable to comply. On such findings the *Oriel* case would require Maggio's discharge even if he were already in jail. It is hardly consistent with that case, or with good judicial administration, to order his commitment on findings that require his immediate release.

When such a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for further proceedings consistent with the principles laid down in this Court's opinion. *Manu-*

[10] 278 U. S. at 363.

facturers' Finance Co. v. *McKey,* 294 U. S. 442, 453, *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327, and cases cited.[11] That practice is appropriate in this case in view of what has been said herein concerning the judgments below.

Vacated and remanded.

Separate opinion of MR. JUSTICE BLACK, in which MR. JUSTICE RUTLEDGE concurs.

August 9, 1943, the referee in bankruptcy found that petitioner had possession of certain merchandise belonging to a bankrupt corporation and ordered him to turn it or the proceeds over to the bankruptcy trustee. In these contempt proceedings (April 18, 1945) the District Court found that petitioner had failed to prove he no longer had possession of the property, and ordered him to be held in jail until he delivered the property or its proceeds to the trustee.

Had the petitioner been charged with embezzling this same property after the 1943 turnover order, doubtless no one would even argue that a doctrine of res judicata barred him from introducing evidence to show that the turnover findings of possession were wrong, and that in truth he did not have possession of the property or its proceeds either on, before, or after August 9, 1943, or April 18, 1945. One basic reason why the findings of fact in a turnover proceeding would not be res judicata in an embezzlement proceeding is that the burden of proof is different in the two types of proceedings. In the first, a turnover proceeding, "clear and convincing proof" is enough; in the second, embezzlement, "proof beyond a reasonable doubt" is required. The burden of proof is

[11] *Cf. Kay* v. *United States,* 303 U. S. 1, 10; *Prairie Farmer Publishing Co.* v. *Indiana Farmer's Pub. Co.,* 299 U. S. 156, 159; *Buzynski* v. *Luckenbach S. S. Co.,* 277 U. S. 226, 228.

heavier in the embezzlement case because a judgment of conviction may embody a criminal punishment, while a turnover judgment does not—it is merely an order for the surrender of property, similar to an order of delivery in a replevin suit.

There is no such reason for different measurements of proof in contempt and embezzlement cases; consequentially, the two are almost identical. Fine, imprisonment, or both can result from a conviction of either. Here if this contempt judgment is carried out against the petitioner, he might be compelled to remain in prison longer than he would had he been convicted and sentenced on a charge of embezzlement. It is true that, if the court was correct in finding that petitioner had possession of the property or its proceeds (and if he still has it), he carries the keys of the jail in his pocket, because he can turn the property or proceeds over to the trustee at any time and thus get his freedom. The crucial question to petitioner in this contempt proceeding was whether he had possession of the property or its proceeds June 5, 1945. And that crucial question was decided against petitioner by the trial court without holding that the evidence was sufficient to prove beyond a reasonable doubt that petitioner still had possession of the property.

I am unwilling to agree to application of a doctrine of res judicata that results in sending people to jail for contempt of court upon a measure of proof substantially the same as that which would support the rendition of a civil judgment for the plaintiff on a promissory note, an open account, or some other debt. All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt. See *Gompers* v. *United*

States, 233 U. S. 604, 610–611; *Michaelson* v. *United States,* 266 U. S. 42, 66–67; *Pendergast* v. *United States,* 317 U. S. 412, 417–418.

The foregoing is written on the assumption that the turnover-contempt procedure is legal, an assumption which I do not accept. I share the opinion of the Circuit Court of Appeals that this procedure is unauthorized by statute and that it should not be permitted to take the place of criminal prosecutions for fraud as apparently was done here.[1] This whole procedure savors too much of the old discredited practice of imprisonment for debts—debts which people are unable to pay. For here, if petitioner did wrongfully dispose of the property, whether or not he was guilty of a crime, he was probably liable in some sort of civil action, basically similar to, if not actually, one for debt. Had a judgment been obtained against him in such a civil case, I doubt if it would be thought at this period that the bankruptcy court could have thrown petitioner in jail for his failure to obey what would have been in effect a court order to pay the debt embodied in the judgment.

Furthermore, the finding of possession of the merchandise as of 1943 may rest on an evidential foundation firm enough to support a civil turnover order but it is too shaky to support a sentence to prison. Accepting that

[1] "We would hold that a *turnover proceeding may not, via a fiction, be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.* We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he is later indicted for violation of 11 U. S. C. A. § 52 (b), his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute." *In re Luma Camera Service,* 157 F. 2d 951, 953–954.

finding, however, the presumption of present or 1945 possession from the possible 1941 or 1943 possession achieves a procedural result which runs counter to basic practices in our system of laws. For as the District Court said, it gave the prosecution the advantage of a "presumption" which, of itself, was held to relieve it from offering further proof of petitioner's guilt in a case where forfeiture of his personal liberty and property was sought; it threw upon the petitioner the burden of proving his innocence.[2]

For the foregoing reasons, among others, I would reverse the judgment of the Circuit Court of Appeals, with directions that the petitioner be released and that no further contempt proceedings be instituted against him based on his refusal to obey the turnover order.

MR. JUSTICE FRANKFURTER, dissenting.

This is one of those rare cases where I find myself in substantial agreement with the direction and main views of an opinion, but am thereby led to a different conclusion. Too often we are called upon to disentangle a snarled skein of facts into a thread of legal principles. In this case, the Court's opinion seems to me to snarl a straight thread of facts into a confusing skein of legal principles. It was the record in a prior case involving the same litigants that invited correction of a rule of bankruptcy administration in the Second Circuit. We denied review.[1]

[2] In holding petitioner in contempt, the District Court said: "Respondent has not sustained his burden of satisfactorily accounting for the disposition of the assets by his mere denial of possession under oath." It then made the following finding of fact: "4. The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply."

[1] 324 U. S. 841.

The record in this case precludes such correction, but the Court's opinion is an effort to whip the devil round the stump.

The precise question before us may be simply stated. The District Court ordered the bankrupt to turn over goods withheld by him from the trustee. On the basis of two prior cases,[2] the Circuit Court of Appeals affirmed this order, *per curiam*. 145 F. 2d 241. These earlier cases in turn relied on a previous case.[3] All three enforced a rule of the Second Circuit that goods in the possession of a bankrupt on the day of bankruptcy are presumed to continue in his possession regardless of the time that may have elapsed. In all three cases, the Circuit Court of Appeals had affirmed the turnover orders although it was maintained that the bankrupts could not obey them.[4] Likewise, in all three cases, that court had declared its impotence to change what it regarded as an untenable rule of bankruptcy administration, although fashioned by it and not by this Court.[5] In almost imprecating language review and reversal by this Court in these cases were invited.[6] In one of these cases, the bankrupt filed a petition

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[2] *Robbins* v. *Gottbetter,* 134 F. 2d 843, and *Cohen* v. *Jeskowitz,* 144 F. 2d 39.

[3] *Seligson* v. *Goldsmith,* 128 F. 2d 977.

[4] *Seligson* v. *Goldsmith,* 128 F. 2d 977, 978–79; *Robbins* v. *Gottbetter,* 134 F. 2d 843, 844; *Cohen* v. *Jeskowitz,* 144 F. 2d 39, 41 (concurring opinion of Frank, J.).

[5] Presumably, this avowed inability of the Circuit Court of Appeals for the Second Circuit to free itself from its own prior decision in this situation is not the reflection of a principle similar to that which binds the House of Lords to its past precedents. It must be attributable to the fact that the Second Circuit has six circuit judges who never sit *en banc* and that presumably they deem it undesirable for the majority of one panel to have a different view from that of a majority of another panel.

[6] 128 F. 2d at 979; 134 F. 2d at 844; 144 F. 2d at 40–41.

for certiorari, which this Court denied.[7] Then came the prior case involving the litigants now before us, with this Court's refusal to review the turnover order. To be sure, the denial of a petition for certiorari carries no substantive implications. Reference to it here is relevant as proof of the finality with which the turnover order, as affirmed by the Circuit Court of Appeals, was invested.

In *Oriel* v. *Russell,* 278 U. S. 358, a unanimous bench, including in its membership judges of wide experience with bankruptcy law,[8] held that upon a citation for contempt to compel obedience of a turnover order the issues adjudicated by that order could not be relitigated. That case decided nothing if it did not decide that what the turnover order adjudicated—that the bankrupt withheld certain property from the bankrupt estate and was still in control of this property on the day he was ordered to turn it over—is the definitive starting point for contempt proceedings to exact obedience to the turnover order. In short, the contempt proceedings must proceed from the turnover order and cannot go behind it. We should not ignore this relevant sentence in *Oriel* v. *Russell:* "Thereafter on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." [9]

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[7] In the first two of these cases, the bankrupt did not seek review in this Court; in the *Jeskowitz* case, the bankrupt took the hint, but this Court denied certiorari. 323 U. S. 787.

[8] Judge A. N. Hand's observation concurring, in the *Robbins* case, 134 F. 2d at 845, is also pertinent: ". . . all the justices of a court of which those exceptionally alert guardians of civil rights, Justices Holmes, Brandeis and Stone, were members, unanimously concurred in the opinion of Chief Justice Taft . . . ."

[9] 278 U. S. at 363.

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The Court today reaffirms *Oriel* v. *Russell*. At the same time it makes inroad on the practical application of *Oriel* v. *Russell*. On virtually an identical record [10] it reverses where *Oriel* v. *Russell* affirmed. The nature and scope of the inroad are uncertain because the Court's opinion, to the best of my understanding, leaves undefined how the District Court is to respect both *Oriel* v. *Russell* and today's decision.

About some aspects of our problem there ought to be no dispute. We are all agreed that while the bankrupt cannot relitigate the determination of a turnover order that he had such and such goods on the day of the order, he can avoid the duty of obedience to that order if he "can show a change of situation after the turnover order relieving him from compliance." [11] The right to be relieved from obeying the turnover order by sustaining the burden of inability to perform, on proof of circumstances not questioning the turnover order, has never been disputed. Again, if a judgment of civil contempt is rendered and the bankrupt is sent to jail until he chooses to obey the court's command, he will not be kept there when keeping him no longer gives promise of performance. *Oriel* v. *Russell* so pronounced.[12]

And so, since the fact that the bankrupt had possession of the goods on the day of the turnover order is a fact

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[10] See Appendix.

[11] 278 U. S. at 364.

[12] " 'I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he can not obey.' " 278 U. S. at 366, quoting from Judge McPherson's opinion in *In re Epstein*, 206 F. 568, 570.

that cannot be controverted or relitigated because his possession of the goods on that day was the very thing adjudicated, the case reduces itself to this simple question: Where, on failure to obey the turnover order, the bankrupt stands mute, offers no evidence as to a change of circumstances since the order or offers evidence of a kind which the District Court may justifiably disbelieve, has he met his burden of proof so as to preclude the District Court from enforcing obedience by commitment for civil contempt?

On the record and the findings of the District Court this is the precise question now presented. There is nothing else in the record, except Judge Frank's statement below that the bankrupt was ordered to perform although the court knew that it was impossible for him to perform.[13] But this assertion of "impossibility" was not derived from the record in these contempt proceedings. It derives from Judge Frank's familiar hostility to what he deems the unfairness of his court's rule of presumption in ordering turnover.[14] Judge Frank here merely repeats his conviction that a turnover order like that rendered against Maggio is an order to turn over goods which could not be

[13] "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must *thus* affirm orders which first direct Maggio 'to do an impossibility, and then punish him for refusal to perform it.'" 157 F. 2d at 955 (italics supplied). Judge Frank made this statement concerning the presumption of continued possession in turnover order proceedings, and was not addressing his remarks to the record before him in the contempt proceeding. The dictum began with this sentence: "Were this a case of first impression involving the validity of a turnover order, we would not accept such reasoning." 157 F. 2d 951, 953. The "thus" in his statement indicates hostility to the basis of the turnover order because of a virus which the lower court feels unable to extract but which automatically infects the contempt proceedings.

[14] "With the turnover order once sustained, the contempt order necessarily followed." *Id.* at 954.

turned over. But that was water over the dam in the contempt proceeding. To give it legal significance when enforcement of the turnover order is in issue is to utter contradictory things from the two corners of the mouth. It is saying that the turnover order cannot be relitigated—that we cannot go back on the adjudication that the bankrupt had the goods at the time he was ordered to turn them over—but we know he did not have the goods, so we contradict the turnover order and do not respect it as *res judicata*.

I cannot reconcile myself to saying that we adhere to *Oriel* v. *Russell* and yet reject its only meaning, namely, that we cannot go behind the judicial determination made by the turnover order that the bankrupt on such and such a day had the enumerated goods. Moreover, the authorities relied upon in Chief Justice Taft's opinion [15] make it clear that his decision *did* contemplate that a coercive contempt order should issue when it appears that the bankrupt has introduced no evidence or, what is the same, evidence that may properly not satisfy the District Court by establishing incapacity to comply since the turnover order.[16] In this case, the District Court was

[15] 278 U. S. 358, 364.

[16] The Chief Justice said ". . . the following seem to us to lay down more nearly the correct view," and cited *Toplitz* v. *Walser*, 27 F. 2d 196, a Third Circuit contempt case in which it is said (at p. 197) "It therefore devolves upon the bankrupt in the latter [contempt] proceeding to show how and when the property previously adjudged in his possession or control had passed out of his possession or control . . . . The trouble with the evidence in the contempt proceeding, the only evidence properly here for review, is that it is directed to the issue of the bankrupt's possession and control of property at the date of bankruptcy raised and definitely decided against her in the turnover proceeding . . . . Though not in form this is in substance a collateral attack upon the now finally established turnover order, which of course is not permissible."; *Epstein* v. *Steinfeld*, 210 F. 236, a turnover proceeding, in which the Third Circuit delineated its procedure, different from that followed in the Second Circuit,

entirely warranted in finding that the bankrupt had produced no evidence to contradict the adjudication of the turnover order that he had the goods when he was told to

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whereby if the referee found a shortage at the time of bankruptcy the turnover order was automatically entered, and the question of present possession or ability to comply with that order was left open for possible contempt proceedings, the presumption of continued possession being applied in such proceedings since the bankrupt had to show that by reason of events occurring since the bankruptcy he was unable to comply (cf. *In re Eisenberg,* 130 F. 2d 160) (this distinction has no real bearing on the instant issue as to either collateral attack or the presumption of continued possession); *Schmid* v. *Rosenthal,* 230 F. 818, a Third Circuit turnover case, citing *Epstein* v. *Steinfeld, supra; Frederick* v. *Silverman,* 250 F. 75, a Third Circuit contempt case citing *Epstein* v. *Steinfeld, supra; Reardon* v. *Pensoneau,* 18 F. 2d 244, an Eighth Circuit contempt case, holding that the bankrupt had not met his burden of establishing present inability to comply, in which it is said (at pp. 245–46) "They [turnover orders] establish the bankrupt's possession and control on the day the referee's order was made. The burden was on him to show what disposition had been made of the $6,900. Until that showing is made relieving him of an intentional loss of its possession and control, it must be presumed that he still has it. . . . a bankrupt cannot escape an order for the surrender of property belonging to his estate 'by simply denying under oath that he has it.'"; *United States ex rel. Paleais* v. *Moore,* 294 F. 852, a Second Circuit *habeas corpus* case following a commitment for contempt, stating (at p. 857) "If, at the time the turn-over order was made, the books and papers were in the bankrupt's hands, the presumption is that they continued to be in his possession or under his control until he has satisfactorily accounted to the court of bankruptcy for their subsequent disposition or disappearance. The burden is upon him satisfactorily to so account for them. He cannot escape an order for their surrender by simply denying under oath that he no longer has them."; *In re Frankel,* 184 F. 539, a contempt case in which L. Hand, then a District Judge, refused to commit for contempt because he did not deem the turnover order binding as *res judicata,* but on rehearing reversed himself, holding that the bankrupt could not show present inability by evidence constituting an indirect attack on the turnover order, stating (at p. 542) "Therefore, in so far as the [turnover] order directs anyone to do anything,

turn them over, unless, in place of what is usually deemed evidence, an infirmity has been found to seep, by a process of osmosis, into the turnover order respect for which in its entirety is the starting point of our problem.

The time to have acted on the inference of impossibility of performance of the turnover order, or to have taken notice of the imprisoning rule of the Second Circuit as to the presumption of continued possession of a bankrupt's withheld goods, was when we were asked to review the Circuit Court of Appeals' denigrating affirmance of the turnover order.[17] When we declined to review that turn-

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he may not in the contempt proceeding question the propriety of the direction; and in so far as the order determines an existing fact, which is necessary in law to the validity of the direction, he may not question its truth. To question such a fact is to question the validity of the direction which depends upon it, and is only an indirect way of reviewing the order. Therefore now to deny the fact that the bankrupt had the money in his possession is in this case to assert that the order directing him to pay it over was erroneous. On this account, therefore, that fact is concluded, once it be granted that it was necessary to the validity of the order, which I have shown. Quite reluctantly, therefore, I can only conclude that I was wrong originally to inquire into the merits, and that a committal must issue." The cumulative effect of these authorities is that a bankrupt's denial of present possession, standing alone, is not sufficient to establish his inability to produce the property or its proceeds, and that the bankruptcy court will not permit the bankrupt to prove present inability to comply with the turnover order by evidence which indirectly constitutes a collateral attack on that order.

[17] For almost forty years, the Second Circuit has tenaciously abided by the presumption of continued possession. While this presumption was previously *sub silentio* utilized (*e. g., In re Schlesinger,* 102 F. 117, affirming 97 F. 930), *In re Stavrahn* in 1909, 174 F. 330, appears to have been the Second Circuit's case of first impression, and the decision that sired the presumption. There the court stated that the bankrupt could not defend against a contempt citation following a turnover order on the assertion that he had

over order, it became a final and binding adjudication. Neither court below was under a misapprehension as to the applicable law in the instant contempt proceeding. The District Court relied on *In re Siegler,* 31 F. 2d 972. But surely reliance on a case that was correctly decided is hardly an indication of misapprehension of law. If the *Siegler* decision had preceded instead of followed [18] *Oriel* v. *Russell,* it might well have been one of the authorities relied upon in Chief Justice Taft's opinion.[19] Nor do we have to speculate as to whether Judge Frank's conclusion that Maggio was unable to comply was based on evidence in this record or on doubt as to the propriety of the turnover order. We have the same printed record before us that he had and it is barren of such evidence. Presum-

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never taken the assets in question, but had to come forward with some reasonable explanation as to what had become of the assets since the turnover order. In 1912, the Second Circuit reiterated the reasoning of its earlier decision in *In re Weber Co.,* 200 F. 404. The presumption had been somewhat inarticulately phrased in the earlier opinion, and the court in this case commended the District Judge for aptly carrying out the mandate of the *Stavrahn* decision. The cases up to 1925 and before the *Oriel* case are listed and discussed at length in *In re H. Magen Co.,* 10 F. 2d 91, in which the court observed that "The law relating to turn-over orders is pretty well established in this circuit." 10 F. 2d at 93. *In re Siegler,* note 18 *supra,* was decided three months after this Court's decision in the *Oriel* case. Then came: *Danish* v. *Sofranski,* 93 F. 2d 424; *In re Pinsky-Lapin & Co.,* 98 F. 2d 776; *Seligson* v. *Goldsmith,* note 3 *supra; Robbins* v. *Gottbetter,* note 2 *supra; Cohen* v. *Jeskowitz,* note 2 *supra;* and the *per curiam* affirmance of the turnover order in the instant bankruptcy proceedings.

[18] "Any difference of opinion respecting the force and effect of a turnover order, which may have prevailed before the decision of the Supreme Court, in Prela v. Hubshman [companion case to *Oriel* v. *Russell*] . . . is now out of place in any discussion of the subject." 31 F. 2d at 973.

[19] Cf. *In re Frankel,* note 16 *supra.*

ably Judge Frank did not travel outside this record and act on undisclosed private knowledge. The whole course of this issue in the Second Circuit in recent years makes it obvious that his observation was merely another animadversion on that Circuit's practice in issuing turnover orders. The Circuit Court of Appeals did not purport to make an independent evaluation of Maggio's evidence bearing on his incapacity to obey the turnover order. It was beyond its power to do so. The Circuit Court was not at large. Its power was limited to a consideration of the justifiability of the District Court's findings on the basis of the record before that court.

The cure for this procedural situation, if cure is called for, is correction of the rule of the Second Circuit regarding presumptions in turnover orders.[20] It ought not to be dealt with indirectly and at the cost of beclouding the doctrine of *res judicata* in proceedings for civil contempt. If Maggio has become the unhappy victim of the procedural snarl into which the Circuit Court of Appeals for the Second Circuit has involved itself by its decisions on the appeals of turnover orders and by this Court's refusal to review such adjudications, the law is not without ample remedies. The District Court has power to discharge a contemnor when confinement has become futile, or release may be had through use of *habeas corpus,* which, in the now classic language of Mr. Justice Holmes, "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings . . . ." *Frank* v. *Mangum,* 237 U. S. 309, 346. These are means available to correct whatever specific hardship this case may present without generating cloudiness indeterminate in range upon a legal principle of such social significance as that of *res judicata* and upon

[20] Cf. *Brune* v. *Fraidin,* 149 F. 2d 325.

a remedy so vital as civil contempt for the sturdy administration of justice.

How is the conscientious District Court to carry out the directions conveyed by the Court's opinion? If the District Court gives unquestioned respect, as it is told to do, to the turnover order of August 9, 1943, it will start with the fact that on August 9, 1943, the bankrupt was able to comply with that order. With that as a starting-point, will the District Court not be entitled to find again, as it has already found,[21] that nothing presented by the bankrupt in exculpation for not complying with the turnover order disproves that he continued to have the property, which he was found to have had as of August 9, 1943? If the District Court should so find, would not the Circuit Court of Appeals and this Court, if the case came here for review, be duty bound to hold that, on the basis of the situation as adjudicated by the turnover order, the District Court could reasonably make such a finding? Or is the District Court to infer that in view of the snarl into which these proceedings have got by reason of the failure to upset the turnover order when directly under review, this Court was indulging in benign judicial winking—that while the fact of the possession of the property had been adjudicated by the turnover order and could not verbally be questioned, the District Court need not accept the determination of that order as facts? But if the District

[21] In the opinion dated April 18, 1945, holding petitioner in contempt of court, the District Court stated that: "Respondent [petitioner here] has not sustained his burden of satisfactorily accounting for the disposition of the assets by his mere denial of possession under oath." And that court's fourth finding of fact was as follows: "The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply."

Court may so drain the adjudication of the turnover order of its only legal significance, why assert that *Oriel* v. *Russell* is left without a scratch? Why reaffirm that an adjudication sustaining a turnover order may not be relitigated when obedience is sought to such turnover order? These are questions which will confront not merely the district judge to whom this case will be remanded. After all, we are concerned with the practical administration of the Bankruptcy Act by district judges all over the United States.

By abstaining from expressing views regarding the requisites of a turnover order, I mean neither to agree nor disagree with observations made by the Court. There has been opportunity in the past for adjudication of that matter, and there may be such an opportunity in the future. This case does not present it. From all of which I conclude that the judgment below should be affirmed, leaving for another day, when the occasion makes it appropriate, to consider directly and explicitly the principle that should govern the issue of turnover orders by bankruptcy courts.[22]

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[22] "The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issue presented on the motion to turn over as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in constant delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one." 278 U. S. at 363.

MUSSER ET AL. *v.* UTAH.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 60. Argued November 10, 1947.—Reargued January 5, 1948.—Decided February 9, 1948.

When there are inherent in an appeal to this Court from a judgment of the highest court of a state questions of state law which were not presented to, or considered by, the highest court of the state, this Court will vacate the judgment and remand the cause to that court for consideration of those questions of state law. Pp. 96–98.

110 Utah 533, 175 P. 2d 724, vacated and remanded.

The Supreme Court of Utah affirmed a conviction of appellants for conspiracy "to commit acts injurious to public morals" in violation of the Utah Code Ann., 1943, § 103–11–1. 110 Utah 533, 175 P. 2d 724. *Judgment vacated and cause remanded,* p. 98.

Claude T. Barnes argued the cause and filed a brief for appellants.

Calvin L. Rampton and *Zar E. Hayes,* Assistant Attorneys General of Utah, argued the cause for appellee on the original argument, and *Mr. Rampton* on the reargument. With them on the brief was *Grover A. Giles,* Attorney General.

Arthur Garfield Hays and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellants sought review by this Court of a decision by the Supreme Court of Utah on the ground that the State convicted them in violation of the Fourteenth

Amendment to the Federal Constitution. In the trial court a motion to dismiss the charge at the close of the evidence broadly indicated reliance on the Fourteenth as well as the First Amendment, and such reliance was indicated in requests for instructions. A preliminary motion to quash the information was stated in broad terms which it is claimed admitted argument of any federal grounds. Trial resulted in conviction and the Supreme Court of the State overruled all constitutional objections and affirmed.

On argument in this Court, inquiries from the bench suggested a federal question which had not been specifically assigned by defendants in this Court, nor in any court below, although general transgression of the Fourteenth Amendment had been alleged. This question is whether the Utah statute, for violation of which the appellants are amerced, is so vague and indefinite that it fails adequately to define the offense or to give reasonable standards for determining guilt. The question grew out of these circumstances:

Defendants were tried on an information which charged violation of § 103–11–1, Utah Code Ann. 1943, in that they conspired "to commit acts injurious to public morals as follows, to-wit: . . . ." It then specified acts which amount briefly to conspiring to counsel, advise, and practice polygamous or plural marriage, and it set forth a series of overt acts in furtherance thereof. The Supreme Court considered that the prosecution was under Paragraph (5) of 103–11–1 which, so far as relevant, defines conspiracy, "(5) to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws . . . ."

It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what

APPENDIX TO OPINION OF FRANKFURTER, J.

Comparison between *Maggio* v. *Zeitz* and *Prela* v. *Hubshman* (companion case to *Oriel* v. *Russell*), 278 U. S. 358

	Identities		Differences	
	Maggio	Prela	Maggio	Prela
Name of bankrupt.			Joseph Maggio (R. cover).	Samuel Prela (R. cover).
Name of trustee.			Raymond Zeitz (R. cover).	Louis Hubshman (R. cover).
Type of property.			Photographic equipment (R. 2).	Silk (R. 1).
Date of proven possession.			Before Jan. 1, 1942 (324 U. S. 841, R. 13).	Before Nov. 22, 1924 (R. 1).
Date of petition in bankruptcy.			Apr. 14, 1942 (324 U. S. 841, R. 4).	Nov. 22, 1924 (R. 1).
Date of petition for turnover.			Jan. 7, 1943 (324 U. S. 841, R. 8).	July 1, 1925 (R. 5).
Interval between petition in bankruptcy and petition for turnover.	Eight months more or less.			
Trustee's proof of possession in bankrupt.	Examination of Maggio's inventories revealed discrepancies between sales and stock on hand at close of last inventory (324 U. S. 841, R. 7).	Prela manufactured blouses from silk; each blouse required 1½ yards of silk; examination of Prela's books revealed discrepancy between blouses manufactured and silk on hand (R. 1).		
Bankrupt's reply to above proof.	1. Inventory figures erroneous (unrecorded sales) (324 U. S. 841, R. 53–61). 2. Denial of present possession of the property. (*Id.* at 62.)	1. Assumption from books erroneous—manufactured a kind of blouse that required more than 1½ yards of silk (R. 2, 19). 2. Denial of present possession of the property. (*Ibid.*)		
District court's ruling on evidence.	1. Assumptions as to past possession correct. 2. Bankrupt's denial of present possession disbelieved. (324 U. S. 841, R. 111.)	(R. 1, 5.)		
Date of turnover order.			Aug. 9, 1943 (R. 5).	July 8, 1926 (R. 3).
Interval between dates of proven possession and turnover order.	20 months more or less.			
Review of turnover order.	Unanimously affirmed by CCA 2 without opinion. L. Hand, Swan, and Clark, J. J., on Oct. 25, 1944 (145 F. 2d 241).	Hough, Mack, and L. Hand, J. J., on Dec. 13, 1926 (unreported) (R. 15).	Cert. denied Feb. 5, 1945, 324 U. S. 841.	
Date of trustee's petition for contempt citation.			Dec. 7, 1944 (R. 3).	April 22, 1927 (R. 13).
Trustee's proof of contempt.	1. Turnover order. 2. Failure to comply. (R. 16.)	(R. 13, 15.)		
Bankrupt's reply to above proof.	1. Did not have possession on date of turnover order. 2. Hasn't got it now. 3. Has become physically incapacitated. (R. 13, 17.)	(R. 17.)	3 (a). Heart trouble (R. 15). 4. Merely repeated denial (R. 13, 17).	3 (a). Paralytic stroke (R. 24). (b) Wife sick, too. (*Ibid.*, 25.) 4. Filed affidavits of former cutter, salesman, and blouse buyers to the effect that blouses in question used 2 and more yards of silk (R. 27, 28, 29).
District court's ruling on evidence.	1. Trustee makes out *prima facie* case by proof of non-compliance with turnover order. 2. Turnover order cannot be collaterally attacked by proving that bankrupt disposed of property prior to date of order to show present inability to comply with order. 3. To avoid contempt, bankrupt must prove present inability to comply by proof of disposition of property subsequent to turnover order. 4. Bankrupt makes no claim that he has disposed of the property since the turnover order. (R. 18, 19.) 5. Physical incapacity of bankrupt and/or bankrupt's wife ignored.	(R. 48, 52.)	6. Bankrupt's bare denial of present inability to comply with turnover disbelieved (R. 19).	6. Bankrupt's evidence and that of other witnesses that as a matter of fact bankrupt disposed of silk prior to turnover order excluded and/or stricken (R. 33–34, 45–46, 50, 54).
Date of contempt citation.			Apr. 18, 1945 (R. 19).	Sept. 9, 1927 (R. 52).
Interval between date of turnover order and date of contempt citation.	20 months.	14 months.	Certiorari to review turnover order applied for, opposed, and denied.	Certiorari to review turnover order not sought.
Review of contempt citation by CCA 2.	Affirmed. 157 F. 2d 951. 1. "With the turnover order once sustained, the contempt order necessarily followed." Citing the *Oriel* case (at p. 954). 2. Findings in the turnover order proceeding are res judicata in the contempt proceeding. (*Ibid.*) 3. "That is to say" the district court "had to accept it as true" that Maggio had possession on the date of the turnover order and that "this possession continued . . . unless Maggio showed that, since August 9, 1943, he had been deprived of that possession or had in some other way become unable to comply with the turnover order." (*Ibid.*) 4. "As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order." (*Ibid.*) 5. Physical incapacity of bankrupt and/or bankrupt's wife treated as irrelevant.	23 F. 2d 413. 1. "A disobedience of the order to turn over presents a prima facie case of contumacy for punishment." Citing the CCA *Oriel* case (at p. 414). 3. "Having been directed to turn over property, it is presumed that the offender continues in his willful and deliberate conduct when he fails to obey the order." (*Ibid.*) 4. "No evidence was offered by the bankrupt to show what he had done with the property since he was adjudged a bankrupt" (at p. 413).	Frank and L. Hand, J. J., with Swan, J. (concurring in the result). 3 (a). "Although we *know* that Maggio cannot comply with the order, we must keep a straight face and pretend that he can . . ." (at pp. 954–5). (Italics supplied.)	Manton and Swan, J. J., with L. Hand, J., dissenting.

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it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase "injurious to public morals" would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing. Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.

When the adequacy of this statute in these respects was questioned, the State asked and was granted reargument here. Rehearing convinces us that questions are inherent in this appeal which were not presented to or considered by the Utah Supreme Court and which involve determination of state law. We recognize that the part of the statute we have quoted does not stand by itself as the law of Utah but is part of the whole body of common and statute law of that State and is to be judged in that context. It is argued that while Paragraph (5) as quoted is admittedly very general, the present charge is sustainable under Paragraph (1) thereof which makes a crime of any conspiracy to commit a crime and that the sweep of Paragraph (5) is or may be so limited by its context or by judicial construction as to supply more definite standards for determining guilt. It is also said that the point, so far

as this case is concerned, has been waived or lost because there was no timely or sufficient assignment of it as ground for dismissal to comply with state practice. We believe we should not pass upon the questions raised here until the Supreme Court of Utah has had opportunity to deal with this ultimate issue of federal law and with any state law questions relevant to it.

This trial was not conducted in federal court nor for violation of federal law. It is a prosecution by the State, in its courts, to vindicate its own laws. Our sole concern with it is to see that no conviction contrary to a valid objection raised under the Fourteenth Amendment is upheld. What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe. In order that the controversy may be restored to the control of the Supreme Court of Utah, its present judgment is vacated and the cause is remanded for proceedings not inconsistent herewith.

Vacated and remanded.

MR. JUSTICE BLACK concurs in the result.

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

I would make a different disposition of the case. I think a deeper vice infects these convictions than their apparent invalidity for vagueness of the Utah statute, first suggested on the original argument here, even if further construction by the Utah courts might possibly remove that ground for reversal. The crucial question, which the case was brought to this Court to review, is

whether the state supreme court has construed the Utah statute to authorize punishment for exercising the right of free speech protected by the First and Fourteenth Amendments to the Federal Constitution.

The statute which appellants have violated provides that it shall be a crime for two or more persons to conspire "to commit any act injurious . . . to public morals." The opinion of the state supreme court construes these words to apply to conduct which induces people to enter into bigamous relationships and, more particularly, to the advocacy of the practice of polygamy. It held that the appellants were properly convicted because the evidence proved that they were parties to "an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons."

Although the entire record of the trial has not been brought here, it is clear that some appellants urged certain particular individuals to practice polygamy.[1] For present purposes I assume that such direct and personalized activity amounting to incitation to commit a crime may be proscribed by the state. However the charge was not restricted to a claim that appellants had conspired to urge particular violations of the law. Instead, the information as construed by the state court broadly condemned the conspiracy to advocate and urge the practice of polygamy.[2] This advocacy was at least in part conducted in religious meetings where, although pressure may also have been applied to individuals, considerable general discussion of

[1] "At one of these meetings, one Heber C. Smith, Jr. was made the specific object of remarks of various defendants." 110 Utah 533, 554, 175 P. 2d 724, 735.

[2] Although the information in terms charged a conspiracy to advocate *and* practice polygamy, the state court construed it as though it charged a conspiracy to advocate *the practice of* polygamy. 110 Utah 533, 544–545, 175 P. 2d 724, 730.

the religious duty to enter into plural marriages was carried on.[3]

Neither the statute, the information, nor the portions of the charge to the jury which are preserved in the printed record distinguish between the specific incitations and the more generalized discussions. Cf. *Thomas* v. *Collins*, 323 U. S. 516. Thus the trial and convictions proceeded on the theory that the statute applied indiscriminately to both types of activity. This is made doubly clear by the fact that the state supreme court set aside the convictions of several defendants who had done no more than attend meetings, give opinions on religious subjects and criticize legislation.[4] By setting aside these convictions that court indicated that it did not consider every discussion of polygamy, or attendance at meetings where the practice is advocated, to be "an act injurious to the public morals." Such a limitation on the scope of the statute was unquestionably required

[3] "It is true . . . that at certain meetings speakers discussed polygamy, reading from the Bible and making the claim that the ancient polygamous marriage system was instituted of God, and that 'plural marriage is a law of God'; that some individuals at these meetings declared that legislation prohibiting the practice of polygamy violates the spirit of the First Amendment to the Federal Constitution; that some speakers denounced officials of the Mormon Church for excommunication of people for teaching or practicing plural marriage, stating that the leaders of said church have 'no divine authority' and that such church is apostate; and that some services were conducted as 'testimonial meetings' at which members of the congregation arose voluntarily to express their views on any subject, and to acknowledge gratitude to God." 110 Utah 533, 551–552, 175 P. 2d 724, 734.

[4] "If it were true that none of the defendants did anything other than to attend meetings as indicated above [see note 3 *supra*], expressing disagreement with some other denomination, criticizing legislation, and giving opinions on religious subjects, none of the convictions could be upheld. The right of free speech cannot be curtailed by indirection through a charge of criminal conspiracy." 110 Utah 533, 552, 175 P. 2d 724, 734.

by the Federal Constitution. But as I read the opinion of the state court, it did not make a further limitation also required by the First and Fourteenth Amendments. The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy.[5] Thus the line was drawn between discussion and advocacy.

The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil actually will result. See *Bridges* v. *California,* 314 U. S. 252, 262–263.

It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable. But conviction that the practice is desirable has a natural tendency to induce the practice itself.[6] Thus, depending on where the circular reasoning

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[5] The court held "that an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute." 110 Utah 533, 546–547, 175 P. 2d 724, 731.

[6] "Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it

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is started, the advocacy of polygamy may either be unlawful as inducing a violation of law, or be constitutionally protected as essential to the proper functioning of the democratic process.

In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting only the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda.[7] Or we might permit advocacy of lawbreaking, but only so long as the advocacy falls short of incitement.[8] But the other extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment. At the very least, as we have indicated, under the clear-and-present-danger rule, the second alternative stated marks the limit of the state's power as restricted by the Amendment.

The Supreme Court of Utah has in effect adopted the third position stated above. It affirmed the convictions

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must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation." Judge Learned Hand in *Masses Pub. Co.* v. *Patten,* 244 F. 535, 540.

[7] "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of a judge." Excerpt from letter written by Thomas Jefferson to Elijah Boardman of New Milford, Connecticut, on July 3, 1801, quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8.

[8] "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." Mr. Justice Brandeis, concurring in *Whitney* v. *California,* 274 U. S. at 376.

on the theory that an agreement to advocate polygamy is unlawful. The trial court certainly proceeded on this theory, if it did not go further and consider discussion of polygamy as injurious to public morals as well. Therefore, even assuming that appellants may have been guilty of conduct which the state may properly restrain, the convictions should be set aside. A general verdict was returned, and hence it is impossible to determine whether the jury convicted appellants on the ground that they conspired merely to advocate polygamy or on the ground that the conspiracy was intended to incite particular and immediate violations of the law. Since therefore the convictions may rest on a ground invalid under the Federal Constitution, I would reverse the judgment of the state court. Cf. *Thomas* v. *Collins, supra; Williams* v. *North Carolina,* 317 U. S. 287; *Stromberg* v. *California,* 283 U. S. 359.

CHICAGO & SOUTHERN AIR LINES, INC. *v.* WATERMAN STEAMSHIP CORP.

NO. 78. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued November 19, 1947.—Decided February 9, 1948.

Section 1006 of the Civil Aeronautics Act, authorizing judicial review of certain orders of the Civil Aeronautics Board, does not apply to orders granting or denying applications of citizens of the United States for authority to engage in overseas and foreign air transportation which are subject to approval by the President under § 801. Pp. 104–114.

(a) Orders of the Board as to certificates for overseas or foreign air transportation are not mature and therefore are not susceptible of judicial review until they are made final by presidential approval, as required by § 801. P. 114.

*Together with No. 88, *Civil Aeronautics Board* v. *Waterman Steamship Corp.*, also on certiorari to the same court.

(b) After such approval has been given, the final orders embody presidential discretion as to political matters beyond the competence of the courts to adjudicate. P. 114.

159 F. 2d 828, reversed.

The Circuit Court of Appeals denied a motion to dismiss a petition seeking review of certain orders of the Civil Aeronautics Board granting and denying certificates of public convenience and necessity authorizing certain American air carriers to engage in overseas and foreign air transportation after such orders had been approved by the President under § 801 of the Civil Aeronautics Act. 159 F. 2d 828. This Court granted certiorari. 331 U. S. 802. *Reversed,* p. 114.

R. Emmett Kerrigan argued the cause and filed a brief for petitioner in No. 78.

Robert L. Stern argued the cause for petitioner in No. 88. With him on the brief were *Solicitor General Perlman, Robert W. Ginnane, Emory T. Nunneley* and *Oliver Carter.*

Bon Geaslin argued the cause for respondent. With him on the brief were *Francis H. Inge* and *Joseph M. Paul, Jr.*

Mr. Justice Jackson delivered the opinion of the Court.

The question of law which brings this controversy here is whether § 1006 of the Civil Aeronautics Act, 49 U. S. C. § 646, authorizing judicial review of described orders of the Civil Aeronautics Board, includes those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation which are subject to approval by the President under § 801 of the Act. 49 U. S. C. § 601.

By proceedings not challenged as to regularity, the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago and Southern Air Lines, a rival applicant. Routes sought by both carrier interests involved overseas air transportation, § 1 (21) (b), between Continental United States and Caribbean possessions and also foreign air transportation, § 1 (21) (c), between the United States and foreign countries. Waterman filed a petition for review under § 1006 of the Act with the Circuit Court of Appeals for the Fifth Circuit. Chicago and Southern intervened. Both the latter and the Board moved to dismiss, the grounds pertinent here being that because the order required and had approval of the President, under § 801 of the Act, it was not reviewable. The Court of Appeals disclaimed any power to question or review either the President's approval or his disapproval, but it regarded any Board order as incomplete until court review, after which "the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." 159 F. 2d 828. Accordingly, it refused to dismiss the petition and asserted jurisdiction. Its decision conflicts with one by the Court of Appeals for the Second Circuit. *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. 2d 810. We granted certiorari both to the Chicago and Southern Air Lines, Inc. (No. 78) and to the Board (No. 88) to resolve the conflict.

Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is "interstate air commerce," "overseas air commerce" or "foreign air commerce," each being appropriately defined. 49 U. S. C. § 401 (20). All air carriers by similar procedures must obtain from the Board certifi-

cates of convenience and necessity by showing a public interest in establishment of the route and the applicant's ability to serve it. But when a foreign carrier asks for any permit, or a citizen carrier applies for a certificate to engage in any overseas or foreign air transportation, a copy of the application must be transmitted to the President before hearing; and any decision, either to grant or to deny, must be submitted to the President before publication and is unconditionally subject to the President's approval. Also the statute subjects to judicial review "any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act." It grants no express exemption to an order such as the one before us, which concerns a citizen carrier but which must have Presidential approval because it involves overseas and foreign air transportation. The question is whether an exemption is to be implied.

This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review. Examples are set forth by Chief Justice Hughes in *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130.

The Waterman Steamship Corporation urges that review of the problems involved in establishing foreign air routes are of no more international delicacy or strategic importance than those involved in routes for water

carriage. It says, "It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea." From this premise it reasons that we should interpret this statute to follow the pattern of judicial review adopted in relation to orders affecting foreign commerce by rail, *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, or communications by wire, *United States* v. *Western Union Telegraph Co.*, 272 F. 893, or by radio, *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641; and it likens the subject-matter of aeronautics legislation to that of Title VI of the Merchant Marine Act of 1936, 46 U. S. C. § 1171, and the function of the Aeronautics Board in respect to overseas and foreign air transportation to that of the Maritime Commission to such commerce when water-borne.

We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While trans-

port by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern governments, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.

The "public interest" that enters into awards of routes for aerial carriers, who in effect obtain also a sponsorship by our government in foreign ventures, is not confined to adequacy of transportation service, as we have held when that term is applied to railroads. *Texas* v. *United States*, 292 U. S. 522, 531. That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge. Congressional hearings and debates extending over several sessions and departmental studies of many years show that the legislative and administrative processes have proceeded in full recognition of these facts.

In the regulation of commercial aeronautics, the statute confers on the Board many powers conventional in other carrier regulation under the Congressional commerce power. They are exercised through usual procedures and apply settled standards with only customary administrative finality. Congress evidently thought of the administrative function in terms used by this Court of another of its agencies in exercising interstate commerce power: "Such a body cannot in any proper sense be

characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States,* 295 U. S. 602, 628. Those orders which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down.

But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order. 49 U. S. C. § 601. Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.

Congress may of course delegate very large grants of its power over foreign commerce to the President. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *Bush & Co.,* 310 U. S. 371. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For

present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.

These considerations seem controlling on the question whether the Board's action on overseas and foreign air transportation applications by citizens are subject to revision or overthrow by the courts.

It may be conceded that a literal reading of § 1006 subjects this order to re-examination by the courts. It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below. The letter of the text might with equal consistency be construed to require any one of three things: first, judicial review of a decision by the President; second, judicial review of a Board order before it acquires finality through Presidential action, the court's decision on review being a binding limitation on the President's action; third, a judicial review before action by the President, the latter being at liberty wholly to disregard the court's judgment. We think none of these results is required by usual canons of construction.

In this case, submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval. Only at that stage was review sought,

and only then could it be pursued, for then only was the decision consummated, announced and available to the parties.

While the changes made at direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller,* 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, 302.

We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.

The court below thought that this disability could be overcome by regarding the Board as a regulatory agent of Congress to pass on such matters as the fitness, willingness and ability of the applicant, and that the Board's own determination of these matters is subject to review. The court, speaking of the Board's action, said: "It is not final till the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." The legal incongruity of interposing judicial review between the action by the Board and that by the President are as great as the practical disadvantages. The latter arise chiefly from the inevitable delay and obstruction in the midst of the administrative proceedings. The former arises from the fact that until the President acts there is no final administrative determination to review. The statute would hardly have forbidden publication before submission if it had contemplated interposition of the courts at this intermediate stage. Nor could it have expected the courts to stay the President's hand after submission while they deliberate on the inchoate determination. The difficulty is manifest in this case. Review could not be sought until the order was made available, and at that time it had ceased to be merely the Board's tentative decision and had become one finalized by Presidential discretion.

Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor. It may be a step which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But admin-

istrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131. The dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination even of the Board's ultimate action, and after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion.

The court below considered that after it reviewed the Board's order its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments

not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423; *Muskrat* v. *United States,* 219 U. S. 346; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386.

We conclude that orders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate. This makes it unnecessary to examine the other questions raised. The petition of the Waterman Steamship Corp. should be dismissed.

Judgment reversed.

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

Congress has specifically provided for judicial review of orders of the Civil Aeronautics Board of the kind involved in this case. That review can be had without intruding on the exclusive domain of the Chief Executive. And by granting it we give effect to the interests of both the Congress and the Chief Executive in this field.

The Commerce Clause of the Constitution grants Congress control over interstate and foreign commerce. Art. I, § 8. The present Act is an exercise of that power. Congress created the Board and defined its functions. It specified the standards which the Board is to apply in granting certificates for overseas and foreign

air transportation.[1] It expressly made subject to judicial review orders of the Board granting or denying certificates to citizens and withheld judicial review where the applicants are not citizens.[2] If this were all, there would be no question.

But Congress did not leave the matter entirely to the Board. Recognizing the important role the President plays in military and foreign affairs, it made him a participant in the process. Applications for certificates of the type involved here are transmitted to him before hearing, all decisions on the applications are submitted to him before their publication, and the orders are "subject to" his approval.[3] Since his decisions in these matters are of a character which involves an exercise of his discretion in foreign affairs or military matters, I do not think Congress intended them to be subject to judicial review.

But review of the President's action does not result from reading the statute in the way it is written.

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[1] See §§ 401, 408 (b), 52 Stat. 987, 1001, 49 U. S. C. §§ 481, 488.

[2] Section 1006 (a) provides in part: "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order." 52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. § 646 (a).

Section 401 (a) requires every air carrier to have a certificate before engaging in air transportation. 52 Stat. 987, 49 U. S. C. § 481 (a). There is the same requirement in case of a foreign air carrier. § 402 (a), 52 Stat. 991, 49 U. S. C. § 482 (a). An air carrier is defined as a citizen who undertakes to engage in air transportation [§ 1 (2), 52 Stat. 977, 49 U. S. C. § 401 (2)], and a foreign air carrier is defined as any person not a citizen who undertakes to engage in foreign air transportation. § 1 (19), 52 Stat. 978, 49 U. S. C. § 401 (19).

[3] § 801, 52 Stat. 1014, 49 U. S. C. § 601.

Congress made reviewable by the courts only orders "issued by the Board under this Act." [4] Those orders can be reviewed without reference to any conduct of the President, for that part of the orders which is the work of the Board is plainly identifiable.[5] The President is presumably concerned only with the impact of the order on foreign relations or military matters. To the extent that he disapproves action taken by the Board, his action controls. But where that is not done, the Board's order has an existence independent of Presidential approval, tracing to Congress' power to regulate commerce. Approval by the President under this statutory scheme has relevance for purposes of review only as indicating *when* the action of the Board is reviewable. When the Board has finished with the order, the administrative function is ended. When the order fixes rights, on clearance by the President, it becomes reviewable. But the action of the President does not broaden the review. Review is restricted to the action of the Board and the Board alone.

The statute, as I construe it, contemplates that certificates issued will rest on orders of the Board which satisfy the standards prescribed by Congress. Presidential approval cannot make valid invalid orders of the Board. His approval supplements rather than supersedes Board action. Only when the Board has acted within the limits of its authority has the basis been laid for issuance of certificates. The requirement that a valid Board order underlie each certificate thus protects the President as well as the litigants and the public interest against unlawful Board action.

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[4] § 1006 (a), *supra*, note 2.

[5] The Board had consolidated for hearing 29 applications for certificates to engage in air transportation which were filed by 15 applicants. The President's partial disapproval of the proposed disposition of these applications did not relate to the applications involved in this case. As to them, the action of the Board stands unaltered.

The importance of the problem is evidenced by the character of cases controlled by this decision. The present ruling is not limited to cases granting or denying certificates for air transportation to and from foreign countries. It also denies power to review orders governing air transportation between two points in Alaska, between two points in Hawaii, between Seattle and Juneau, between New Orleans and San Juan.[6] All of those are now beyond judicial review. And so they should be so far as conduct of the President is concerned. But Congress has commanded otherwise as to action by the Board. The Board can act in a lawless way. With that in mind, Congress sought to preserve the integrity of the administrative process by making judicial review a check on Board action. That was the aim of Congress, now defeated by a legalism which in my view does not square with reality.

In this petition for review, the respondent charged that the Board had no substantial evidence to support its findings that Chicago and Southern Air Lines was fit, willing and able to perform its obligations under the certificate; and it charged that when a change of conditions as to Chicago and Southern Air Lines' ability to perform was called to the attention of the Board, the Board refused to reopen the case. I do not know whether there is merit in those contentions. But no matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders

[6] By § 801 the approval of the President extends to orders "authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession." 52 Stat. 1014, 49 U. S. C. § 601. Section 1 (21) includes in overseas air transportation commerce between a place in the continental United States and a place in a Territory or possession of the United States, or between a place in a Territory or possession of the United States and a place in any other Territory or possession. 52 Stat. 979, 49 U. S. C. § 401 (21).

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questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.

Judicial review would assure the President, the litigants and the public that the Board had acted within the limits of its authority. It would carry out the aim of Congress to guard against administrative action which exceeds the statutory bounds. It would give effect to the interests of both Congress and the President in this field.

SEABOARD AIR LINE RAILROAD CO. *v.* DANIEL, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 390. Argued January 8, 1948.—Decided February 16, 1948.

In a railroad reorganization under § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, a Virginia corporation, with the approval of the Interstate Commerce Commission, succeeded to the ownership and operation of a unitary railroad system in six states, including South Carolina. In granting its approval, the Commission found that, for the corporation to comply with the laws of South Carolina forbidding the ownership and operation of railroads in the State by foreign corporations, would result in "substantial delay and needless expense" and "would not be consistent with the public interest." The corporation sued in the Supreme Court of South Carolina to enjoin the State Attorney General from enforcing these state laws against it or collecting the heavy statutory penalties for noncompliance. *Held:*

1. The State Supreme Court had jurisdiction of the suit, with power to determine whether the Commission's order exempted the corporation from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order. Pp. 122–123.

2. The Commission's order was intended to exempt the corporation from obedience to the State's laws forbidding foreign corporations to own or operate railroads in the State. P. 124.

3. The Commission was authorized to issue such an order by § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940. *Texas* v. *United States,* 292 U. S. 522. Pp. 124–126.

4. It was not prevented from doing so by § 5 (11), which forbids creation of a federal corporation but authorizes a state railroad corporation to exercise the powers therein granted in addition to those bestowed upon it by the state of its creation. Pp. 126–127.

5. The corporation is entitled to the injunction it sought. P. 127.

211 S. C. 122, 43 S. E. 2d 839, reversed.

The Supreme Court of South Carolina dismissed a suit brought therein by a Virginia railroad corporation to enjoin the Attorney General of South Carolina from enforcing against it certain state laws forbidding foreign corporations to own or operate railroads in the State. 211 S. C. 122, 43 S. E. 2d 839. On appeal to this Court, *reversed and remanded,* p. 127.

W. R. C. Cocke argued the cause for appellant. With him on the brief were *J. B. S. Lyles, Harold J. Gallagher, Leonard D. Adkins* and *James B. McDonough, Jr.*

Irvine F. Belser, Assistant Attorney General of South Carolina, argued the cause for appellees. With him on the brief were *John M. Daniel,* Attorney General, and *T. C. Callison,* Assistant Attorney General.

Mr. Justice Black delivered the opinion of the Court.

The constitution and statutes of South Carolina provide that railroad lines within that State can be owned and operated only by state-created corporations; a railroad corporation chartered only under the laws of another state is forbidden under heavy penalties to exercise such

powers within South Carolina.[1] There is a way, however, in which a foreign railroad corporation may, under South Carolina statutes, indirectly exercise some powers over its South Carolina operations. It may organize a South Carolina subsidiary. In addition, it may, under South Carolina law, consolidate that corporation with itself. In that event, so far as South Carolina statutes can govern, the consolidated result would be a corporation both of South Carolina and of another state.[2]

In 1946 the appellant, Seaboard Air Line Railroad Company, with the approval of the Interstate Commerce Commission, succeeded to the ownership and operation of a unitary railroad system with 4,200 railway miles in six southern states. Seven hundred and thirty-six miles of its lines traverse South Carolina connecting with its lines in adjoining states. Appellant is a Virginia created corporation, has no South Carolina subsidiary, and has effected no consolidation with a South Carolina created corporation. It is therefore subject to the penalties provided by South Carolina law if that law can validly be applied to it.

This action was brought by appellant in the South Carolina Supreme Court to enjoin the state attorney general from attempting to collect the statutory penalties from appellant or to enforce the statutory provisions against it.[3] The complaint alleged the following facts,

[1] S. C. Const. Art. 9, § 8; S. C. Code Ann. § 7784 (1942). Violations are punishable by fines of $500 for each county in which the railroad operates. Apparently each day's operation of the railroad constitutes a separate offense. The appellant in this suit operates in 30 South Carolina counties.

[2] S. C. Const. Art. 9, § 8; S. C. Code Ann. §§ 7777, 7778, 7779, 7785, 7789 (1942). See *Geraty* v. *Atlantic Coast Line R. Co.*, 80 S. C. 355, 361, 60 S. E. 936, 937.

[3] The appellant also prayed for a mandamus to compel the Secretary of State to accept and file papers and documents tendered by

about which there is no substantial dispute. Appellant applied to the Interstate Commerce Commission for approval of its purchase of the railway system pursuant to § 5 of the Interstate Commerce Act, as amended, 49 U. S. C. § 5. After notice to the Governor of South Carolina and others, the Commission conducted hearings and made a report in which it found that compliance by appellant with the South Carolina railroad corporation laws would result in "substantial delay and needless expense." It further found that compliance "would not be consistent with the public interest"—the criterion which § 5 required the Commission to use in passing upon a change in ownership or control of a railroad. The Commission then entered an order which authorized appellant, as a Virginia corporation, to own and operate the entire system including the South Carolina mileage. The complaint also asserted that the order, by explicit reference to the Commission finding in its report, affirmatively authorized appellant to own and operate the entire railway system without complying with the South Carolina railroad corporation laws.[4]

The answer to the complaint did not challenge the constitutional power of Congress to relieve appellant of compliance with South Carolina's requirements of state incorporation. It took the position that insofar as the Commission order could be interpreted as an attempt to override state laws in this respect it was void because outside the scope of the Commission's statutory authority.

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appellant seeking authority to do business in the state as a foreign corporation under other South Carolina statutes. That phase of the case is not pressed here.

[4] The complaint also alleged, and it is argued here, that the state constitutional and statutory provisions imposed burdens on this interstate railroad in violation of the Commerce Clause of the Constitution of the United States. The view we take makes it unnecessary for us to pass on this contention.

The appellant then filed a demurrer on the ground that the answer as a matter of law constituted neither a defense nor a counterclaim since it admitted all allegations of fact in the complaint, and advanced nothing more than erroneous legal conclusions as asserted reasons why appellant should not be granted the relief for which it prayed.

No evidence was taken and the State Supreme Court decided the case on the pleadings. That court construed the Commission's order as relieving appellant from compliance with the statutory and constitutional provisions in issue, but it agreed with the respondents that the Commission lacked power under § 5 to enter such an order. Accordingly the State Supreme Court revoked the temporary restraining order it had previously issued, denied the requested injunction, and dismissed the complaint. 211 S. C. 122, 43 S. E. 2d 839. The case is properly here on appeal under § 237 (a) of the Judicial Code, as amended, 28 U. S. C. § 344 (a).

First. The complaint largely relied on an order of the Interstate Commerce Commission as a basis for the relief sought. The answer questioned the validity and scope of that order but did not seek a decree to set it aside or suspend it. Federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul or suspend an order of the Commission. In such suits the United States is an indispensable party. 28 U. S. C. § 46. Although the jurisdiction of the South Carolina Supreme Court was there conceded, and is not here challenged, we think it appropriate to pass upon it.

So far as the appellant's complaint is concerned, this is not the kind of action to "set aside" a Commission order of which the federal district courts have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension

or annulment. Nor did the answer seek to have the enforcement of the order enjoined, although it did question its validity as a basis for the relief sought in the complaint.

The appellant was in this dilemma. Federal law required it to obey the order so long as it remained in effect; for a failure to abide by its terms serious federal penalties could be imposed on it. 49 U. S. C. §§ 10 (1), 16 (7), (8), (9), (10). On the other hand, South Carolina statutes provided penalties for obedience to the order, which South Carolina officials asserted were enforceable against appellant despite the Commission's order. There was thus a bona fide controversy between appellant and the state officials over the validity of the order. Appellant wanted to obey the order; the state officials insisted appellant must obey their statutes instead. Federal district courts have not been granted special jurisdiction to review and confirm orders of the Commission at the suit of railroads wishing to obey such orders.

Under the foregoing circumstances appellant was not compelled to wait until someone who had standing to attack the Commission's order might decide to seek its annulment in a federal district court. It properly sought relief from a court which could obtain jurisdiction of the parties whose refusal to recognize the order gave rise to its predicament. And the state court then had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt appellant from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order. *Illinois Cent. R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 502–505. See *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.,* 258 U. S. 377, 381–382; *Central New England R. Co.* v. *Boston & A. R. Co.,* 279 U. S. 415, 420–421.

Second. It is here contended that the Commission's order did not manifest a clear purpose to authorize the exemption of appellant from obedience to the state's domestic corporation policy. We have no doubt that the Commission intended its order to have this effect. Its final order expressly stated that, subject to a condition not here relevant, it approved and authorized "the purchase . . . and the operation" by the appellant of the South Carolina and other railroad properties. Furthermore, the Commission discussed the South Carolina requirements in its report and therein made findings that compliance by appellant with them "would not be consistent with the public interest." These references were made to the South Carolina provisions, according to the Commission's report, in response to the appellant's suggestion that it would "avoid complications" if the Commission's report showed "on its face that our order is intended to override them."

Third. Respondents contend that the Commission lacked statutory authority to enter an order which would permit a Virginia corporation to operate these railroad lines in and through South Carolina contrary to that state's constitutional and legislative policy. They point to the broad powers states have always exercised in excluding foreign corporations and in admitting them within their borders upon conditions. They also emphasize the importance of this regulatory power to the states, and urge that, in the absence of express language requiring it, § 5 should be construed neither to restrict that state power nor to authorize the Commission to override state enactments. Recognizing the force of these arguments in general, we note the following circumstances which render them inapplicable in this case.

Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be

read with this purpose in mind. In keeping with this purpose Congress has often recognized that the nation's railroads should have sound corporate and financial structures and has taken appropriate steps to this end. The purchase of this very railroad by appellant resulted from extensive reorganization proceedings conducted by the Interstate Commerce Commission and federal district courts in accordance with congressional enactments applicable to railroads. In furtherance of this congressional policy these agencies approved reorganization plans which called for the purchase and operation of these properties, including the portion in South Carolina, by appellant, as a Virginia corporation.

This Court has previously approved a Commission order entered in a § 5 consolidation proceeding which granted a railroad relief from state laws analogous to the state requirements here. *Texas* v. *United States,* 292 U. S. 522 (1934). Most of the reasons which justified the Commission's order in that case are equally applicable here. Furthermore, since that case was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may interfere with efficient and economical railroad operation. By § 5 (11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49 U. S. C. § 5 (11), Congress granted the Commission "exclusive and plenary" authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. The breadth of this grant of power can be understood only by reference to § 5 (2) (b) which authorizes the Commission to condition its approval upon "such terms and conditions and such modifications as it shall find to be just and reasonable." All of this power can be exercised in accordance with what the Commission may find to be "consistent with the public interest." The purchaser of railroad property with Commission approval is

authorized by § 5 (11) "to own and operate any properties . . . acquired through said transaction without invoking any approval under State authority," and such an approved owner, according to that paragraph, is "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties . . . acquired through such transaction."

This language very clearly reposes power in the Commission to exempt railroads under a § 5 proceeding from state laws which bar them from operating in the state or impose conditions upon such operation. The state court nevertheless thought that the last sentence of § 5 (11) negatived a congressional purpose to empower the Commission to relieve railroads from state laws such as South Carolina's. That sentence reads: "Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State." We see nothing in this sentence that detracts from the broad powers granted the Commission by § 5. In fact, the language of the sentence appears to support the Commission's power here exercised. Although the sentence bars creation of a federal corporation, it clearly authorizes a railroad corporation to exercise the powers therein granted over and above those bestowed upon it by the state of its creation. These federally conferred powers can be exercised in the same manner as though they had been granted to a federally created corporation. See *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 38, 40–45. Here, just as a federally created railroad corporation could for federal purposes operate in

South Carolina, so can this Virginia corporation exercise its federally granted power to operate in that State.

Other arguments of respondent have been considered and found to be without merit. Appellant is entitled to the injunction it sought.

The judgment of the South Carolina Supreme Court denying the injunction and dismissing the complaint is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion.

Reversed and remanded.

FUNK BROTHERS SEED CO. *v.* KALO INOCULANT CO.

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

No. 280. Argued January 13, 1948.—Decided February 16, 1948.

1. Certain product claims of Bond Patent No. 2,200,532, on certain mixed cultures of root-nodule bacteria capable of inoculating the seeds of leguminous plants belonging to several cross-inoculation groups, *held* invalid for want of invention. Pp. 128–132.
2. Discovery of the fact that certain strains of each species of these bacteria can be mixed without harmful effect on the properties of either is not patentable, since it is no more than the discovery of a phenomenon of nature. P. 131.
3. The application of this newly-discovered natural principle to the problem of packaging inoculants was not invention or discovery within the meaning of the patent laws. Pp. 131–132.

161 F. 2d 981, reversed.

In a patent infringement suit, the District Court held certain product claims invalid for want of invention. The Circuit Court of Appeals reversed. 161 F. 2d 981. This Court granted certiorari. 332 U. S. 755. *Reversed,* p. 132.

H. A. Toulmin, Jr. argued the cause for petitioner. With him on the brief was *D. C. Staley.*

J. Bernhard Thiess argued the cause for respondent. With him on the brief were *Sidney Neuman* and *M. Hudson Rathburn.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a patent infringement suit brought by respondent. The charge of infringement is limited to certain product claims [1] of Patent No. 2,200,532 issued to Bond on May 14, 1940. Petitioner filed a counterclaim asking for a declaratory judgment that the entire patent be adjudged invalid.[2] The District Court held the product claims invalid for want of invention and dismissed the complaint. It also dismissed the counterclaim. Both parties appealed. The Circuit Court of Appeals reversed, holding that the product claims were valid and infringed and that the counterclaim should not have been dismissed. 161 F. 2d 981. The question of validity is the only question presented by this petition for certiorari.

Through some mysterious process leguminous plants are able to take nitrogen from the air and fix it in the plant for conversion to organic nitrogenous compounds. The ability of these plants to fix nitrogen from the air depends on the presence of bacteria of the genus Rhizo-

[1] The product claims in suit are 1, 3, 4, 5, 6, 7, 8, 13, and 14. Claim 4 is illustrative of the invention which is challenged. It reads as follows:

"An inoculant for leguminous plants comprising a plurality of selected mutually non-inhibitive strains of different species of bacteria of the genus Rhizobium, said strains being unaffected by each other in respect to their ability to fix nitrogen in the leguminous plant for which they are specific."

[2] The patent also contains process claims.

bium which infect the roots of the plant and form nodules on them. These root-nodule bacteria of the genus Rhizobium fall into at least six species. No one species will infect the roots of all species of leguminous plants. But each will infect well-defined groups of those plants.[3] Each species of root-nodule bacteria is made up of distinct strains which vary in efficiency. Methods of selecting the strong strains and of producing a bacterial culture from them have long been known. The bacteria produced by the laboratory methods of culture are placed in a powder or liquid base and packaged for sale to and use by agriculturists in the inoculation of the seeds of leguminous plants. This also has long been well known.

It was the general practice, prior to the Bond patent, to manufacture and sell inoculants containing only one species of root-nodule bacteria. The inoculant could therefore be used successfully only in plants of the particular cross-inoculation group corresponding to this species. Thus if a farmer had crops of clover, alfalfa, and soy beans he would have to use three separate inoculants.[4] There had been a few mixed cultures for field legumes. But they had proved generally unsatisfactory because the different species of the Rhizobia bacteria produced an inhibitory effect on each other when mixed in a common base, with the result that their efficiency

[3] The six well-recognized species of bacteria and the corresponding groups (cross-inoculation groups) of leguminous plants are:

Rhizobium trifolii	Red clover, crimson clover, mammoth clover, alsike clover
Rhizobium meliloti	Alfalfa, white or yellow sweet clovers
Rhizobium phaseoli	Garden beans
Rhizobium leguminosarum	Garden peas and vetch
Rhizobium lupini	Lupines
Rhizobium japonicum	Soy beans

[4] See note 3, *supra*.

was reduced. Hence it had been assumed that the different species were mutually inhibitive. Bond discovered that there are strains of each species of root-nodule bacteria which do not exert a mutually inhibitive effect on each other. He also ascertained that those mutually non-inhibitive strains can, by certain methods of selection and testing, be isolated and used in mixed cultures. Thus he provided a mixed culture of Rhizobia capable of inoculating the seeds of plants belonging to several cross-inoculation groups. It is the product claims which disclose that mixed culture that the Circuit Court of Appeals has held valid.

We do not have presented the question whether the methods of selecting and testing the non-inhibitive strains are patentable. We have here only product claims. Bond does not create a state of inhibition or of non-inhibition in the bacteria. Their qualities are the work of nature. Those qualities are of course not patentable. For patents cannot issue for the discovery of the phenomena of nature. See *Le Roy* v. *Tatham,* 14 How. 156, 175. The qualities of these bacteria, like the heat of the sun, electricity, or the qualities of metals, are part of the storehouse of knowledge of all men. They are manifestations of laws of nature, free to all men and reserved exclusively to none. He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes. If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end. See *Telephone Cases,* 126 U. S. 1, 532–533; *DeForest Radio Co.* v. *General Electric Co.,* 283 U. S. 664, 684–685; *Mackay Radio & Tel. Co.* v. *Radio Corp.,* 306 U. S. 86, 94; *Cameron Septic Tank Co.* v. *Saratoga Springs,* 159 F. 453, 462–463. The Circuit Court of Appeals thought that Bond did much more than discover a law of nature, since he made a new and different composition of non-

inhibitive strains which contributed utility and economy to the manufacture and distribution of commercial inoculants. But we think that that aggregation of species fell short of invention within the meaning of the patent statutes.

Discovery of the fact that certain strains of each species of these bacteria can be mixed without harmful effect to the properties of either is a discovery of their qualities of non-inhibition. It is no more than the discovery of some of the handiwork of nature and hence is not patentable. The aggregation of select strains of the several species into one product is an application of that newly-discovered natural principle. But however ingenious the discovery of that natural principle may have been, the application of it is hardly more than an advance in the packaging of the inoculants. Each of the species of root-nodule bacteria contained in the package infects the same group of leguminous plants which it always infected. No species acquires a different use. The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. Each species has the same effect it always had. The bacteria perform in their natural way. Their use in combination does not improve in any way their natural functioning. They serve the ends nature originally provided and act quite independently of any effort of the patentee.

There is, of course, an advantage in the combination. The farmer need not buy six different packages for six different crops. He can buy one package and use it for any or all of his crops of leguminous plants. And, as respondent says, the packages of mixed inoculants also hold advantages for the dealers and manufacturers by reducing inventory problems and the like. But a product must be more than new and useful to be patented; it must also satisfy the requirements of invention or dis-

covery. *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 90, 91, and cases cited; 35 U. S. C. § 31, R. S. § 4886. The application of this newly-discovered natural principle to the problem of packaging of inoculants may well have been an important commercial advance. But once nature's secret of the non-inhibitive quality of certain strains of the species of Rhizobium was discovered, the state of the art made the production of a mixed inoculant a simple step. Even though it may have been the product of skill, it certainly was not the product of invention. There is no way in which we could call it such unless we borrowed invention from the discovery of the natural principle itself. That is to say, there is no invention here unless the discovery that certain strains of the several species of these bacteria are non-inhibitive and may thus be safely mixed is invention. But we cannot so hold without allowing a patent to issue on one of the ancient secrets of nature now disclosed. All that remains, therefore, are advantages of the mixed inoculants themselves. They are not enough.

Since we conclude that the product claims do not disclose an invention or discovery within the meaning of the patent statutes, we do not consider whether the other statutory requirements contained in 35 U. S. C. § 31, R. S. § 4886, are satisfied.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

My understanding of Bond's contribution is that prior to his attempts, packages of mixed cultures of inoculants presumably applicable to two or more different kinds of legumes had from time to time been prepared, but had met with indifferent success. The reasons for failure were not understood, but the authorities had concluded that in general pure culture inoculants were alone reliable because mixtures were ineffective due to the mutual in-

hibition of the combined strains of bacteria. Bond concluded that there might be special strains which lacked this mutual inhibition, or were at all events mutually compatible. Using techniques that had previously been developed to test efficiency in promoting nitrogen fixation of various bacterial strains, Bond tested such efficiency of various mixtures of strains. He confirmed his notion that some strains were mutually compatible by finding that mixtures of these compatible strains gave good nitrogen fixation in two or more different kinds of legumes, while other mixtures of certain other strains proved mutually incompatible.

If this is a correct analysis of Bond's endeavors, two different claims of originality are involved: (1) the idea that there are compatible strains, and (2) the experimental demonstration that there were in fact some compatible strains. Insofar as the court below concluded that the packaging of a particular mixture of compatible strains is an invention and as such patentable, I agree, provided not only that a new and useful property results from their combination, but also that the particular strains are identifiable and adequately identified. I do not find that Bond's combination of strains satisfies these requirements. The strains by which Bond secured compatibility are not identified and are identifiable only by their compatibility.

Unless I misconceive the record, Bond makes no claim that Funk Brothers used the same combination of strains that he had found mutually compatible. He appears to claim that since he was the originator of the idea that there might be mutually compatible strains and had practically demonstrated that some such strains exist, everyone else is forbidden to use a combination of strains whether they are or are not identical with the combinations that Bond selected and packaged together. It was this claim that, as I understand it, the District Court

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found not to be patentable, but which, if valid, had been infringed.

The Circuit Court of Appeals defined the claims to "cover a composite culture in which are included a plurality of species of bacteria belonging to the general Rhizobium genus, carried in a conventional base." 161 F. 2d 981, 983. But the phrase "the claims cover a composite culture" might mean "a particular composite culture" or "any composite culture." The Circuit Court of Appeals seems to me to have proceeded on the assumption that only "a particular composite culture" was devised and patented by Bond, and then applies it to "any composite culture" arrived at by deletion of mutually inhibiting strains, but strains which may be quite different from Bond's composite culture.

The consequences of such a conclusion call for its rejection. Its acceptance would require, for instance in the field of alloys, that if one discovered a particular mixture of metals, which when alloyed had some particular desirable properties, he could patent not merely this particular mixture but the idea of alloying metals for this purpose, and thus exclude everyone else from contriving some other combination of metals which, when alloyed, had the same desirable properties. In patenting an alloy, I assume that both the qualities of the product and its specific composition would need to be specified. The strains that Bond put together in the product which he patented can be specified only by the properties of the mixture. The District Court, while praising Bond's achievement, found want of patentability. The Circuit Court of Appeals reversed the judgment of the District Court by use of an undistributed middle—that the claims cover a "composite culture"—in the syllogism whereby they found patentability.

It only confuses the issue, however, to introduce such terms as "the work of nature" and the "laws of nature."

For these are vague and malleable terms infected with too much ambiguity and equivocation. Everything that happens may be deemed "the work of nature," and any patentable composite exemplifies in its properties "the laws of nature." Arguments drawn from such terms for ascertaining patentability could fairly be employed to challenge almost every patent. On the other hand, the suggestion that "if there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end" may readily validate Bond's claim. Nor can it be contended that there was no invention because the composite has no new properties other than its ingredients in isolation. Bond's mixture does in fact have the new property of multi-service applicability. Multi-purpose tools, multivalent vaccines, vitamin complex composites, are examples of complexes whose sole new property is the conjunction of the properties of their components. Surely the Court does not mean unwittingly to pass on the patentability of such products by formulating criteria by which future issues of patentability may be prejudged. In finding Bond's patent invalid I have tried to avoid a formulation which, while it would in fact justify Bond's patent, would lay the basis for denying patentability to a large area within existing patent legislation.

MR. JUSTICE BURTON, with whom MR. JUSTICE JACKSON concurs, dissenting.

On the grounds stated by the Circuit Court of Appeals the judgment should be affirmed.

When the patentee discovered the existence of certain strains of bacteria which, when combined with certain other strains of bacteria, would infect two or more leguminous plants without loss of their respective nitrogen-fixing efficiencies, and utilized this discovery by segregating some of these mutually non-inhibitive strains and

combining such strains into composite inoculants, we agree with MR. JUSTICE FRANKFURTER that the combinations so produced satisfied the statutory requirements of invention or discovery.[1] These products were a prompt and substantial commercial success, filling a long-sought and important agricultural need.

However, we do not agree that the patent issued for such products is invalid for want of a clear, concise description of how the combinations were made and used. The statutory requirement is that the inventor or discoverer—

> "shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. . . . No plant patent shall be declared invalid on the ground of noncompliance with this section if the description is made as complete as is reasonably possible." [2]

The completeness and character of the description must vary with the subject to be described. Machines lend themselves readily to descriptions in terms of mechanical

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[1] R. S. § 4886, as amended, 46 Stat. 376; 53 Stat. 1212, 35 U. S. C. § 31.

[2] R. S. § 4888, as amended, 38 Stat. 958–959; 46 Stat. 376, 35 U. S. C. § 33.

principles and physical characteristics. On the other hand, it may be that a combination of strains of bacterial species, which strains are distinguished from one another and recognized in practice solely by their observed effects, can be definable reasonably only in terms of those effects. In the present case, the patentee has defined the combinations in terms of their mutually inhibiting and non-inhibiting effects upon their respective abilities to take free nitrogen from the air and place it in the soil. These combinations were discovered by observation of these effects—they are in practice identified by these effects for the commercial uses for which they are made. It is these effects that differentiate them from the other bacteria heretofore generally identified only as common members of the same species and not commercially valuable for use with leguminous plants of more than one of the groups named in the opinion of the Court. The identification of the strains stated in the patent is that which the patentee used in making the novel combinations of them that have been shown to be highly useful. There appears to be no question but that the petitioners are now able to identify and use the strains in the manner described in the patent. The record thus indicates that the description is sufficiently full, clear, concise and exact to enable persons skilled in the art or science to which this discovery appertains or with which it is most nearly connected to make, construct, compound and use the same. There is no suggestion as to how it would be reasonably possible to describe the patented product more completely. The patent covers all composite cultures of bacterial strains of the species described which do not inhibit each other's ability to fix nitrogen. Bacteriologists, skilled in the applicable art, will not have difficulty in selecting the non-inhibitive strains by employing such standard and recognized laboratory tests as are described in the application for this patent.

The statute itself shows that Congress has recognized the inherent difficulty presented. While this patent may not be technically a "plant patent" in the precise sense in which that term is used in this Section, the references in the Section to the differences in descriptions expected in mechanical patents and plant patents obviously support the position here taken. An inventor should not be denied a patent upon an otherwise patentable discovery merely because the nature of the discovery defies description in conventional terms. Terms ordinarily unsuitable to describe and distinguish products that are capable of description and distinction by their appearance may be the most appropriate in which to describe and distinguish other products that are not reasonably possible of identification by their appearance, but which are easily identified by their effects when being sought for or described by those skilled in the art.

WOODS, HOUSING EXPEDITER, *v.* CLOYD W. MILLER CO. ET AL.

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

No. 486. Argued February 6, 1948.—Decided February 16, 1948.

1. Title II of the Housing and Rent Act of 1947, enacted after the effective date of the Presidential Proclamation terminating hostilities on December 31, 1946, and limiting the rent which may be charged for certain housing accommodations in "defense-rental areas," is a valid exercise of the war power of Congress. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Ruppert* v. *Caffey*, 251 U. S. 264; *Stewart* v. *Kahn*, 11 Wall. 493. Pp. 141–146.
2. The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise; and the legislative history shows that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause. P. 144.

3. The Act prescribes adequate standards for the guidance of administrative action and does not unconstitutionally delegate legislative power. Pp. 144–145.
4. By its exemption of certain classes of housing accommodations, the Act does not violate the Fifth Amendment. P. 145.
5. The fact that the property regulated suffers a decrease in value is no more fatal to the exercise of the war power than it is where the police power is invoked to the same end. P. 146.

74 F. Supp. 546, reversed.

The Housing Expediter sued to enjoin violations of Title II of the Housing and Rent Act of 1947. The District Court denied a permanent injunction on the ground that the Act was unconstitutional. 74 F. Supp. 546. On direct appeal to this Court, *reversed,* p. 146.

Solicitor General Perlman argued the cause for appellant. With him on the brief were *Robert L. Stern, Robert W. Ginnane, Irving M. Gruber* and *Ed Dupree.*

Paul S. Knight argued the cause and filed a brief for appellees.

Mr. Justice Douglas delivered the opinion of the Court.

The case is here on a direct appeal, Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. § 349a, from a judgment of the District Court holding unconstitutional Title II of the Housing and Rent Act of 1947. 61 Stat. 193, 196.

The Act became effective on July 1, 1947, and the following day the appellee demanded of its tenants increases of 40% and 60% for rental accommodations in the Cleveland Defense-Rental Area, an admitted violation of the Act and regulations adopted pursuant thereto.[1] Appel-

[1] Section 204 (b) of the Act provides that "no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established

lant thereupon instituted this proceeding under § 206 (b) of the Act [2] to enjoin the violations. A preliminary injunction issued. After a hearing it was dissolved and a permanent injunction denied.

The District Court was of the view that the authority of Congress to regulate rents by virtue of the war power (see *Bowles* v. *Willingham,* 321 U. S. 503) ended with the Presidential Proclamation terminating hostilities on December 31, 1946,[3] since that proclamation inaugurated "peace-in-fact" though it did not mark termination of the war. It also concluded that, even if the war power continues, Congress did not act under it because it did not say so, and only if Congress says so, or enacts provisions so implying, can it be held that Congress intended to exercise such power. That Congress did not

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under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947." Controlled Housing Rent Regulation, 12 Fed. Reg. 4331, contains similar provisions. §§ 2 (a), 4 (a). Provisions of this statute and regulation, not here material, allow adjustment of maximum rentals when necessary to correct inequities and permit a 15% increase if negotiated between landlord and tenant and incorporated in a lease of a designated term.

[2] Section 206 (a) makes it unlawful "to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204." Section 206 (b) authorized the Housing Expediter to apply to any federal, state, or territorial court of competent jurisdiction for an order enjoining "any act or practice which constitutes or will constitute a violation of subsection (a) of this section."

[3] Proclamation 2714, 12 Fed. Reg. 1. That proclamation recognized that "a state of war still exists." On July 25, 1947, on approving S. J. Res. 123 terminating certain war statutes, the President issued a statement in which he declared that "The emergencies declared by the President on September 8, 1939, and May 27, 1941, and the state of war continue to exist, however, and it is not possible at this time to provide for terminating all war and emergency powers."

so intend, said the District Court, follows from the provision that the Housing Expediter can end controls in any area without regard to the official termination of the war,[4] and from the fact that the preceding federal rent control laws (which were concededly exercises of the war power) were neither amended nor extended. The District Court expressed the further view that rent control is not within the war power because "the emergency created by housing shortage came into existence long before the war." It held that the Act "lacks in uniformity of application and distinctly constitutes a delegation of legislative power not within the grant of Congress" because of the authorization to the Housing Expediter to lift controls in any area before the Act's expiration. It also held that the Act in effect provides "low rentals for certain groups without taking the property or compensating the owner in any way." See 74 F. Supp. 546.

We conclude, in the first place, that the war power sustains this legislation. The Court said in *Hamilton* v. *Kentucky Distilleries 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 for the duration of that emergency. Whatever may be the consequences when war is officially terminated,[5] the war power does not necessarily end with the cessation of hostilities. We recently held that it is adequate to support the preservation of rights created by wartime legislation, *Fleming* v. *Mohawk Wrecking &*

[4] Section 204 (c) provides: "The Housing Expediter is hereby authorized and directed to remove any or all maximum rents before this title ceases to be in effect, in any defense-rental area, if in his judgment the need for continuing maximum rents in such area no longer exists due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met."

[5] See *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 57.

Lumber Co., 331 U. S. 111. But it has a broader sweep. In *Hamilton* v. *Kentucky Distilleries Co.*, *supra*, and *Ruppert* v. *Caffey*, 251 U. S. 264, prohibition laws which were enacted after the Armistice in World War I were sustained as exercises of the war power because they conserved manpower and increased efficiency of production in the critical days during the period of demobilization, and helped to husband the supply of grains and cereals depleted by the war effort. Those cases followed the reasoning of *Stewart* v. *Kahn*, 11 Wall. 493, which held that Congress had the power to toll the statute of limitations of the States during the period when the process of their courts was not available to litigants due to the conditions obtaining in the Civil War.

The constitutional validity of the present legislation follows *a fortiori* from those cases. The legislative history of the present Act makes abundantly clear that there has not yet been eliminated the deficit in housing which in considerable measure was caused by the heavy demobilization of veterans and by the cessation or reduction in residential construction during the period of hostilities due to the allocation of building materials to military projects.[6] Since the war

[6] See H. R. Rep. No. 317, 80th Cong., 1st Sess., pp. 1, 2, 3, 10–11. The Report states, p. 2:

"There are several factors, in addition to the normal increase in population, which have contributed to the existing housing shortage. These include demobilization of a large number of veterans, shifts in population, less intensive use of housing accommodations, amount of new housing construction, trend away from construction of rental units, and change from tenant to owner occupancy."

As to the effect of demobilization of veterans the Report states, p. 2:

"Heavy demobilization of members of our armed forces, particularly in late 1945 and the first half of 1946, made effective an important demand for housing accommodations. In 1945 an estimated 6,279,000 veterans of World War II were returned to civilian life,

effort contributed heavily to that deficit, Congress has the power even after the cessation of hostilities to act to control the forces that a short supply of the needed article created. If that were not true, the Necessary and Proper Clause, Art. I, § 8, cl. 18, would be drastically limited in its application to the several war powers. The Court has declined to follow that course in the past. *Hamilton* v. *Kentucky Distilleries Co., supra,* pp. 155, 156; *Ruppert* v. *Caffey, supra,* pp. 299, 300. We decline to take it today. The result would be paralyzing. It would render Congress powerless to remedy conditions the creation of which necessarily followed from the mobilization of men and materials for successful prosecution of the war. So to read the Constitution would be to make it self-defeating.

We recognize the force of the argument that the effects of war under modern conditions may be felt in the econ-

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in 1946 the number so returned was 5,659,000, and in 1947 to February 28 an additional 212,000 veterans were demobilized. Statistics are not available as to the number of new family units created by returning veterans but undoubtedly the figure is substantial and in many cases creation of new family units was delayed until these veterans were returned to civilian life. The importance and delayed impact of the 11,938,000 veterans returned to civilian life in 1945 and 1946 on an already acute housing shortage is readily apparent."

The effect of the war upon the construction of new dwelling units is shown by the following table:

Total non-farm dwelling units constructed

1937	336,000	1943	350,000
1938	406,000	1944	169,000
1939	515,000	1945	247,000
1940	603,000	1946	776,200
1941	715,000	1947 (11 months)	799,000
1942	497,000		

The figures for the years 1937–1945 inclusive are taken from H. R. Rep. No. 317, *supra,* p. 3. Those for 1946 and 1947 are taken from U. S. Bureau of Labor Statistics, Construction, Dec. 1947, p. 4.

omy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry. *Hamilton* v. *Kentucky Distilleries Co., supra; Ruppert* v. *Caffey, supra.*

The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise. Here it is plain from the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause.[7] Its judgment on that score is entitled to the respect granted like legislation enacted pursuant to the police power. See *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543.

Under the present Act the Housing Expediter is authorized to remove the rent controls in any defense-rental area if in his judgment the need no longer exists by reason of new construction or satisfaction of demand in other ways.[8] The powers thus delegated are far less extensive than those sustained in *Bowles* v. *Willingham, supra,* pp. 512–515. Nor is there here a grant of unbridled administra-

[7] See H. R. Rep. No. 317, *supra,* note 6, and statement of Representative Wolcott, Chairman of the House Committee on Banking and Currency which reported the rent bill, 93 Cong. Rec. 4395.

[8] See note 4, *supra.*

tive discretion. The standards prescribed pass muster under our decisions. See *Bowles* v. *Willingham, supra,* pp. 514–516, and cases cited.

Objection is made that the Act by its exemption of certain classes of housing accommodations [9] violates the Fifth Amendment. A similar argument was rejected under the Fourteenth Amendment when New York made like exemptions under the rent-control statute which was here for review in *Marcus Brown Co.* v. *Feldman, supra,* pp. 195, 198–199. Certainly Congress is not under greater limitations. It need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest. See *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450. This alone is adequate answer to the objection, equally applicable to the original Act sustained in *Bowles* v. *Willingham, supra,* that the present Act lacks uniformity in application.

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[9] Sec. 202 (c) provides: "The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or (2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or (3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect, or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations."

The fact that the property regulated suffers a decrease in value is no more fatal to the exercise of the war power (*Bowles* v. *Willingham, supra,* pp. 517, 518) than it is where the police power is invoked to the same end. See *Block* v. *Hirsh, supra.*

Reversed.

MR. JUSTICE FRANKFURTER concurs in this opinion because it decides no more than was decided in *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, and *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, and merely applies those decisions to the situation now before the Court.

MR. JUSTICE JACKSON, concurring.

I agree with the result in this case, but the arguments that have been addressed to us lead me to utter more explicit misgivings about war powers than the Court has done. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable "war power."

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not

relate to the management of the war itself, the constitutional basis should be scrutinized with care.

I think we can hardly deny that the war power is as valid a ground for federal rent control now as it has been at any time. We still are technically in a state of war. I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent—as permanent as the war debts. But I find no reason to conclude that we could find fairly that the present state of war is merely technical. We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies. I think the conclusion that the war power has been applicable during the lifetime of this legislation is unavoidable.

FISHER *v.* HURST, CHIEF JUSTICE, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

No. 325, Misc. Decided February 16, 1948.

The order of the state district court quoted in the opinion did not depart from the mandate issued by this Court in *Sipuel* v. *Board of Regents*, 332 U. S. 631; and a motion for leave to file a petition for a writ of mandamus to compel compliance with that mandate is denied. Pp. 147–151.

Thurgood Marshall, Amos T. Hall, William H. Hastie and *Marian Wynn Perry* filed a brief for petitioner.

PER CURIAM.

Petitioner moves for leave to file a petition for a writ of mandamus to compel compliance with our mandate

issued January 12, 1948, in *Sipuel* v. *Board of Regents,* 332 U. S. 631. We there said:

> "The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938)."

Petitioner states that on January 17, 1948, the Supreme Court of Oklahoma rendered an opinion in which it was said:

> "Said Board of Regents is hereby directed, under the authority conferred upon it by the provisions of Art. 13–A, Constitution of the State of Oklahoma, and Title 70 O. S. 1941, Secs. 1976, 1979, to afford to plaintiff, and all others similarly situated, an opportunity to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with the equal protection clause of the Fourteenth Amendment of the Federal Constitution and with the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of this state. Art. 13, Sec. 3, Constitution of Oklahoma; 70 O. S. 1941, Secs. 451–457.
>
> "Reversed with directions to the trial court to take such proceedings as may be necessary to fully carry out the opinion of the Supreme Court of the United States and this opinion. The mandate is ordered to issue forthwith."

It is further stated by petitioner that the District Court of Cleveland County of Oklahoma entered an order on January 22, 1948, as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THIS COURT that unless and until the separate school of law for negroes, which the Supreme Court of Oklahoma in effect directed the Oklahoma State Regents for Higher Education to establish
>
> 'with advantages for education substantially equal to the advantages afforded to white students,'
>
> is established and ready to function at the designated time applicants of any other group may hereafter apply for admission to the first-year class of the School of Law of the University of Oklahoma, and if the plaintiff herein makes timely and proper application to enroll in said class, the defendants, Board of Regents of the University of Oklahoma, et al., be, and the same are hereby ordered and directed to either:
>
> "(1) enroll plaintiff, if she is otherwise qualified, in the first-year class of the School of Law of the University of Oklahoma, in which school she will be entitled to remain on the same scholastic basis as other students thereof until such a separate law school for negroes is established and ready to function, or
>
> "(2) not enroll any applicant of any group in said class until said separate school is established and ready to function.
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if such a separate law school is so established and ready to function, the defendants, Board of Regents of the University of Oklahoma, et al., be, and the same are hereby ordered and directed to

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not enroll plaintiff in the first-year class of the School of Law of the University of Oklahoma.

"The cost of this case is taxed to defendants.

"This court retains jurisdiction of this cause to hear and determine any question which may arise concerning the application of and performance of the duties prescribed by this order."

The only question before us on this petition for a writ of mandamus is whether or not our mandate has been followed. It is clear that the District Court of Cleveland County did not depart from our mandate.

The petition for certiorari in *Sipuel* v. *Board of Regents,* did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes. On submission, we were clear it was not an issue here. The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. On remand, the district court correctly understood our decision to hold that the equal protection clause permits no such defense.

Nothing which may have transpired since the orders of the Oklahoma courts were issued is in the record before us, nor could we consider it on this petition for writ of mandamus if it were. The Oklahoma District Court has retained jurisdiction to hear and determine any question arising under its order. Whether or not the order is followed or disobeyed should be determined by it in the first instance. The manner in which, or the method by which, Oklahoma may have satisfied, or could satisfy, the requirements of the mandate of this Court, as applied by the District Court of Cleveland County in its order of January 22, 1948, is not before us.

Motion for leave to file petition for writ of mandamus is denied.

MR. JUSTICE MURPHY is of the opinion that a hearing should be had in order to determine whether the action of the Oklahoma courts subsequent to the issuance of this Court's mandate constitutes an evasion of that mandate.

MR. JUSTICE RUTLEDGE, dissenting.

I am unable to join in the Court's opinion or in its disposition of the petition. In my judgment neither the action taken by the Supreme Court of Oklahoma nor that of the District Court of Cleveland County, following upon the decision and issuance of our mandate in No. 369, *Sipuel* v. *Board of Regents,* 332 U. S. 631, is consistent with our opinion in that cause or therefore with our mandate which issued forthwith.[1]

It is possible under those orders for the state's officials to dispose of petitioner's demand for a legal education equal to that afforded to white students by establishing overnight a separate law school for Negroes or to continue affording the present advantages to white students while denying them to petitioner. The latter could be done either by excluding all applicants for admission to the first-year class of the state university law school after the date of the District Court's order or, depending upon the meaning of that order, by excluding such applicants and asking all first-year students enrolled prior to that order's date to withdraw from school.

Neither of those courses, in my opinion, would comply with our mandate. It plainly meant, to me at any

[1] The mandate reversed the Oklahoma Supreme Court's judgment and remanded the cause to it "for proceedings not inconsistent with this opinion."

rate, that Oklahoma should end the discrimination practiced against petitioner at once, not at some later time, near or remote. It also meant that this should be done, if not by excluding all students, then by affording petitioner the advantages of a legal education equal to those afforded to white students. And in my comprehension the equality required was equality in fact, not in legal fiction.

Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school. Nor could the necessary time be taken to create such facilities, while continuing to deny them to petitioner, without incurring the delay which would continue the discrimination our mandate required to end at once. Neither would the state comply with it by continuing to deny the required legal education to petitioner while affording it to any other student, as it could do by excluding only students in the first-year class from the state university law school.

Since the state courts' orders allow the state authorities at their election to pursue alternative courses, some of which do not comply with our mandate, I think those orders inconsistent with it. Accordingly I dissent from the Court's opinion and decision in this case.

KING *v.* ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

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

No. 171. Argued December 10–11, 1947.—Decided March 8, 1948.

Under the Rules of Decision Act (§ 34 of the Judiciary Act of 1789, R. S. § 721, 28 U. S. C. § 725), as applied in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a federal court, in a diversity of citizenship case arising in South Carolina and turning on a question of state law on which there has been no decision by the highest court of the State, need not follow a decision on the question by a South Carolina county court of common pleas, whose decisions are not reported and, under state practice, are binding only on the parties to the particular case and do not constitute precedents in any other case in that court or in any other court of the State. Pp. 153–162.
161 F. 2d 108, affirmed.

In a diversity of citizenship case, a federal district court awarded a judgment against an insurer to the beneficiary of a life insurance policy. 65 F. Supp. 740. The Circuit Court of Appeals reversed. 161 F. 2d 108. This Court granted certiorari. 332 U. S. 754. *Affirmed,* p. 162.

Jesse W. Boyd and *Harvey W. Johnson* argued the cause and filed a brief for petitioner.

E. W. Dillon and *C. F. Haynsworth, Jr.* argued the cause for respondent. With them on the brief was *F. Dean Rainey.*

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

This is a suit to obtain payment of the proceeds of a $5,000 insurance policy. Federal jurisdiction is founded on diversity of citizenship, and, for present purposes,

South Carolina law is controlling.[1] We granted certiorari[2] in order to determine whether the Circuit Court of Appeals' refusal to follow the only South Carolina decision directly in point, the decision of a Court of Common Pleas, was consistent with the Rules of Decision Act[3] as applied in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and subsequent cases.

The petitioner, Mrs. King, is the beneficiary of the policy; her husband, Lieutenant King, was the insured; and the respondent Order of United Commercial Travelers of America is the insurer. The policy insured against King's accidental death, but contained a clause exempting the respondent from liability for "death resulting from participation . . . in aviation." It is this aviation exclusion clause which gave rise to the litigation now before us.

King lost his life one day in the winter of 1943 when a land-based Civil Air Patrol plane in which he was flight observer made an emergency landing thirty miles off the coast of North Carolina. The plane sank, but King was not seriously hurt and managed to get out of the plane and don his life jacket. He was still alive two and a half hours later, when an accompanying plane was forced to leave the scene. When picked up about four and a half hours after the landing, however, he was dead. The medical diagnosis was "Drowning as a result of exposure in the water."

The respondent took the position that death, while "accidental," resulted from "participation . . . in avia-

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[1] Both courts below so held, and until the case was briefed for this Court, neither party took issue with this holding or raised any full faith and credit question. Hence it is unnecessary for us to consider whether or not *United Commercial Travelers of America* v. *Wolfe,* 331 U. S. 586 (1947), is applicable.

[2] 332 U. S. 754.

[3] Judiciary Act of 1789, § 34, R. S. § 721, 28 U. S. C. § 725.

tion." Accordingly, it refused to pay Mrs. King the proceeds of the policy. A resident of South Carolina, she then sued the respondent in a court of that State, contending that drowning rather than the airplane flight was the cause of death within the meaning of the policy. The respondent, an Ohio corporation, exercised its statutory right to remove the cause to the Federal District Court for the Western District of South Carolina.[4]

The parties agreed that South Carolina law was controlling, but up to the time of the District Court's decision neither of them had located any decision on aviation exclusion clauses by any South Carolina court. The District Court therefore fell back on what it deemed to be general principles of South Carolina insurance law, as enunciated by the State Supreme Court: that ambiguities in an insurance contract are to be resolved in favor of the beneficiary, and that the cause of death, within the meaning of accident insurance policies, is the immediate, not the remote cause.[5] Applying these principles, the court held that King's death resulted from drowning, not from participation in aviation, and that Mrs. King was entitled to recover.[6]

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[4] 28 U. S. C. § 71.

[5] For this proposition the court cited *Goethe* v. *New York Life Ins. Co.*, 183 S. C. 199, 190 S. E. 451 (1937). In that case the insured died following vigorous efforts to put out a fire. There was disputed medical evidence as to whether the symptoms shown just before death indicated heatstroke or heart disease as the cause of death. There was no evidence that the insured suffered from heart disease before that time. The Supreme Court of South Carolina upheld a jury determination that heatstroke caused death, and then, on the most disputed point in the case, ruled that heatstroke was a "bodily injury" within the meaning of an accident insurance policy. It seems to us, as it apparently did to the Circuit Court of Appeals, questionable whether this case supports the principle for which it was cited.

[6] 65 F. Supp. 740 (1946).

Two months later, a South Carolina court, the Court of Common Pleas for Spartanburg County, likewise ruled in favor of Mrs. King in a suit against a different insurer on a $2,500 policy which contained an almost identical aviation exclusion clause. The judge followed the same reasoning as the District Court had and relied, at least in part, on that court's decision. Under South Carolina statutes the insurer in this second case had the right to appeal to the State Supreme Court,[7] but did not do so.

On appeal of the present case, the Circuit Court of Appeals reversed the District Court's judgment for Mrs. King.[8] The court acknowledged that under South Carolina law ambiguities in insurance policies are to be construed against the insurer, but it found no ambiguity in the aviation exclusion clause insofar as its application to the facts of this case was concerned. On the contrary, King's death was thought clearly to have resulted from "participation . . . in aviation." Nothing in South Carolina Supreme Court decisions, it was said, was inconsistent with this view, whereas that court's accepted theories of proximate cause in tort cases supported it.[9] Under these circumstances, the Circuit Court of Appeals expressed its disbelief that the Supreme Court of South Carolina would have ruled for Mrs. King, had her case been before it, "in the face of reason and the very considerable authority" from other jurisdictions.[10] The Common Pleas decision in Mrs. King's favor, it was thought, was not binding on the Circuit Court of Appeals

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[7] 1 S. C. Code Ann. §§ 26 and 780.

[8] 161 F. 2d 108 (1947).

[9] The court cited *Horne* v. *Atlantic Coast Line R. Co.*, 177 S. C. 461, 181 S. E. 642 (1935).

[10] Among the cases cited were *Neel* v. *Mutual Life Ins. Co. of New York*, 131 F. 2d 159 (C. C. A. 2, 1942), and *Green* v. *Mutual Benefit Life Ins. Co.*, 144 F. 2d 55 (C. C. A. 1, 1944).

as a final expression of South Carolina law since it was not binding on other South Carolina courts and since the court rendering it had relied on the District Court's ruling in the present case.

After we granted certiorari, a new factor was interjected in the case. Another South Carolina Court of Common Pleas, the one for Greenville County, handed down an opinion which, so far as relevant here, expressly rejected the reasoning of the Spartanburg Court of Common Pleas and espoused that of the Circuit Court of Appeals.

What effect, if any, we should give to this second Common Pleas decision becomes an appropriate subject for inquiry only if it is first determined that the Circuit Court of Appeals erred in not following the Spartanburg decision, which was the only one outstanding at the time of its action.[11] We therefore address ourselves first to that question.

The Rules of Decision Act [12] commands federal courts to regard as "rules of decision" the substantive "laws" of the appropriate state, except only where the Constitution, treaties, or statutes of the United States provide otherwise. And the *Erie R. Co.* case decided that "laws," in this context, include not only state statutes, but also the unwritten law of a state as pronounced by its courts.

The ideal aimed at by the Act is, of course, uniformity of decision within each state. So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit, and it is inadmissible that cases dependent on that law should be decided differently

[11] Although the decision by the Spartanburg Court of Common Pleas was rendered after the District Court decision, it was proper for the Circuit Court of Appeals to consider it. See *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538 (1941).

[12] See note 3, *supra*.

according to whether they are before federal or state courts. This is particularly true where accidental factors such as diversity of citizenship and the amount in controversy enable one of the parties to choose whether the case is tried in a federal or a state court.

Effectuation of that policy is comparatively easy when the issue confronting a federal court has previously been decided by the highest court in the appropriate state; the *Erie R. Co.* case decided that decisions and opinions of that court are binding on federal courts. The *Erie R. Co.* case left open, however, the more difficult question of the effect to be given to decisions by lower state courts on points never passed on by the highest state court.

Two years later, a series of four cases presented some aspects of that question. In three of the cases this Court held that federal courts are bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise. *Six Companies* v. *Highway District,* 311 U. S. 180 (1940); *West* v. *American T. & T. Co.,* 311 U. S. 223 (1940); and *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464 (1940).[13] In the fourth case, *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169 (1940), the Court went further and held that a federal court had to follow two decisions announced four years earlier by the New Jersey Court of Chancery, a court of original jurisdiction.

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[13] In all three cases the state supreme court had refused to review the intermediate appellate court decision; in the *West* and *Stoner* cases, the intermediate appellate court's decision had involved the same parties engaged in the subsequent case before the federal courts; and in the *Six Companies* case, the intermediate appellate court's decision had remained on the books for over twenty years without disapproval. These factors were mentioned in our opinions, but were not necessarily determinative. See *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 178 (1940).

The *Fidelity Union Trust Co.* case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions. This Court took pains to point out that the status of the New Jersey Court of Chancery was not that of the usual *nisi prius* court. It had state-wide jurisdiction. Its standing on the equity side was comparable to that of New Jersey's intermediate appellate courts on the law side. A uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state's highest court. And chancery decrees were ordinarily treated as binding in later cases in chancery.

The present case involves no attack on the policy of the Rules of Decision Act, the principle of the *Erie R. Co.* case, or the soundness of the other cases referred to above. It involves the practical administration of the Act; and the question it raises is whether, in the long run, it would promote uniformity in the application of South Carolina law if federal courts confronted with questions under that law were obliged to follow the ruling of a Court of Common Pleas.

The Courts of Common Pleas make up South Carolina's basic system of trial courts for civil actions.[14] There are fourteen judges for these courts, one for each of the judicial circuits into which the state's forty-six counties are

[14] S. C. Const., Art. 5, § 15. These courts also have limited appellate jurisdiction, varying somewhat from county to county. The Court of Common Pleas for Spartanburg County handles appeals from the county's probate court, 1 S. C. Code Ann. § 228, its court of domestic relations, 1 *id.* §§ 256–24 and 256–44, and its magistrates courts. The latter have civil jurisdiction concurrent with the courts of Common Pleas only in suits involving less than $100, 1 *id.* § 257.

The county court for Spartanburg County has concurrent jurisdiction in civil suits involving less than $3,000, but appeal from its decisions is directly to the Supreme Court of South Carolina, 1 *id.* §§ 184 and 190.

grouped.[15] A circuit judge hears civil cases at specified times in each county comprising the circuit to which he is then assigned, and at such times his court is called the Court of Common Pleas for that particular county.[16] In addition, he presides over a parallel set of criminal courts, the Courts of General Sessions. South Carolina has no tier of intermediate appellate courts, and appeal from Common Pleas decisions is directly, and as a matter of right, to the State Supreme Court.[17]

While the Courts of Common Pleas are denominated courts of record, their decisions are not published or digested in any form whatsoever. They are filed only in the counties in which the cases are tried, and even there the sole index is by the parties' names.[18] Perhaps because these facts preclude ready availability to bench and bar, the Common Pleas decisions seem to be accorded little weight as precedents in South Carolina's own courts. In this connection, respondent has submitted a certificate from the Chief Justice of the Supreme Court of South Carolina to the effect that "under the practice in this State an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina."

Consideration of these facts leads us to the conclusion that the Circuit Court of Appeals did not commit error. While that court properly attributed some weight to the

[15] S. C. Const., Art. 5, § 13; 1 S. C. Code Ann. § 50. There is provision for periodic interchange of judges among the circuits. 1 S. C. Code Ann. § 22.

[16] S. C. Const., Art. 5, § 16; 1 S. C. Code Ann. §§ 51–64.

[17] See note 7 *supra*.

[18] S. C. Circuit Court Rule 39. There is a Clerk of the Court of Common Pleas for each county. S. C. Const., Art. 5, § 27.

Spartanburg Common Pleas decision, we believe that it was justified in holding the decision not controlling and in proceeding to make its own determination of what the Supreme Court of South Carolina would probably rule in a similar case.

In the first place, a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's "law." In future cases between different parties, as indicated above, a Common Pleas decision does not exact conformity from either the same court or lesser courts [19] within its territorial jurisdiction; and it may apparently be ignored by other Courts of Common Pleas without the compunctions which courts often experience in reaching results divergent from those reached by another court of coordinate jurisdiction. Thus a Common Pleas decision does not, so far as we have been informed, of itself evidence one of the "rules of decision commonly accepted and acted upon by the bar and inferior courts." [20] Furthermore, as we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, "in effect, only another court of the State"; [21] it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal

[19] *I. e.*, county courts, magistrates courts, probate courts, and courts of domestic relations. See note 14 *supra*.

[20] *West* v. *American T. & T. Co.*, 311 U. S. 223, 236 (1940).

[21] *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108 (1945).

courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.[22]

In affirming the decision below, we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County. We do not purport to determine the correctness of its ruling on the merits. Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the *Fidelity Union Trust Co.* case, other situations in other states may well call for a different result.

It may also be well to add that, even if the Circuit Court of Appeals had been in error at the time of its decision, reversal of its judgment would not necessarily be appropriate in view of the second Common Pleas decision.[23] But we prefer to regard that second decision as an illustration of the perils of interpreting a Common Pleas decision as a definitive expression of "South Carolina law," not as a controlling factor in our decision.

Affirmed.

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[22] In the present case, the Spartanburg decision came to light because petitioner had been a party to it, the Greenville decision because respondent's counsel had been a party to it.

[23] See *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538 (1941).

Syllabus.

SUTTLE, ADMINISTRATRIX, *v.* REICH BROS. CONSTRUCTION CO. ET AL.

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

No. 214. Argued December 18, 1947.—Decided March 8, 1948.

A resident and citizen of Mississippi brought an action based on diversity of citizenship in the Federal District Court for the Eastern District of Louisiana against a partnership and its individual members who were residents of the Western District of Louisiana and a Texas corporation which had qualified to do business in Louisiana and made itself amenable to suit in the federal courts for either the Eastern or Western District of that State. *Held:* The venue was improper as to the partnership and its individual members and the suit was properly dismissed as to them, since none of the parties was a resident of the Eastern District of Louisiana within the meaning of §§ 51 and 52 of the Judicial Code. Pp. 164–169.

(a) The "residence" of a corporation, within the meaning of the venue statutes, is only in the state and district in which it was incorporated. Pp. 166–168.

(b) While, concededly, the Texas corporation had made itself amenable to suit in the federal courts of either district in Louisiana by qualifying to do business in that State, such action on the part of the corporation did not constitute a waiver by the partnership and its individual members of the privileges conferred upon them by the venue statutes. P. 168.

161 F. 2d 289, affirmed.

The District Court for the Eastern District of Louisiana dismissed as to respondents (residents of the Western District), on the ground of improper venue, a suit brought against them and a foreign corporation by a resident of Mississippi. The Circuit Court of Appeals affirmed. 161 F. 2d 289. This Court granted certiorari. 332 U. S. 755. *Affirmed,* p. 169.

Charles F. Engle and *John D. Miller* argued the cause and filed a brief for petitioner.

George T. Owen, Jr. argued the cause and filed a brief for respondents.

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

We granted certiorari in this case to consider a question arising under the federal venue statutes. Petitioner, a resident and citizen of the State of Mississippi, brought a negligence action based on diversity of citizenship in the District Court for the Eastern District of Louisiana. The defendants in that suit were the respondents Reich Bros. Construction Company, a partnership, and its individual members, residents of the Western District of Louisiana, and Highway Insurance Underwriters, a Texas corporation which had qualified to do business in Louisiana pursuant to a statute of that State.

Section 51 of the Judicial Code provides that ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." [1] This general provision is qualified by § 52 of the Judicial Code, which states that ". . . if there are two or more defendants, residing in different districts of the State, . . . [suit] may be brought in either district, . . ." [2]

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[1] Act of March 3, 1887, 24 Stat. 552, as corrected by Act of August 13, 1888, 25 Stat. 433, 28 U. S. C. § 112.

[2] R. S. § 740, 36 Stat. 1101, 28 U. S. C. § 113. The section in its entirety follows: "When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall endorse

It is conceded by the parties that the Texas corporation, Highway Insurance, having qualified to do business in Louisiana is amenable to suit in the federal courts for either the Eastern or Western District of that State.[3] The critical issue of the case is whether Highway Insurance may be regarded as a "resident" of the Eastern District of Louisiana within the meaning of § 52 of the Judicial Code, so that respondents Reich Bros. Construction Company and its individual members may properly be sued as co-defendants of the corporation in the Eastern District of Louisiana, despite the fact that respondents are residents of the Western District of that State.

The respondents moved to dismiss the action on the ground of improper venue. The District Court granted the motion, and the suit was dismissed as to respondents, leaving the action pending against the corporation. The Circuit Court of Appeals affirmed.[4]

The issue we are called upon to resolve is a narrow one. We are not confronted with the abstract question whether, under any circumstances or for any purposes, a foreign corporation may properly be regarded as acquiring "residence" in a State other than that in which it was incorporated. Nor is our problem that of discovering whether, under state law, a qualified foreign corporation is treated as a "resident" of the State in

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thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."

[3] See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4 (1940).

[4] 161 F. 2d 289 (1947).

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which it is doing business.[5] The sole issue of this case relates to the construction of the term "residence," appearing in the particular federal venue statutes under consideration, as it applies to a foreign corporation.

The "residence" of a corporation, within the meaning of these statutes has frequently been the subject of consideration by this Court for a period of over half a century. Shortly after Congress had enacted § 51 of the Judicial Code in substantially its present form, this Court declared that the "residence" of a corporation, within the meaning of the venue statutes, is only in "the State and district in which it has been incorporated."[6] Thus, in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 450 (1892), it was said: "This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicil, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it."

For almost sixty years, in an unbroken line of decisions, this Court has applied the same construction.[7] That view

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[5] See *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 443–444 (1946); *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175 (1939); *Ex parte Schollenberger*, 96 U. S. 369, 377 (1878).

[6] *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449 (1892).

[7] *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 205 (1892); *In re Keasbey and Mattison Co.*, 160 U. S. 221, 229 (1895); *Macon Grocery Co.* v. *Atlantic Coast Line R. Co.*, 215 U. S. 501, 509 (1910); *Ladew* v. *Tennessee Copper Co.*, 218 U. S. 357, 367 (1910); *Male* v. *Atchison, Topeka & Santa Fe R. Co.*, 240 U. S. 97, 102 (1916); *General Investment Co.* v. *Lake Shore & Michigan Southern R. Co.*, 260 U. S. 261, 274–279 (1922); *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 270 U. S. 363, 366 (1926); *Luckett* v. *Delpark, Inc.*, 270 U. S. 496, 499 (1926); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U. S. 208, 211 (1927). And see *In re Hohorst*, 150 U. S. 653, 662 (1893); *Galveston, Harrisburg and San Antonio R. Co.* v. *Gonzales*, 151 U. S. 496, 503–504, 506 (1894).

was reaffirmed as recently as 1946 in the opinion of the Court in *Mississippi Publishing Corp.* v. *Murphree,* 326 U. S. 438, 441.[8]

Congress has revealed a similar understanding of the term "residence" when enacting special venue statutes in situations in which it was intended that, at the election of the plaintiff, a corporation should become amenable to suit either in the State of incorporation or in States in which it is carrying on corporate activities. In those statutes, Congress has provided that the venue of such suits should be located not only in the district in which the corporation is a "resident" or an "inhabitant," but also in districts in which it may be "found," "transacts business," or has an agent to receive service of process.[9]

Nor does the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U. S. 165 (1939), require that the term "residence" be construed differently. In that case, the plaintiffs, citizens and residents of New Jersey, brought suit based on diversity of citizenship against the defendant, a Delaware corporation, in the Southern District of New York. This Court held that the venue requirements in the federal courts may be waived and that the defendant, since it had appointed an agent to receive service of process in New York pursuant to

[8] Section 52 of the Judicial Code qualifies or provides an exception to the general provisions of § 51. There would be no basis for the suggestion that Congress intended to attribute a meaning to the term "residence" in § 51 different from that in § 52.

[9] See, *e. g.,* § 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22: "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." See also § 48 of the Judicial Code, 29 Stat. 695, 28 U. S. C. § 109; § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15; 36 Stat. 291, 45 U. S. C. § 56.

a statute of that State, might not insist upon suit being brought in Delaware, the State of its incorporation, or in New Jersey, the State in which plaintiffs resided. But this Court did not hold that in losing the privilege of insisting upon suit in districts specified in § 51 of the Judicial Code, the defendant corporation thereby acquired "residence" in New York, within the meaning of the venue statutes. Indeed, the Court specifically stated that the suit "was not brought 'in the district of the residence of either the plaintiff or the defendant.' " [10]

For the reasons stated, we hold that the Highway Insurance Underwriters, a Texas corporation and respondents' co-defendant, is not a resident of the Eastern District of Louisiana in which suit was brought, within the meaning of § 52 of the Judicial Code. While, concededly, the Texas corporation has made itself amenable to suit in the federal courts of either district in Louisiana by qualifying to do business in that State, such action on the part of the corporation may in no way be regarded as a waiver by respondents of the privileges conferred upon them by the venue statutes. Section 51 in general terms provides that a diversity suit of the sort involved here must be brought either in the district in which the plaintiff resides or in which the defendant resides. This suit, brought in the Eastern District of Louisiana, satisfies neither requirement. Respondents' privilege conferred by § 51 can be defeated either by waiver on the part of respondents or, as provided in § 52, by petitioner bringing suit against respondents and others in a district in Louisiana in which one of the co-defendants has acquired residence but in which respondents do not reside. Neither circumstance is present here. Respondents made timely assertion of their privilege and

[10] *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167 (1939).

may not be deemed to have waived their venue objections. As we have held, their co-defendant, Highway Insurance Underwriters, may not be regarded as a resident of the Eastern District of Louisiana in which suit was brought. It follows, therefore, that respondents' objections to venue were well taken, and that, in sustaining those objections, the District Court and the Circuit Court of Appeals reached a result in accord with the requirements of the federal venue statutes as consistently construed by this Court. If those requirements are to be altered, it is a task which must be undertaken by Congress.

Affirmed.

UNITED STATES ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

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

No. 223. Argued February 3–4, 1948.—Decided March 8, 1948.

1. The Interstate Commerce Commission has power under the Interstate Commerce Act to order a railroad to make deliveries of interstate carload shipments of livestock without discrimination to a shipper on the shipper's private sidetrack, even though compliance with that order will require the railroad to use an intermediate segment of track maintained and operated by the railroad but owned by and leased from a competing shipper whose lease to the railroad precludes use of such track for the purpose of making such deliveries to its competitors. Pp. 175–178.

(a) The definitions contained in §§ 1 (1) (a) and 1 (3) (a) of the Interstate Commerce Act make all trackage "in use by any common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier but only used by it under a lease. P. 176.

(b) The command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination. P. 177.

2. It does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of shippers. P. 177.
3. Under § 2 of the Elkins Act, the Commission was justified in including, in an order against certain railroads to cease discriminatory practices, a non-carrier owner of a segment of track who required such discriminatory practices pursuant to the contract leasing such track to one of the railroads. P. 171, n. 2.

71 F. Supp. 499, reversed.

The Interstate Commerce Commission issued a cease and desist order requiring certain interstate railroads and the owner of a segment of railroad track leased to one of the railroads to desist from certain discriminatory practices in connection with interstate shipments. 266 I. C. C. 55. A federal district court enjoined enforcement of the order. 71 F. Supp. 499. On appeal to this Court, *reversed*, p. 178.

Frederick Bernays Wiener argued the cause for the United States and the Interstate Commerce Commission, appellants. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Edward Dumbauld, Daniel W. Knowlton* and *Edward M. Reidy.*

William N. Strack and *John P. Staley* submitted on brief for Swift & Co., appellant.

Robert R. Pierce argued the cause for the Baltimore & Ohio Railroad Co. et al., appellees. With him on the brief were *Harold H. McLean, Leo P. Day, George H. P. Lacey, Willis T. Pierson, John A. Duncan* and *Francis R. Cross.*

Ashley Sellers argued the cause for the Cleveland Union Stock Yards Co., appellee. With him on the brief were *Matthew S. Farmer* and *Carl McFarland.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case is properly here on appeal, 28 U. S. C. § 345, from a district court decree enjoining enforcement of a cease and desist order of the Interstate Commerce Commission. 71 F. Supp. 499. The order enjoined required the five railroad appellees [1] to abstain from refusing to deliver interstate shipments of livestock to the sidetrack of Swift & Company's packing plant at Cleveland, Ohio, and to establish tariffs for such deliveries. Swift's sidetrack has only one connection with a railroad. That connection is with the main line of the New York Central by way of a spur track, known as "Spur No. 245," operated by that railroad. One end of this spur owned by the New York Central connects with its main line; the other end of the spur, also owned by the railroad, connects with Swift's sidetrack and with other private sidetracks. A 1619-foot middle segment of the spur, known as "Track 1619," is owned by the Cleveland Union Stock Yards Company. Under the terms of a trackage agreement with Stock Yards, New York Central uses Track 1619 for deliveries to Swift's sidetrack and other private sidetracks connected with Spur No. 245. Thus all interstate railroad shipments to Swift's siding and to others similarly located can be made only over the segment of track owned by Stock Yards. Because of its interest in Track 1619, Stock Yards was made a party to the proceedings before the Commission and was included in its cease and desist order along with the railroads.[2]

[1] The railroad appellees are Baltimore & Ohio Railroad Company, the Erie Railroad Company, the Wheeling & Lake Erie Railroad Company, the New York Central Railroad Company, and the Pennsylvania Railroad Company.

[2] Appellees argue that Stock Yards was improperly made a party and that the Commission was without power to include Stock Yards in its cease and desist order. We think § 2 of the Elkins Act, 32

So long as Stock Yards continues to own Track 1619, delivery of livestock and other freight by New York Central to Swift and others similarly located depends upon whether and to what extent Stock Yards will grant or has granted New York Central a right to operate over Track 1619. This present case involves the question of whether the railroads, and particularly New York Central, in making deliveries of livestock over Track 1619 to Swift's sidetrack must comply with certain conditions imposed by Stock Yards in its present agreement with New York Central.

Track 1619 was constructed in 1899 on Stock Yards' property by Stock Yards and New York Central's predecessor in interest. A contemporaneous written agreement, cancellable on 60-days' written notice by the railroad, gave the railroad a right to use the track for railroad purposes, provided the use did not interfere with Stock Yards' business. In 1910, after negotiations with the railroad, Swift built its sidetrack, and the railroad extended its Spur No. 245 by a track which connected Track 1619 with Swift's siding. The 1899 written trackage agreement was superseded by another in 1924. This one was cancellable by either party on 30-days' written notice. It provided that the railroad should maintain the tracks at its own expense, and it granted to the railroad "the free and uninterrupted use of any and all tracks or portions thereof belonging to the Industry and located on its land." From 1910, when Swift's siding was constructed,

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Stat. 848, 49 U. S. C. § 42, justified the Commission's action and find no merit to the contention that we should by interpretation restrict that section's broad language authorizing inclusion as parties of "all persons interested in or affected by the rate, regulation, or practice under consideration" by the Commission or by a court, and which provides that decrees may be made with reference to such additional parties to the same extent as though they were carriers.

to 1924, and for many years thereafter, the railroad continued to deliver all kinds of commodities to Swift and to other packers likewise served only by way of Spur No. 245 and Track 1619.

In the early 1930's Stock Yards concluded that it was losing patronage and fees because of delivery of livestock to Swift at its siding. A large part of Stock Yards' income comes from fees it charges for unloading and delivering interstate shipments of livestock to pens within its yard. Stock carried over Track 1619 to Swift's siding and to other private sidings are unloaded at those sidings; as a result Stock Yards loses the fees it would receive if livestock consigned to Swift and to other packers were unloaded at the Stock Yards. With a view toward collecting unloading fees from Swift and other packers served by Spur No. 245, Stock Yards instituted negotiations with the New York Central which in 1935 resulted in a modification of their 1924 agreement. The old 1924 agreement had unconditionally granted "Railroad, (a) the free and uninterrupted use of any and all tracks . . . ." The 1935 modified agreement also granted New York Central "the free and uninterrupted use" of Stock Yards' tracks, but added "except for competitive traffic a charge for which use shall be the subject of a separate agreement."

After this 1935 restrictive modification Stock Yards demanded that the railroad adopt one of two courses with regard to livestock, which the parties agreed was the "competitive traffic" the modified agreement was designed to suppress. The railroad must either stop carrying livestock over Track 1619 to Swift and other packers or pay Stock Yards, for use of Track 1619 in carrying livestock to these packers, an amount equivalent to fees Stock Yards would have collected had the livestock consigned to them been unloaded and delivered in the yard. This amount was considered exorbitant by New York Central and the

other railroads for whom New York Central performed switching charges, and they therefore refused to pay it. The result was that in 1938 the railroads ceased delivering livestock to the sidings of Swift and other packers served by Spur No. 245,[3] although they have under agreement with Stock Yards continued to use the spur for delivery of all other kinds of commodity shipments to these sidings. Swift demanded that the railroads deliver livestock to its siding, and in 1941 filed a complaint with the Interstate Commerce Commission upon their refusal to make deliveries.

After notice and hearing the Commission concluded that the railroad's refusal to carry livestock to Swift violated several provisions of the Interstate Commerce Act. It was found to violate § 3 (1) because of the discrimination against a single commodity, livestock, and because New York Central's deliveries of livestock to the sidetracks of some of Swift's nearby competitors, whose sidings were served without using Track 1619, subjected Swift to undue prejudice and gave those competitors an undue preference. The Commission also found that the failure to deliver under the circumstances shown was a violation of § 1 (6) which forbids unreasonable practices affecting the manner and method of delivering freight, and also a violation of § 1 (9) which requires railroads to operate switch connections with private side tracks

[3] In 1938 New York Central ceased to switch livestock carloads of other carriers over Spur No. 245 to Swift's siding, and it canceled its tariffs for this service. Since that time there has been no specific tariff authority for movement of livestock to Swift's siding when shipped to Cleveland over lines other than the New York Central. Although New York Central has never canceled its tariff for livestock shipments to Swift's Cleveland siding from points of origin on its own lines, it has delivered all livestock consigned to Swift's siding to Stock Yards since 1938. Swift has been forced to pay charges to Stock Yards to obtain possession of livestock unloaded at the yards.

without discrimination under such conditions as the Commission found to exist here.

The Commission's findings of fact are not challenged. There can be no doubt that those facts found would constitute a violation of the sections referred to if Spur No. 245 were wholly owned by the railroad. Ownership of Track 1619 by Stock Yards and its objection to livestock deliveries is, in fact, the only reason suggested for the railroads' failure to deliver shipments of livestock to Swift as they do to neighboring packers, and for their failure to provide switching connections for livestock shipments. From what has been said our question is this: Can the noncarrier owner of a segment of railroad track who contracts for an interstate railroad's use of the segment as part of its line reserve a right to regulate the type of commodities that the railroad may transport over the segment, or would such a reservation be invalid under the Interstate Commerce Act?

The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, *New York* v. *United States,* 331 U. S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 616. It would be strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts, even though the contracts were executed before enactment of the legislation. See *Philadelphia, Balt. & Wash. R. Co.* v. *Schubert,* 224 U. S. 603, 613–614; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 483, 485–86.

We think the provisions of the Interstate Commerce Act plainly empowered the Commission to enter this order against the discriminatory practices found, despite ownership of Track 1619 by Stock Yards. Section 1 (1) (a) makes the Interstate Commerce Act applicable to common carriers "wholly by railroad." Section 1 (3) (a) defines the term "railroad" as including "all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks . . . ." As one of the many other indications that Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instrumentalities, § 1 (3) (a) also provides that the word "transportation" as used in the Act shall broadly include "locomotives . . . and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof . . . ." It is true, as appellees argue, that the above language of § 1 (3) (a) is definitional only. *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434. But it is also true that these definitions by their unambiguous language make all trackage "in use by any common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier but only used by it under a contract or agreement. Thus Track 1619, though owned by Stock Yards, was subject to the Act because of its use by the New York Central under trackage agreements.

It is just as prejudicial to shippers and the public for a railroad that uses a portion of track under lease or contract to discriminate as it is for the discrimination to be inflicted by a railroad that owns its entire track. Practically the only argument suggested to justify discriminatory practices under the circumstances here is that an owner has a right to let others use his land subject

to whatsoever conditions the owner chooses to impose. It is even argued that to construe the Interstate Commerce Act as limiting that right would result in depriving an owner of his property without due process of law. But no such broad generalization can be accepted. Property can be used even by its owner only in accordance with law, and conditions its owner places on its use by another are subject to like limitations. Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.

Here Congress under its constitutional authority has provided that no railroad shall engage in certain types of discriminatory conduct in violation of three provisions of the Act. The Commission found that discriminatory conduct here. The excuse offered by the railroads is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination.

We hold that the Commission's order was authorized by statute and that it does not deprive Stock Yards of its property without due process of law. In doing so we do not pass upon any questions in relation to the dedication of Track 1619 to railroad use. Neither do we decide what are the relative financial rights of Stock Yards and New York Central under their contracts, nor whether Stock Yards can cancel the contract with New York Central, nor what would be the duty of New York Central should Stock Yards attempt to terminate its right to use Track 1619. We only hold that Stock Yards' ownership of Track 1619 does not vest it with power to compel

the railroads to operate in a way which violates the Interstate Commerce Act.

The Commission's order is valid and should be enforced.

Reversed.

MR. JUSTICE BURTON, dissenting.

For the reasons stated in the opinion of the District Court in this case, 71 F. Supp. 499, I believe that the order of the Interstate Commerce Commission exceeded its jurisdiction and that the judgment permanently enjoining the enforcement of such order should have been affirmed.

DONALDSON, POSTMASTER GENERAL, *v.* READ MAGAZINE, INC. ET AL.

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

No. 50. Argued October 24, 1947. Reargued January 5, 1948.—Decided March 8, 1948.

1. Where the Postmaster General has issued a fraud order under 39 U. S. C. §§ 259, 732, and later concludes that it is broader than necessary to protect the public, he has power to modify the order so as to make it less inclusive—even though there be pending in this Court at the time a review of a judgment of a federal court of appeals affirming a judgment of a district court enjoining enforcement of the order. Pp. 183–185.
2. The evidence in this case was sufficient to support the finding of the Postmaster General that respondents' advertisements of a so-called "puzzle contest" had been deliberately contrived to divert readers' attention from material but adroitly obscured facts and that respondents were conducting a scheme to obtain money through the mails by means of false and fraudulent representations in violation of 39 U. S. C. §§ 259, 732. Pp. 185–189.
3. The fraud order statutes, 39 U. S. C. §§ 259, 732, as interpreted and applied by the Postmaster General in this case, are constitutional. *Public Clearing House* v. *Coyne,* 194 U. S. 497. Pp. 189–192.

81 U. S. App. D. C. 339, 158 F. 2d 542, reversed.

The District Court enjoined enforcement of a fraud order issued by the Postmaster General under 39 U. S. C. §§ 259, 732. 63 F. Supp. 318. The Court of Appeals affirmed. 81 U. S. App. D. C. 339, 158 F. 2d 542. This Court granted certiorari, 331 U. S. 798, and substituted Donaldson for Hannegan as petitioner. 332 U. S. 840. *Reversed and remanded to the District Court,* p. 192.

Robert L. Stern argued the cause for petitioner. With him on the briefs were *Solicitor General Perlman* and *Paul A. Sweeney,* and with them was *Assistant Attorney General Ford* on the original argument and *H. Graham Morison, Melvin Richter* and *Alvin O. West* on the reargument.

John W. Burke, Jr. argued the cause and filed the briefs for respondents. With him on the brief on the reargument was *Mac Asbill.*

Mr. Justice Black delivered the opinion of the Court.

This case presents questions as to the validity of an order issued by petitioner, the Postmaster General, which directed that mail addressed to some of respondents be returned to the senders marked "Fraudulent," and that postal money order sums payable to their order be returned to the remitters.

The respondent Publishers Service Company has conducted many contests to promote the circulation of newspapers in which it has advertised that prizes would be given for the solution of puzzles. Through its corporate subsidiaries, respondents Literary Classics, Inc., and Read Magazine, Inc., it publishes books and two monthly magazines called *Read* and *Facts.* The place of business is in New York City.

In 1945 respondents to promote sales of their books put on a nationally advertised project, known as the Facts Magazine Hall of Fame Puzzle Contest. The

Postmaster General after a hearing found "upon evidence satisfactory to him" that the "puzzle contest" was "a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code . . . ." Specifically, the Postmaster General found that the representations were false and fraudulent for two principal reasons. First, that prospective contestants were falsely led to believe that they might be eligible to win prizes upon payment of $3 as a maximum sum when in reality the minimum requirement was $9, and as it later developed they were finally called on to pay as much as $42 to be eligible for increased prize offers. Second, the Postmaster General found that though the contest was emphasized in advertisements as a "puzzle contest" it was not a puzzle contest; that respondents knew from experience that the puzzles were so easy that many people would solve all the "puzzles" and that prizes would be awarded only as a result of a tie-breaking letter-essay contest; and that contestants were deliberately misled concerning all these facts by artfully composed advertisements.

The contest was under the immediate supervision of respondents Henry Walsh Lee and Judith S. Johnson, editor-in-chief and "contest editor" respectively of *Facts*. The Postmaster General's original fraud order related to mail and money orders directed to

> "Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor; Facts Magazine; and Henry Walsh Lee, Editor in Chief, Facts Magazine, and their officers and agents as such, at New York, New York."

Respondents filed a complaint in the United States District Court for the District of Columbia to enjoin enforcement of the order. They alleged its invalidity on

the grounds that there was no substantial evidence to support the Postmaster General's findings of fraud, and that the statutory provisions under which the order was issued authorize the Postmaster General to act as a censor and hence violate the First Amendment. The District Court issued a temporary restraining order but directed that pending further orders respondents should deposit in court all moneys and the proceeds of all checks and money orders received through the mails as qualifying fees for the Hall of Fame Puzzle Contest. After a hearing the respondents' motion for summary judgment was granted on the ground that the findings were not supported by substantial evidence. 63 F. Supp. 318. The United States Court of Appeals for the District of Columbia affirmed on the same ground, one judge dissenting. 158 F. 2d 542. We granted certiorari.

The case has been twice argued in this Court. Briefs of both parties on the first argument dealt only with the question of whether the Postmaster General's findings of fraud were supported by substantial evidence. But assuming validity of the findings, questions arose during the first oral argument concerning the scope of the fraud order. That order had included a direction to the New York postmaster to refuse to deliver any mail or to pay any money orders to *Facts,* its officers and agents, including its editor-in-chief, who was also editor of *Read.* The two monthly magazines, both published in New York, had an aggregate circulation of nearly five hundred thousand copies. We were told the total deprivation of the right of *Facts* and of the editor of the two magazines to receive mail and to cash money orders would practically put both magazines out of business. See *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407. Furthermore, the order was of indefinite duration and *Facts* and its affiliates have made a business of conducting contests to promote the circulation of books

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and magazines. The order, if indefinitely enforced, might have resulted in barring delivery of mail and payment of money orders in relation to other non-fraudulent contests as well as legitimate magazine business. All of the foregoing raised questions about the validity and scope of the original order, if unmodified, which we deemed of sufficient importance to justify further argument. For that reason we set the case down for reargument, requesting parties to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it from statutory or constitutional objections.[1]

Thereafter, and before reargument, the Postmaster General revoked the order insofar as it applied to *Facts* magazine, its editor-in-chief, and its officers and agents.

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[1] "This case is ordered restored to the docket for reargument. On reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings. They are requested to discuss the following:

"1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its editor-in-chief? If so,

"(a) Is the order within the Postmaster General's authority under 39 U. S. C. Secs. 259, 732?

"(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

"2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so,

"(a) Is the order within the Postmaster General's statutory authority?

"(b) If so, are these code provisions in conflict with the Constitution of the United States?

"3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?"

As modified, the order bars delivery of mail and payment of money orders only to addressees designated in the contest advertisements:

> "Puzzle Contest, Facts Magazine; Contest Editor, Facts Magazine; Judith S. Johnson, Contest Editor; Miss J. S. Johnson, Contest Editor; Contest Editor."

The Postmaster General, so we are informed, does not construe the modified order as forbidding delivery of mail or payment of money orders to *Facts* magazine or even to Miss Judith (J. S.) Johnson, individually. So construed, the order is narrowly restricted to mail and money orders sent in relation to the Hall of Fame Puzzle Contest found fraudulent, and would not bar deliveries to the magazines, to their editor, or to the three corporate respondents. It would bar deliveries to Judith (J. S.) Johnson, only if sent to her at the designated address and in her capacity as "Contest Editor." Likewise the District Court's order impounding funds is limited to qualifying fees received in the Hall of Fame Puzzle Contest. If the Postmaster General's action in modifying the order is valid, the questions we asked to have argued have largely been eliminated from the original order.

Respondents' contentions now are: (1) The Postmaster General lacked power to modify his original fraud order, and hence that order remains subject to any and all of its original infirmities. (2) The findings on which the order is based are not supported by substantial evidence. (3) The statutes under which the order was issued violate various constitutional provisions.

First. Respondents' contention that the Postmaster General was without power to modify the order by elimination of *Facts* magazine, its editor, and its officers and agents is based almost entirely on their two other grounds for asserting invalidity of the order. Of course, if the order were wholly invalid as to all of the respondents for these reasons, it could not have been validated

merely by eliminating some of them from its terms. But laying aside respondents' other contentions for the moment, we have no doubt as to the Postmaster General's authority to modify the fraud order.

Having concluded that the original order was broader than necessary to reach the fraud proved, the Postmaster General not only possessed the power but he had the duty to reduce its scope to what was essential for that purpose. The purpose of mail fraud orders is not punishment, but prevention of future injury to the public by denying the use of the mails to aid a fraudulent scheme. See *Comm'r* v. *Heininger,* 320 U. S. 467, 474. Such orders if too broad could work great hardships and inflict unnecessary injuries upon innocent persons and businesses. No persuasive reason has been suggested why the Postmaster General should be without power to modify an order of this kind. Such an order is similar to an equitable injunction to restrain future conduct, and like such an injunction should be subject to modification whenever it appears that one or more of the restraints imposed are no longer needed to protect the public. *United States* v. *Swift & Co.,* 286 U. S. 106, 114; see *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 570.

Furthermore, the modification here involved was for respondents' benefit; it gave them a part of the very relief for which they prayed. It removed the ban against delivery of mail and payment of money orders to their magazine, its editor and its agents—a ban which we were told would have done them irreparable injury if left in effect. The possibility that another order might be entered against the eliminated respondents is too remote to require us to consider the original order as though the modification had never been made. See *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 475–476.

Nor does the modification subject respondents to any disadvantage in this case in reference to the impounded funds. Those funds are sums sent in as qualifying fees for the scheme found fraudulent. They are in court custody because of the court's restraining order; but for it they would have been returned to the senders as ordered by the Postmaster General. Now, as before the fraud order was modified, their disposition is dependent entirely upon the validity of the finding of fraud. Respondents could thus claim the funds only by asserting a right growing out of the scheme found fraudulent. The court having lawful command of such funds must allocate them to the remitters if the order is valid. See *Inland Steel Co.* v. *United States,* 306 U. S. 153, 156–158; *United States* v. *Morgan,* 307 U. S. 183, 194–195.

Second. Respondents contend that there was no substantial evidence to support the Postmaster General's findings that they had represented that prizes could be won (1) on payment of only three dollars as contest fees or (2) by the mere solution of puzzles. They say that the very advertisements and circular letters to contestants from which these inferences were drawn by the Postmaster General contained language which showed that the first $3 series of puzzles might result in ties, making necessary a second and maybe a third $3 puzzle series, and that if these three efforts failed to determine the prize winners, they would then be selected on the basis of competitive letters, written by the tied contestants on the subject "The Puzzle I Found Most Interesting and Educational in This Contest."

There were sentences in the respondents' advertisements and communications which, standing alone, would have conveyed to a careful reader information as to the nine-dollar fees and the letter-essay feature of the contest. Had these sentences stood alone, doubtless the

fraud findings of the Postmaster General would not have been justified. But they did not stand alone. They were but small and inconspicuous portions of lengthy descriptions used by respondents to present their contest to the public in their advertisements and letters. In reviewing fraud findings of the Postmaster General, neither this Court nor any other is authorized to pick out parts of the advertisements on which respondents particularly rely, decide that these excerpts would have supported different findings, and set aside his order for that reason. We consider all the contents of the advertisements and letters, and all of the evidence, not to resolve contradictory inferences, but only to determine if there was evidence to support the Postmaster General's findings of fraud. *Leach* v. *Carlile,* 258 U. S. 138, 140.

Respondents' advertisements were long; their form letters to contestants discussing the contest, its terms, and its promises were even longer than the advertisements. Paradoxically, the advertisements constituted at the same time models of clarity and of obscurity—clarity in referring to prizes and to a "puzzle contest," obscurity in referring to a remote possibility of a letter-essay contest. In bold type, almost an inch high, their advertisements referred to "$10,000 FIRST PRIZE PUZZLE CONTEST." Time after time they used the words "puzzle" and "puzzle contest." Conspicuous pictures of sample "puzzles" covered a large part of a page. Rebus "puzzles" Nos. 1 to 4 of the contest were there. An explanation of what each represented appeared above it. The first, it was explained, represented "the inventor of the phonograph and electric light," the second "a Republican President who became Chief Justice of the Supreme Court." The last two contained equally helpful clues to the "puzzles." The advertisements left no doubt that the contest presented an opportunity to win large prizes in connection

with solution of puzzles, which puzzles, to say the least, would not be too taxing on the imagination.

Readers who might have felt some reluctance about paying their money to enter an essay contest were not so impressively and conspicuously informed about that prospect; here the advertisement became a model of obscurity. In the lower left corner of one of the advertising pages appeared the "Official Rules of the Contest," to which rules references were carefully placed in various parts of the advertisement, and which were printed, as the District Court's opinion observed, "in small type." There were ten rules. About the middle of Rule 9 appeared the only reference to the possible need for letters as a means of breaking ties. And it is impossible to say that the Postmaster General drew an unreasonable inference in concluding that competitive letter-writing thus obscurely referred to was mentioned only as a remote and unexpected contingency. The same kind of obscurity and doubt occurs in reference to the cost of the contest. The District Court in an opinion holding that the Postmaster General's findings were not supported by the evidence had this to say about one advertisement which was widely used:

> "Indeed, the advertisement is by no means a model of clarity and lucidity. It is diffuse and prolix, and at times somewhat obscure. Many of its salient provisions are printed in rather small type. An intensive and concentrated reading of the entire text is indispensable in order to arrive at an understanding of the entire scheme. Nevertheless, a close analysis of this material discloses the complete plan. Nothing is omitted, concealed or misrepresented. There is no deception. The well-founded criticisms of the plaintiffs' literature are a far cry from justifying a conclusion that the announcement was a fraud on

> the public. . . . The conclusion is inevitable that there is no evidence to support the finding of fact on which the fraud order is based and that, therefore, the plaintiff is entitled to a permanent injunction against the enforcement of the order."

We agree with the District Court that many people are intellectually capable of discovering the cost and nature of this contest by "intensive and concentrated reading" and by close analysis of these advertisements. Nevertheless, we believe that the Postmaster General could reasonably have concluded, as he did, that the advertisements and other writings had been artfully contrived and composed in such manner that they would confuse readers, distract their attention from the fact that the scheme was in reality an essay contest, and mislead them into thinking that they were entering a "rebus puzzle" contest, in which prizes could be won by an expenditure of not more than $3. That respondents' past experience in similar contests enabled them to know at the beginning that essay writing, not puzzle solutions, would determine prize winners is hardly controvertible on this record. That experience was borne out in this contest by the fact that of the 90,000 contestants who submitted answers to the first series of 80 puzzles, 35,000 solved all of them, and of that number 27,000 had completed the first set of "tie-breaking puzzles" when the fraud order was issued. Under the circumstances, to advertise this as a puzzle contest instead of what it actually was cannot be attributed to a mere difference in "nomenclature"; such conduct falls far short of that fair dealing of which fraud is the antithesis.

Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead. *Wiser*

v. *Lawler,* 189 U. S. 260, 264; *Farley* v. *Simmons,* 99 F. 2d 343, 346; see also cases collected in 6 Eng. Rul. Cas. 129–131. That exceptionally acute and sophisticated readers might have been able by penetrating analysis to have deciphered the true nature of the contest's terms is not sufficient to bar findings of fraud by a fact-finding tribunal. Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds. *Durland* v. *United States,* 161 U. S. 306–313, 314; *Wiser* v. *Lawler, supra* at 264; *Oesting* v. *United States,* 234 F. 304, 307. People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. "Laws are made to protect the trusting as well as the suspicious." *Federal Trade Comm'n* v. *Standard Education Society,* 302 U. S. 112, 116.

The Postmaster General found that respondents' advertisements had been deliberately contrived to divert readers' attention from material but adroitly obscured facts. That finding has substantial support in the evidence. The District Court and the Court of Appeals were wrong in holding the evidence insufficient.

Third. It is contended that §§ 259 and 732 of 39 U. S. C., the sections under which this order was issued, are in conflict with various constitutional provisions and that the statutes should be held unenforceable for this reason. Specifically, it is argued that the sections authorize a prior censorship and thus violate the First Amendment; authorize unreasonable searches and seizures in violation of the Fourth Amendment; violate the due process clause of the Fifth Amendment; deny the kind of trial guaranteed in criminal proceedings by the Sixth Amendment and by Art. III, § 2, cl. 3; and inflict unusual punishment in violation of the Eighth Amendment.

In 1872 Congress first authorized the Postmaster General to forbid delivery of registered letters and payment of

money orders to persons or companies found by the Postmaster General to be conducting an enterprise to obtain money by false pretenses through the use of the mails. 17 Stat. 322–323, 39 U. S. C. § 732. In the same statute Congress made it a crime to place letters, circulars, advertisements, etc., in the mails for the purpose of carrying out such fraudulent artifices or schemes. 17 Stat. 323, 18 U. S. C. § 338. In 1889 Congress declared "non-mailable" letters and other matter sent to help perpetrate frauds. 25 Stat. 874, 39 U. S. C. § 256. In 1895 the Postmaster General's fraud order powers were extended to cover all letters or other matter sent by mail. 28 Stat. 964, 39 U. S. C. § 259. And Congress has passed many more statutes, such, for illustration, as the Securities and Exchange Act, 48 Stat. 77, 906, 15 U. S. C. § 77 (e), and the Federal Trade Commission Act as amended, 52 Stat. 114, 15 U. S. C. § 52, to protect people against fraudulent use of the mails.

All of the foregoing statutes, and others which need not be referred to specifically, manifest a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been regularly enforced by the executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric. This Court in 1904, in the case of *Public Clearing House* v. *Coyne,* 194 U. S. 497, sustained the constitutional power of Congress to enact the laws. The decision there rejected all the contentions now urged against the validity of the statutes in their entirety, insofar as the present contentions have any possible merit. No decision of this Court either before or after the *Coyne* case has questioned the power of Congress to pass these

laws. The *Coyne* case has been cited with approval many times.

Recognizing that past decisions of this Court if adhered to preclude acceptance of their contentions, respondents urge that certain of our decisions since the *Coyne* case have partially undermined the philosophy on which it rested. Respondents refer particularly to comparatively recent decisions under the First and Fourteenth Amendments.[2] None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

We reject the contention that we should overrule the *Coyne* case and declare these fraud order statutes to be wholly void and unenforceable.

An additional argument urged by respondents is that the fraud order statutes as interpreted and applied by the Postmaster General in this case violate some of the constitutional provisions above mentioned. We consider this suggestion only in connection with the modified order. Its future effect is merely to enjoin the continuation of conduct found fraudulent. Carried no further than this, the order has not even a slight resemblance to punishment—it only keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the extent necessary to protect others from their fraudulent artifices. And so far as the impounding order is concerned, of course respondents can have no just or legal claim to money

[2] *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245–249; *Near* v. *Minnesota*, 283 U. S. 697, 713, *et seq.*; *Bridges* v. *California*, 314 U. S. 252, 260–263; *Craig* v. *Harney*, 331 U. S. 367; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407.

mailed to them as a result of their fraudulent practices. Nor does the modified order jeopardize respondents' magazine except to the extent, if any, that its circulation might be dependent on monies received from this contest scheme found fraudulent. A contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public.

The order as modified is valid and its enforcement should not have been enjoined. The judgments of the United States Court of Appeals for the District of Columbia and of the District Court are reversed. The cause is remanded to the District Court to dismiss the petition for injunction and to provide for proper return to the remitters of the impounded funds sent in response to the fraudulent advertisements and communications.

It is so ordered.

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

The two lower courts reviewed in detail the facts in this case. Both held that the predecessor of the present Postmaster General exceeded his authority in issuing his stringent order of October 1, 1945. The modification of that order on December 8, 1947, by the present Postmaster General, then serving as Acting Postmaster General, has restricted it to appropriate parties. It has not altered, however, the primary basis for the lower court's injunction of November 27, 1945, against the enforcement of the order. That injunction was granted because the record failed to show evidence sufficient to justify the drastic administrative action taken in reliance upon the lottery and fraud sections of the mail and money order statutes. R. S. §§ 3929 and 4041, as amended, 26 Stat. 466, 28 Stat. 964; 39 U. S. C. §§ 259 and 732. This dissent

protests the overruling of the conclusions of the lower courts on this issue and seeks especially to discourage any increase, or even repetition, of the degree of censorship evidenced by this order.

The former Postmaster General applied here the drastic summary police powers entrusted to his office by Congress to deal with fraudulent swindlers using the mail in the conduct of lotteries or any other scheme for obtaining money by false or fraudulent pretenses. No charge of a lottery or scheme of chance was made the basis for the order before us. This particular puzzle and letter-writing contest, to which the order was limited, was a contest of the familiar type which offers prizes and thereby seeks to attract prospects for later sales. The sponsor candidly stated that this contest was conducted for advertising purposes and it distributed to the contestants samples from a series of books published by its subsidiary, Literary Classics, Inc. The entrance fees of 15 cents, required to accompany the respective sets of puzzle solutions, might well add up to more than all the expenses of the program, including the substantial prizes, provided the responses were many. Such fees, however, would fail to meet those expenses if the responses were few. The financial success of the contest depended upon the number of volunteers choosing to enter it.

The District Court found:

> "These considerations, . . . , do not justify an inference of fraud. Under no circumstances, therefore, can the puzzle contest and its descriptive literature be considered a fraudulent device or strategem [stratagem] for obtaining money. The conclusion is inevitable that there is no evidence to support the finding of fact on which the fraud order is based and that, therefore, the plaintiff is entitled to a permanent injunction against the enforcement of the order." *Read Magazine* v. *Hannegan,* 63 F. Supp. 318, 322.

The Court of Appeals found:

"Appellant does not claim that any statement in the advertisements was untrue or that there was any departure from the procedure announced in the Official Rules of the Contest. There is no claim by him that the judging of the letters was to be other than bona fide, or that any contestant failed to receive the promised books. No contestant, so far as the record shows, complained of being misled or defrauded. In other words, the fraud order is not premised upon specific or affirmative misstatements, or upon failure to perform as promised, but is premised upon an impression which appellant says is conveyed by the advertisements as a whole. He derives the impression from the headlines in the advertisements and the comparative urgency which he finds in some of the expressions in them.

. . . . . .

"To support appellant's conclusion in this case, one must ascribe to the advertisements an impression directly contrary to the stated rules of the contest. One must thus assume that readers were led not to read the Rules, or were led to ignore them or to misunderstand them or to believe something else contrary to their statement. There is no evidence, we think, to support any of those assumptions. The Rules were legibly printed. They were emphasized, rather than minimized, in the text. They were clear to any reasonable mind. No contradictory expressions occurred elsewhere.

"That this contest was an advertising device designed to promote the book-publishing business of appellees must have been plain to the most casual reader. The advertisements specifically told him, 'This contest with FACTS MAGAZINE as sponsor,

is being presented as a means of popularizing the Literary Classics Book Club.' . . .

"We fail to see that the letters which were written to the contestants who successfully solved the first series of puzzles, cast any complexion upon the venture different from that cast by the original advertisements themselves.

. . . . . .

"We think that the advertisements before us fairly urged contestants to read the Rules and that the Rules stated fairly, in style of type, placement, and terms, what was proposed. That being so, and there being no ambiguity in or departure from the proposals stated, a finding of false pretenses, representations, or promises could not properly be made." *Hannegan* v. *Read Magazine,* 81 U. S. App. D. C. 339, 341–343, 158 F. 2d 542, 544, 545–546.

Not only do I fail to find adequate reason to overrule the findings and conclusions of the two lower courts but, on examination of the record, I agree with them. I believe that the Postmaster General exceeded his authority when he applied his drastic censorship and fraud order to this particular program. There was no compulsion on anyone to enter this contest. Everyone who did so received, as advertised, certain reprints of classical literature and, until the contest was stopped, each contestant had the advertised opportunity to win certain cash prizes.

Anyone who entered this contest to win substantial prizes by doing so little to win them should at least examine the exact terms of the contest and make himself responsible for meeting the rules prescribed by those offering to make the gifts he sought. The contestants rendered no services for which they had a right to compensation. They merely paid a small entrance fee. For that they were entitled to have the contest conducted in accordance with the rules stated.

The findings of the lower courts make it clear that there has been no claim of failure or impending failure by the sponsor to carry out the terms of the contest. The record shows no complaint from any contestant. Nevertheless, the Postmaster General took it upon himself to stop the contest. On the evidence before him and before the courts, this was an abuse of his discretion. It was "palpably wrong and therefore arbitrary." See *Leach* v. *Carlile,* 258 U. S. 138, 140.

COLE ET AL. *v.* ARKANSAS.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 373. Argued February 4–5, 1948.—Decided March 8, 1948.

Petitioners were tried in a state court under an information charging them only with a violation of § 2 of a state statute, making it an offense to promote an unlawful assemblage. The trial court instructed the jury that they were charged with an offense under § 2; and they were convicted. They appealed to the State Supreme Court, contending, *inter alia,* that § 2 was contrary to the Federal Constitution. Without passing on that question, the State Supreme Court sustained their convictions on the ground that the information charged and the evidence showed that petitioners had violated § 1 of the same statute, which describes the distinct offense of using force and violence. *Held:* Petitioners were denied due process of law and the judgment is reversed and remanded to the State Supreme Court for further proceedings. Pp. 197–202.

(a) It is as much a violation of due process to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. P. 201.

(b) To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court. P. 202.

211 Ark. 836, 202 S. W. 2d 770, reversed.

Petitioners were tried and convicted of a violation of § 2 of a state statute. Their convictions were affirmed by the Supreme Court of Arkansas on the ground that they had violated § 1, describing a separate and distinct offense. 211 Ark. 836, 202 S. W. 2d 770. This Court granted certiorari. 332 U. S. 834. *Reversed and remanded,* p. 202.

David Rein and *Joseph Forer* argued the cause for petitioners. With them on the brief was *Lee Pressman.*

Oscar E. Ellis, Assistant Attorney General of Arkansas, and *Shields M. Goodwin* argued the cause for respondent. With *Mr. Ellis* on the brief was *Guy E. Williams,* Attorney General.

Mr. Justice Black delivered the opinion of the Court.

The petitioners were convicted of a felony in an Arkansas state court and sentenced to serve one year in the state penitentiary. The State Supreme Court affirmed, one judge dissenting on the ground that the evidence was insufficient to sustain the convictions. 211 Ark. 836, 202 S. W. 2d 770. A petition for certiorari here alleged deprivation of important rights guaranteed by the Fourteenth Amendment. We granted certiorari because the record indicated that at least one of the questions presented was substantial. That question, in the present state of the record, is the only one we find it appropriate to consider. The question is: "Were the petitioners denied due process of law . . . in violation of the Fourteenth Amendment by the circumstance that their convictions were affirmed under a criminal statute for violation of which they had not been charged?"

The present convictions are under an information. The petitioners urge that the information charged them with a violation of § 2 of Act 193 of the 1943 Arkansas Legis-

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lature and that they were tried and convicted of violating only § 2. The State Supreme Court affirmed their convictions on the ground that the information had charged and the evidence had shown that the petitioners had violated § 1 of the Arkansas Act which describes an offense separate and distinct from the offense described in § 2.

The information charged:

> ". . . Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean,[1] in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with eath [*sic*] other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas."

The foregoing language describing the offense charged in the information is substantially identical with the following language of § 2 of the Arkansas Act. That section provides:

> "It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent . . . any person from engaging in any lawful vocation, or for any person acting . . . in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage."

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[1] The State Supreme Court held that Bean's conviction was based on insufficient evidence, reversed his conviction, and directed that the cause be dismissed as to him.

The record indicates that at the request of the prosecuting attorney, the trial judge read § 2 to the jury. He then instructed them that § 2 "includes two offenses, first, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here. The latter offense is the one on trial in this case."

The trial court also instructed the jury that they could not convict petitioners unless "convinced beyond a reasonable doubt that they promoted, encouraged, and aided in an unlawful assemblage at the plant of the Southern Cotton Oil Company, for the purpose of preventing Otha Williams from engaging in a lawful vocation." This instruction, like the preceding one, told the jury that the trial of petitioners was for violation of § 2, since § 2 makes an unlawful assemblage an ingredient of the offense it defines and § 1 [2] does not. Thus the petitioners were clearly tried and convicted by the jury for promoting an unlawful assemblage made an offense by § 2, and were not tried for the offense of using force and violence as described in § 1.[3]

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[2] "Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years." Act 193, Arkansas Acts of 1943.

[3] A previous conviction of petitioners under an indictment charging them with a violation of § 1 was set aside by the State Supreme Court because of the erroneous admission of evidence by the trial court. *Cole* v. *State*, 210 Ark. 433, 196 S. W. 2d 582.

When the case reached the State Supreme Court on appeal, that court recognized that the information as drawn did include a charge that petitioners violated § 2 of the Act. That court also held that the information accused petitioners of "using force and violence to prevent Williams from working," and that the "use of force or violence, or threat of the use of force or violence, is made unlawful by Sec. 1." For this reason the Supreme Court said that it affirmed the convictions of the petitioners "without invoking any part of Sec. 2 of the Act . . . ." That court accordingly refused to pass upon petitioners' federal constitutional challenges to § 2. It later denied a petition for rehearing in which petitioners argued: "To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the 14th Amendment to the United States Constitution."

We therefore have this situation. The petitioners read the information as charging them with an offense under § 2 of the Act, the language of which the information had used. The trial judge construed the information as charging an offense under § 2. He instructed the jury to that effect. He charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense "of using force and violence." Without completely ignoring the judge's charge, the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offense defined in § 1.[4] Yet the State Supreme Court refused to consider the validity of the convictions under

[4] "Under any reasonable construction Section 1 creates separate offenses, as does Section 2, and an indictment that alleges crimes covered by a part of Section 1 does not impose upon the defendant

§ 2, for violation of which petitioners were tried and convicted. It affirmed their convictions as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted.

No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Oliver,* 333 U. S. 257, 273, decided today, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge* v. *Oregon,* 299 U. S. 353, 362.

Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. *Frank* v. *Mangum,* 237 U. S. 309, 327. *Cf. Mooney* v. *Holohan,* 294 U. S. 103, 113. That court has not affirmed these convictions on the basis of the trial petitioners were afforded. The convictions were for a violation of § 2. Petitioners urged in the State Supreme Court that the evidence was insufficient to support their convictions of a violation of § 2. They also raised serious

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a duty to defend under Section 2 or against 'threat' provisions of Section 1." *Cole* v. *State,* 210 Ark. 433, 441, 196 S. W. 2d 582, 586.

objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution.[5] None of their contentions were passed upon by the State Supreme Court. It affirmed their convictions as though they had been tried and convicted of a violation of § 1 when in truth they had been tried and convicted only of a violation of a single offense charged in § 2, an offense which is distinctly and substantially different from the offense charged in § 1. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law.

In the present state of the record we cannot pass upon those contentions which challenge the validity of § 2 of the Arkansas Act. The judgment is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[5] The objections pressed in the Arkansas Supreme Court and also argued here were: (1) that petitioners were deprived of freedom of speech and assembly by reason of their convictions under § 2; (2) that their convictions were based upon a statute or charges too vague and indefinite to conform to due process; and (3) that Act 193 deprived them of the equal protection of the laws by making certain conduct, which otherwise would have been a misdemeanor, a felony when committed by striking workmen.

Syllabus.

ILLINOIS EX REL. McCOLLUM *v.* BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 90. Argued December 8, 1947.—Decided March 8, 1948.

With the permission of a board of education, granted under its general supervisory powers over the use of public school buildings, religious teachers, employed subject to the approval and supervision of the superintendent of schools by a private religious group including representatives of the Catholic, Protestant and Jewish faiths, gave religious instruction in public school buildings once each week. Pupils whose parents so requested were excused from their secular classes during the periods of religious instruction and were required to attend the religious classes; but other pupils were not released from their public school duties, which were compulsory under state law. A resident and taxpayer of the school district whose child was enrolled in the public schools sued in a state court for a writ of mandamus requiring the board of education to terminate this practice. *Held:*

1. A judgment of the State Supreme Court sustaining denial of the writ of mandamus on the ground that the state statutes granted the board of education authority to establish such a program drew into question "the validity of a statute" of the State within the meaning of § 237 of the Judicial Code, and was appealable to this Court. P. 206.

2. As a resident and taxpayer of the school district and the parent of a child required by state law to attend the school, appellant had standing to maintain the suit. P. 206.

3. Both state courts having ruled expressly on appellant's claim that the state program violated the Federal Constitution, a motion to dismiss the appeal on the ground that appellant failed properly to present that question in the State Supreme Court cannot be sustained. P. 207.

4. This utilization of the State's tax-supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings violates the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment. Pp. 209–212.

396 Ill. 14, 71 N. E. 2d 161, reversed.

The Supreme Court of Illinois affirmed a denial of a petition for a writ of mandamus requiring a board of education to terminate the giving of religious instruction by private teachers in the public schools. 396 Ill. 14, 71 N. E. 2d 161. On appeal to this Court, *reversed and remanded,* p. 212.

Walter F. Dodd and *Edward R. Burke* argued the cause for appellant. *Mr. Dodd* also filed a brief.

John L. Franklin and *Owen Rall* argued the cause and filed a brief for appellees.

Briefs of *amici curiae* urging reversal were filed by *Henry Epstein, Leo Pfeffer* and *Samuel Rothstein* for the Synagogue Council of America et al.; *Herbert A. Wolff* for the American Ethical Union; *E. Hilton Jackson, Challen B. Ellis, W. D. Jamieson* and *Kahl K. Spriggs* for the Joint Conference Committee on Public Relations of several Baptist conventions; *Edward C. Park* for the American Unitarian Association; *Kenneth W. Greenawalt, Leon Despres, Russell Whitman, John D. Miller, William L. Marbury, Thomas H. Eliot, Winthrop Wadleigh, Whitney N. Seymour* and *Gurney Edwards* for the American Civil Liberties Union; and *Homer Cummings* and *William D. Donnelly* for the General Conference of Seventh Day Adventists.

George F. Barrett, Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, filed a brief as *amici curiae,* urging affirmance.

Charles H. Tuttle filed a brief for the Protestant Council of New York City, as *amicus curiae.*

Mr. Justice Black delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious

instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum, began this action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given general supervisory powers over the use of the public school buildings within the school districts. Ill. Rev. Stat. ch. 122, §§ 123, 301 (1943).

Appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools in Champaign School District Number 71, . . . and in all public school houses and buildings in said district when occupied by public schools."

The board first moved to dismiss the petition on the ground that under Illinois law appellant had no standing to maintain the action. This motion was denied. An answer was then filed, which admitted that regular weekly religious instruction was given during school hours to those pupils whose parents consented and that those pupils were released temporarily from their regular secular classes for the limited purpose of attending the religious classes. The answer denied that this coordinated program of religious instruction violated the State or Federal Constitution. Much evidence was heard, findings of fact were made, after which the petition for mandamus was denied on the ground that the school's religious instruction program violated neither the federal nor state constitutional provisions invoked by the appellant. On appeal the State Supreme Court affirmed. 396 Ill. 14, 71 N. E. 2d 161. Appellant appealed to this Court under 28 U. S. C. § 344 (a), and we noted probable jurisdiction on June 2, 1947.

The appellees press a motion to dismiss the appeal on several grounds, the first of which is that the judgment of the State Supreme Court does not draw in question the "validity of a statute of any State" as required by 28 U. S. C. § 344 (a). This contention rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute. But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 U. S. C. § 344 (a). *Hamilton* v. *Regents of U. of Cal.,* 293 U. S. 245, 258. A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. *Coleman* v. *Miller,* 307 U. S. 433, 443, 445, 464.

A third ground for the motion is that the appellant failed properly to present in the State Supreme Court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts on this question, the argument cannot be successfully maintained. The motion to dismiss the appeal is denied.

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute.[1] In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend;[2] they were held weekly, thirty minutes for

[1] Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: (1) In actual practice certain Protestant groups have obtained an overshadowing advantage in the propagation of their faiths over other Protestant sects; (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it; and (3) the power given the school superintendent to reject teachers selected by religious groups and the power given the local Council on Religious Education to determine which religious faiths should participate in the program was a prior censorship of religion.

In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

[2] The Supreme Court described the request card system as follows: ". . . Admission to the classes was to be allowed only upon the express written request of parents, and then only to classes designated by the parents. . . . Cards were distributed to the parents

the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools.[3] The classes were taught in three

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of elementary students by the public-school teachers requesting them to indicate whether they desired their children to receive religious education. After being filled out, the cards were returned to the teachers of religious education classes either by the public-school teachers or the children. . . ." On this subject the trial court found that ". . . those students who have obtained the written consent of their parents therefor are released by the school authorities from their secular work, and in the grade schools for a period of thirty minutes' instruction in each week during said school hours, and forty-five minutes during each week in the junior high school, receive training in religious education. . . . Certain cards are used for obtaining permission of parents for their children to take said religious instruction courses, and they are made available through the offices of the superintendent of schools and through the hands of principals and teachers to the pupils of the school district. Said cards are prepared at the cost of the council of religious education. The handling and distribution of said cards does not interfere with the duties or suspend the regular secular work of the employees of the defendant. . . ."

[3] The State Supreme Court said: "The record further discloses that the teachers conducting the religious classes were not teachers in the public schools but were subject to the approval and supervision of the superintendent. . . ." The trial court found: "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." The president of the local school board testified: ". . . The Protestants would have one group and the Catholics, and would be given a room where they would have the class and we would go along with the plan of the religious people. They were all to be treated alike, with the understanding that the teachers they would bring into the school were approved by the superintendent. . . . The superintendent was the last word so far as the individual was concerned. . . ."

separate religious groups by Protestant teachers,[4] Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.[5]

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released

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[4] There were two teachers of the Protestant faith. One was a Presbyterian and had been a foreign missionary for that church. The second testified as follows: "I am affiliated with the Christian church. I also work in the Methodist Church and I taught at the Presbyterian. I am married to a Lutheran."

[5] The director of the Champaign Council on Religious Education testified: ". . . If any pupil is absent we turn in a slip just like any teacher would to the superintendent's office. The slip is a piece of paper with a number of hours in the school day and a square, and the teacher of the particular room for the particular hour records the absentees. It has their names and the grade and the section to which they belong. It is the same sheet that the geography and history teachers and all the other teachers use, and is furnished by the school. . . ."

in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1. There we said: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[6] Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[7] Neither a state nor

[6] The dissent, agreed to by four judges, said: "The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. . . . Again, it was the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation." *Everson* v. *Board of Education,* 330 U. S. 1, 59, 60.

[7] The dissenting judges said: "In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. . . . Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." *Everson* v. *Board of Education,* 330 U. S. 1, 41, 52–53.

the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id.* at 15–16. The majority in the *Everson* case, and the minority as shown by quotations from the dissenting views in our notes 6 and 7, agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free

exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER delivered the following opinion, in which MR. JUSTICE JACKSON, MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON join.*

We dissented in *Everson* v. *Board of Education,* 330 U. S. 1, because in our view the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority. Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this.

This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the mean-

*MR. JUSTICE RUTLEDGE and MR. JUSTICE BURTON concurred also in the Court's opinion.

ing of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." But agreement, in the abstract, that the First Amendment was designed to erect a "wall of separation between church and State," does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before us.

To understand the particular program now before us as a conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution and with due regard to the kind of society for which it was designed, we must put this Champaign program of 1940 in its historic setting. Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.

The emigrants who came to these shores brought this view of education with them. Colonial schools certainly

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started with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of "one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures." The Laws and Liberties of Massachusetts, 1648 edition (Cambridge 1929) 47.[1]

The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. It is appropriate to recall that the Remonstrance of James Madison, an event basic in the history of religious liberty, was called forth by a proposal which involved support to religious education. See MR. JUSTICE RUTLEDGE'S opinion in the *Everson* case, *supra,* 330 U. S. at 36–37. As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various forms in other States. New York and Massachusetts provide famous chapters in the history that established dissociation of religious teaching from State-maintained schools. In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was

[1] For an exposition of the religious origins of American education, see S. W. Brown, The Secularization of American Education (1912) cc. I, II; Knight, Education in the United States (2d rev. ed. 1941) cc. III, V; Cubberley, Public Education in the United States (1934) cc. II, III.

taught.[2] In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict.[3] The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. In sustaining Stephen Girard's will, this Court referred to the inevitable conflicts engendered by matters "connected with religious polity" and particularly "in a country composed of such a variety of religious sects as our country." *Vidal* v. *Girard's Executors,* 2 How. 127, 198. That was more than one hundred years ago.

Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its

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[2] See Boese, Public Education in the City of New York (1869) c. XIV; Hall, Religious Education in the Public Schools of the State and City of New York (1914) cc. VI, VII; Palmer, The New York Public School (1905) cc. VI, VII, X, XII. And see New York Laws 1842, c. 150, § 14, amended, New York Laws 1844, c. 320, § 12.

[3] S. M. Smith, The Relation of the State to Religious Education in Massachusetts (1926) c. VII; Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929).

people.[4] A totally different situation elsewhere, as illustrated for instance by the English provisions for religious education in State-maintained schools, only serves to illustrate that free societies are not cast in one mould. See the Education Act of 1944, 7 and 8 Geo. VI, c. 31. Different institutions evolve from different historic circumstances.

It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupu-

[4] It has been suggested that secular education in this country is the inevitable "product of 'the utter impossibility of harmonizing multiform creeds.'" T. W. M. Marshall, *Secular Education in England and the United States,* 1 American Catholic Quarterly Review 278, 308. It is precisely because of this "utter impossibility" that the fathers put into the Constitution the principle of complete "hands-off," for a people as religiously heterogeneous as ours.

lously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent conflict.[5] While in small communities of comparatively homogeneous religious beliefs, the need for absolute separation presented no urgencies, elsewhere the growth of the secular school encountered the resistance of feeling strongly engaged against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.

Enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In

[5] See Cubberley, Public Education in the United States (1934) pp. 230 *et seq.*; Zollmann, *The Relation of Church and State,* in Lotz and Crawford, Studies in Religious Education (1931) 403, 418 *et seq.*; Payson Smith, *The Public Schools and Religious Education,* in Religion and Education (Sperry, Editor, 1945) pp. 32 *et seq.;* also Mahoney, The Relation of the State to Religious Education in Early New York 1633–1825 (1941) c. VI; McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870–1945 (1946) c. I; and see note 10, *infra.*

that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:

> "Encourage free schools, and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." "The President's Speech at Des Moines," 22 *Catholic World* 433, 434–35 (1876).

So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education,[6] such as had

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[6] President Grant's Annual Message to Congress, December 7, 1875, 4 Cong. Rec. 175 *et seq.*; Ames, The Proposed Amendments to the Constitution of the United States during the First Century of its History, H. R. Doc. No. 353, Pt. 2, 54th Cong., 2d Sess., pp. 277–78. In addition to the first proposal, "The Blaine Amendment," five others to similar effect are cited by Ames. The reason for the failure of these attempts seems to have been in part that the "provisions of the State constitutions are in almost all instances adequate on this subject, and no amendment is likely to be secured." *Id.*

In the form in which it passed the House of Representatives, the Blaine Amendment read as follows: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public

been written into many State constitutions.[7] By 1894, in urging the adoption of such a provision in the New York Constitution, Elihu Root was able to summarize a century of the nation's history: "It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State." Root, Addresses on Government and Citizenship, 137, 140.[8] The extent to which

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property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. . . ." H. Res. 1, 44th Cong., 1st Sess. (1876).

[7] See *Constitutions of the States and United States,* III Report of the New York State Constitutional Convention Committee (1938) Index, pp. 1766–67.

[8] It is worthy of interest that another famous American lawyer, and indeed one of the most distinguished of American judges, Jeremiah S. Black, expressed similar views nearly forty years before Mr. Root: "The manifest object of the men who framed the institutions of this country, was to have a *State without religion,* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other . . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. For that reason they built up a wall of complete and perfect partition between the two." From *Religious Liberty*

this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control." [9]

Prohibition of the commingling of sectarian and secular instruction in the public school is of course only half the story. A religious people was naturally concerned about the part of the child's education entrusted "to the family altar, the church, and the private school." The promotion of religious education took many forms. Laboring under financial difficulties and exercising only persuasive authority, various denominations felt handicapped in their task of religious education. Abortive

(1856) in Black, Essays and Speeches (1886) 51, 53; cf. Brigance, Jeremiah Sullivan Black (1934). While Jeremiah S. Black and Elihu Root had many things in common, there were also important differences between them, perhaps best illustrated by the fact that one became Secretary of State to President Buchanan, the other to Theodore Roosevelt. That two men, with such different political alignment, should have shared identic views on a matter so basic to the well-being of our American democracy affords striking proof of the respect to be accorded to that principle.

[9] 25 Stat. 676, 677, applicable to North Dakota, South Dakota, Montana and Washington, required that the constitutional conventions of those States "provide, by ordinances irrevocable without the consent of the United States and the people of said States . . . for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control . . . ." The same provision was contained in the Enabling Act for Utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 267, 270; New Mexico and Arizona, 36 Stat. 557, 559, 570. Idaho and Wyoming were admitted after adoption of their constitutions; that of Wyoming contained an irrevocable ordinance in the same terms. Wyoming Constitution, 1889, Ordinances, § 5. The Constitution of Idaho, while it contained no irrevocable ordinance, had a provision even more explicit in its establishment of separation. Idaho Constitution, 1889, art. IX, § 5.

attempts were therefore frequently made to obtain public funds for religious schools.[10] But the major efforts of religious inculcation were a recognition of the principle of Separation by the establishment of church schools privately supported. Parochial schools were maintained by various denominations. These, however, were often beset by serious handicaps, financial and otherwise, so that the religious aims which they represented found other directions. There were experiments with vacation schools, with Saturday as well as Sunday schools.[11] They all fell short of their purpose. It was urged that by appearing to make religion a one-day-a-week matter, the

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[10] See, *e. g.*, the New York experience, including, *inter alia*, the famous Hughes controversy of 1840–42, the conflict culminating in the Constitutional Convention of 1894, and the attempts to restore aid to parochial schools by revision of the New York City Charter, in 1901, and at the State Constitutional Convention of 1938. See McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870–1945 (1946) pp. 119–25; Mahoney, The Relation of the State to Religious Education in Early New York 1633–1825 (1941) c. VI; Hall, Religious Education in the Public Schools of the State and the City of New York (1914) pp. 46–47; Boese, Public Education in the City of New York (1869) c. XIV; Compare New York Laws 1901, vol. 3, § 1152, p. 492, with amendment, *id.*, p. 668; see Nicholas Murray Butler, *Religion and Education* (Editorial) in 22 Educational Review 101, June, 1901; New York Times, April 8, 1901, p. 1, col. 1; April 9, 1901, p. 2, col. 5; April 19, 1901, p. 2, col. 2; April 21, 1901, p. 1, col. 3; Editorial, April 22, 1901, p. 6, col. 1.

Compare S. 2499, 79th Cong., 2d Sess., providing for Federal aid to education, and the controversy engendered over the inclusion in the aid program of sectarian schools, fully discussed in, *e. g.*, "The Nation's Schools," January through June, 1947.

[11] For surveys of the development of private religious education, see, *e. g.*, A. A. Brown, A History of Religious Education in Recent Times (1923); Athearn, Religious Education and American Democracy (1917); Burns and Kohlbrenner, A History of Catholic Education in the United States (1937); Lotz and Crawford, Studies in Religious Education (1931) Parts I and IV.

Sunday school, which acquired national acceptance, tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson.

Out of these inadequate efforts evolved the week-day church school, held on one or more afternoons a week after the close of the public school. But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his "business hours."

The initiation of the movement [12] may fairly be attributed to Dr. George U. Wenner. The underlying assumption of his proposal, made at the Interfaith Conference on Federation held in New York City in 1905, was that the public school unduly monopolized the child's time and that the churches were entitled to their share of it.[13] This, the schools should "release." Accordingly, the Federation, citing the example of the Third Republic of France,[14] urged that upon the request of their parents

[12] Reference should be made to Jacob Gould Schurman, who in 1903 proposed a plan bearing close resemblance to that of Champaign. See Symposium, 75 The Outlook 635, 636, November 14, 1903; Crooker, Religious Freedom in American Education (1903) pp. 39 *et seq.*

[13] For the text of the resolution, a brief in its support, as well as an exposition of some of the opposition it inspired, see Wenner's book, Religious Education and the Public School (rev. ed. 1913).

[14] The French example is cited not only by Wenner but also by Nicholas Murray Butler, who thought released time was "restoring the American system in the state of New York." *The Place of Religious Instruction in Our Educational System,* 7 Vital Speeches 167, 168 (Nov. 28, 1940); see also Report of the President of Columbia University, 1934, pp. 22–24. It is important to note, however, that the French practice must be viewed as the result of the struggle to

children be excused from public school on Wednesday afternoon, so that the churches could provide "Sunday school on Wednesday." This was to be carried out on church premises under church authority. Those not desiring to attend church schools would continue their normal classes. Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.

The proposal aroused considerable opposition and it took another decade for a "released time" scheme to become part of a public school system. Gary, Indiana, inaugurated the movement. At a time when industrial

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emancipate the French schools from control by the Church. The leaders of this revolution, men like Paul Bert, Ferdinand Buisson, and Jules Ferry, agreed to this measure as one part of a great step towards, rather than a retreat from, the principle of Separation. The history of these events is described in Muzzey, *State, Church, and School in France,* The School Review, March through June, 1911.

In effect, moreover, the French practice differs in crucial respects from both the Wenner proposal and the Champaign system. The law of 1882 provided that "Public elementary schools will be closed one day a week in addition to Sunday in order to permit parents, if they so desire, to have their children given religious instruction outside of school buildings." Law No. 11,696, March 28, 1882, Bulletin des Lois, No. 690. This then approximates that aspect of released time generally known as "dismissed time." No children went to school on that day, and the public school was therefore not an alternative used to impel the children towards the religious school. The religious education was given "outside of school buildings."

The Vichy Government attempted to introduce a program of religious instruction within the public school system remarkably similar to that in effect in Champaign. The proposal was defeated by intense opposition which included the protest of the French clergy, who apparently feared State control of the Church. See Schwartz, *Religious Instruction under Pétain,* 58 Christian Century 1170, Sept. 24, 1941.

expansion strained the communal facilities of the city, Superintendent of Schools Wirt suggested a fuller use of the school buildings. Building on theories which had become more or less current, he also urged that education was more than instruction in a classroom. The school was only one of several educational agencies. The library, the playground, the home, the church, all have their function in the child's proper unfolding. Accordingly, Wirt's plan sought to rotate the schedules of the children during the school-day so that some were in class, others were in the library, still others in the playground. And some, he suggested to the leading ministers of the City, might be released to attend religious classes if the churches of the City cooperated and provided them. They did, in 1914, and thus was "released time" begun. The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools.[15]

From such a beginning "released time" has attained substantial proportions. In 1914–15, under the Gary program, 619 pupils left the public schools for the church schools during one period a week. According to responsible figures almost 2,000,000 in some 2,200 communities

[15] Of the many expositions of the Gary plan, see, *e. g.*, A. A. Brown, *The Week-Day Church Schools of Gary, Indiana,* 11 Religious Education 5 (1916); Wirt, *The Gary Public Schools and the Churches, id.* at 221 (1916).

participated in "released time" programs during 1947.[16] A movement of such scope indicates the importance of the problem to which the "released time" programs are directed. But to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement operates, the more ominous the breaches in the wall of separation.

Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some "released time" classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.[17]

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[16] See the 1947 Yearbook, International Council of Religious Education, p. 76; also New York Times, September 21, 1947, p. 22, col. 1.

[17] Respects in which programs differ include, for example, the amount of supervision by the public school of attendance and performance in the religious class, of the course of study, of the selection of teachers; methods of enrolment and dismissal from the secular classes; the amount of school time devoted to operation of the program; the extent to which school property and administrative machinery are

The substantial differences among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign? Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, "subject to the approval and supervision of the superintendent." The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent "who in turn will determine whether or not it is practical for said group to teach in said school

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involved; the effect on the public school program of the introduction of "released time"; the proportion of students who seek to be excused; the effect of the program on non-participants; the amount and nature of the publicity for the program in the public schools.

The studies of detail in "released time" programs are voluminous. Most of these may be found in the issues of such periodicals as The International Journal of Religious Education, Religious Education, and Christian Century. For some of the more comprehensive studies found elsewhere, see Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin 1941, No. 3; Gorham, A Study of the Status of Weekday Church Schools in the United States (1934); Lotz, *The Weekday Church School*, in Lotz and Crawford, Studies in Religious Education (1931) c. XII; Forsyth, Week-Day Church Schools (1930); Settle, The Weekday Church School, Educational Bulletin No. 601 of The International Council of Religious Education (1930); Shaver, Present-Day Trends in Religious Education (1928) cc. VII, VIII; Gove, Religious Education on Public School Time (1926).

system." If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.[18] Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of

[18] It deserves notice that in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that "allowing him to take the religious education course might help him to become a member of the group."

their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.[19]

Mention should not be omitted that the integration of religious instruction within the school system as practiced in Champaign is supported by arguments drawn from educational theories as diverse as those derived from Catholic conceptions and from the writings of John Dewey.[20] Movements like "released time" are seldom

[19] The divergent views expressed in the briefs submitted here on behalf of various religious organizations, as *amici curiae*, in themselves suggest that the movement has been a divisive and not an irenic influence in the community: The American Unitarian Association; The General Conference of Seventh Day Adventists; The Joint Conference Committee on Public Relations set up by the Southern Baptist Convention, The Northern Baptist Convention, The National Baptist Convention Inc., and the National Baptist Convention; The Protestant Council of the City of New York; and The Synagogue Council of America and National Community Relations Advisory Council.

[20] There is a prolific literature on the educational, social and religious merits of the "released time" movement. In support of "released time" the following may be mentioned: The International Council of Religious Education, and particularly the writings of Dr. Erwin L. Shaver, for some years Director of its Department of Weekday Religious Education, in publications of the Council and in numerous issues of The International Journal of Religious Education (*e. g., They Reach One-Third,* Dec., 1943, p. 11; *Weekday Religious Education Today,* Jan., 1944, p. 6), and Religious Education (*e. g., Survey of Week-Day Religious Education,* Feb., 1922, p. 51; *The Movement for Weekday Religious Education,* Jan.–Feb., 1946, p. 6);

single in origin or aim. Nor can the intrusion of religious instruction into the public school system of Champaign be minimized by saying that it absorbs less than an hour a week; in fact, that affords evidence of

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see also Information Service, Federal Council of Churches of Christ, May 29, 1943. See also Cutton, *Answering the Arguments,* The International Journal of Religious Education, June, 1930, p. 9, and *Released Time, id.,* Sept., 1942, p. 12; Hauser, *"Hands Off the Public School?",* Religious Education, Mar.–Apr., 1942, p. 99; Collins, *Release Time for Religious Instruction,* National Catholic Education Association Bulletin, May, 1945, pp. 21, 27–28; Weigle, *Public Education and Religion,* Religious Education, Apr.–June, 1940, p. 67; Nicholas Murray Butler, *The Place of Religious Instruction in Our Educational System,* 7 Vital Speeches 167 (Nov. 28, 1940); Howlett, *Released Time for Religious Education in New York City,* 64 Education 523, May, 1944; Blair, *A Case for the Weekday Church School,* 7 Frontiers of Democracy 75, Dec. 15, 1940; cf. Allred, Legal Aspects of Release Time (National Catholic Welfare Conference, 1947). Favorable views are also cited in the studies in note 17, *supra.* Many not opposed to "released time" have declared it "hardly enough" or "pitifully inadequate." *E. g.,* Fleming, God in Our Public Schools (2d ed. 1944) pp. 80–86; Howlett, *Released Time for Religious Education in New York City,* Religious Education, Mar.–Apr., 1942, p. 104; Cavert, *Points of Tension Between Church and State in America Today,* in Church and State in the Modern World (1937) 161, 168; F. E. Johnson, The Church and Society (1935) 125; Hubner, Professional Attitudes toward Religion in the Public Schools of the United States Since 1900 (1944) 108–109, 113; cf. Ryan, *A Protestant Experiment in Religious Education,* The Catholic World, June, 1922; Elliott, *Are Weekday Church Schools the Solution?,* The International Journal of Religious Education, Nov., 1940, p. 8; Elliott, *Report of the Discussion,* Religious Education, July–Sept., 1940, p. 158.

For opposing views, see V. T. Thayer, Religion in Public Education (1947) cc. VII, VIII; Moehlman, The Church as Educator (1947) c. X; Chave, A Functional Approach to Religious Education (1947) 104–107; A. W. Johnson, The Legal Status of Church-State Relationships in the United States (1934) 129–130; Newman, The Sectarian Invasion of Our Public Schools (1925). See also Payson Smith, *The Public Schools and Religious Education,* in Religion and Education

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a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as "dismissed time," whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school.[21] The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious

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(Sperry, Editor, 1945) 32, 42–47; Herrick, *Religion in the Public Schools of America,* 46 Elementary School Journal 119, Nov., 1945; Kallen, *Churchmen's Claims on the Public School,* The Nation's Schools, May, 1942, p. 49; June, 1942, p. 52. And cf. John Dewey, *Religion in Our Schools* (1908), reprinted in 2 Characters and Events (1929) 504, 508, 514. "Released time" was introduced in the public schools of the City of New York over the opposition of organizations like the Public Education Association and the United Parents Associations.

The arguments and sources pro and con are collected in Hubner, Professional Attitudes toward Religion in the Public Schools in the United States since 1900 (1944) 94 *et seq.* And see the symposia, *Teaching Religion in a Democracy,* The International Journal of Religious Education, Nov., 1940, pp. 6–16; *The Aims of Week-Day Religious Education,* Religious Education, Feb., 1922, p. 11; *Released Time in New York City, id.,* Jan.–Feb., 1943, p. 15; *Progress in Weekday Religious Education, id.,* Jan.–Feb., 1946, p. 6; *Can Our Public Schools Do More about Religion?,* 125 Journal of Education 245, Nov., 1942, *id.* at 273, Dec., 1942; *Religious Instruction on School Time,* 7 Frontiers of Democracy 72–77, Dec. 15, 1940; and the articles in 64 Education 519 *et seq.,* May, 1944.

[21] See note 14, *supra.* Indications are that "dismissed time" is used in an inconsiderable number of the communities employing released time. Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin 1941, No. 3, p. 22; Shaver, *The Movement for Weekday Religious Education,* Religious Education, Jan.–Feb., 1946, pp. 6, 9.

instruction such momentum and planning. To speak of "released time" as being only half or three quarters of an hour is to draw a thread from a fabric.

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Everson* v. *Board of Education,* 330 U. S. at 59. If nowhere else, in the relation between Church and State, "good fences make good neighbors."

MR. JUSTICE JACKSON, concurring.

I join the opinion of MR. JUSTICE FRANKFURTER, and concur in the result reached by the Court, but with these reservations: I think it is doubtful whether the facts of this case establish jurisdiction in this Court, but in any event that we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. I make these reservations a matter of record in view of the number of litigations likely to be started as a result of this decision.

A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways:

First. When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. Typical of such cases was *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. There penalties were threatened against both parent and child for refusal of the latter to perform a compulsory ritual which offended his convictions. We intervened to shield them against the penalty. But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating.

Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

Second. Where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. We can protect a taxpayer against such a levy. This was the *Everson Case,* 330 U. S. 1, as I saw it then and see it now. It was complained in that case that the school treasurer drew a check on public funds to reimburse parents for a child's bus fare if he went to a Catholic parochial school or a public school, but not if he went to any other private or denominational school. Reference to the record in that case will show that the School District was not operating busses, so it was not a question of allowing Catholic children to ride publicly owned busses along with others, in the interests of their safety, health or morals. The child had to travel to and from parochial school on commercial busses like other paying passengers and all other school children, and he was exposed to the same dangers. If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, it would not merely have been constitutional to grant it; it would have been unconstitutional to refuse it to any child merely because he was a Catholic. But in the *Everson Case* there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we

had jurisdiction to examine the constitutionality of the levy and to protect against it if a majority had agreed that the subsidy for transportation was unconstitutional.

In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury.

If, however, jurisdiction is found to exist, it is important that we circumscribe our decision with some care. What is asked is not a defensive use of judicial power to set aside a tax levy or reverse a conviction, or to enjoin threats of prosecution or taxation. The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. The prayer for relief is that a writ issue against the Board of Education "ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools." The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they not only end the "released time" plan but also ban every form of teaching which suggests or recognizes that there is a God. She would ban all teaching of the Scriptures. She especially mentions as an example of invasion of her rights "having pupils learn and recite such statements as, 'The Lord is my Shepherd, I shall not want.'" And she objects to teaching that the King James version of the Bible "is

called the Christian's Guide Book, the Holy Writ and the Word of God," and many other similar matters. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision.

To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid ex-

posure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and a State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.

The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, "to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools," is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian

begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And, more importantly, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.

MR. JUSTICE REED, dissenting.

The decisions reversing the judgment of the Supreme Court of Illinois interpret the prohibition of the First Amendment against the establishment of religion, made effective as to the states by the Fourteenth Amendment, to forbid pupils of the public schools electing, with the approval of their parents, courses in religious education. The courses are given, under the school laws of Illinois as approved by the Supreme Court of that state, by lay or clerical teachers supplied and directed by an interdenominational, local council of religious education.[1] The classes are held in the respective school buildings of the pupils at study or released time periods so as to avoid conflict with recitations. The teachers and supplies are paid for by the interdenominational group.[2] As I am

[1] The trial court found that: " 'The Champaign Council of Religious Education' [is] a voluntary association made up of the representatives of the Jewish, Roman Catholic and Protestant faiths in the school district."

[2] There is no extra cost to the state but as a theoretical accounting problem it may be correct to charge to the classes their comparable proportion of the state expense for buildings, operation and teachers. In connection with the classes, the teachers need only keep a record

convinced that this interpretation of the First Amendment is erroneous, I feel impelled to express the reasons for my disagreement. By directing attention to the many instances of close association of church and state in American society and by recalling that many of these relations are so much a part of our tradition and culture that they are accepted without more, this dissent may help in an appraisal of the meaning of the clause of the First Amendment concerning the establishment of religion and of the reasons which lead to the approval or disapproval of the judgment below.

The reasons for the reversal of the Illinois judgment, as they appear in the respective opinions, may be summarized by the following excerpts. The opinion of the Court, after stating the facts, says: "The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. . . . And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education,* 330 U. S. 1." Another opinion phrases it thus: "We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement." These expressions in the decisions seem to

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of the pupils who attend. Increased custodial requirements are likewise nominal. It is customary to use school buildings for community activities when not needed for school purposes. See Ill. Rev. Stat., ch. 122, § 123.

leave open for further litigation variations from the Champaign plan. Actually, however, future cases must run the gantlet not only of the judgment entered but of the accompanying words of the opinions. I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.

From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. I reach this conclusion notwithstanding one sentence of indefinite meaning in the second opinion: "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial." The use of the words "cooperation," "fusion," "complete hands-off," "integrate" and "integrated" to describe the relations between the school and the Council in the plan evidences this. So does the interpretation of the word "aid." The criticized "momentum of the whole school atmosphere," "feeling of separatism" engendered in the non-participat-

ing sects, "obvious pressure . . . to attend," and "divisiveness" lead to the stated conclusion. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited. The history of American education is against such an interpretation of the First Amendment.

The opinions do not say in words that the condemned practice of religious education is a law respecting an establishment of religion contrary to the First Amendment. The practice is accepted as a state law by all. I take it that when the opinion of the Court says that "The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects" and concludes "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith," the intention of its author is to rule that this practice is a law "respecting an establishment of religion." That was the basis of *Everson* v. *Board of Education,* 330 U. S. 1. It seems obvious that the action of the School Board in permitting religious education in certain grades of the schools by all faiths did not prohibit the free exercise of religion. Even assuming that certain children who did not elect to take instruction are embarrassed to remain outside of the classes, one can hardly speak of that embarrassment as a prohibition against the free exercise of religion. As no issue of prohibition upon the free exercise of religion is before us, we need only examine the School Board's action to see if it constitutes an establishment of religion.

The facts, as stated in the reversing opinions, are adequately set out if we interpret the abstract words used in the light of the concrete incidents of the record. It is

correct to say that the parents "consented" to the religious instruction of the children, if we understand "consent" to mean the signing of a card like the one in the margin.[3] It is correct to say that "instructors were subject to the approval and supervision of the superintendent of schools," if it is understood that there were no definitive written rules and that the practice was as is shown in the excerpts from the findings below.[4] The substance of the

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[3] "CHAMPAIGN COUNCIL OF RELIGIOUS EDUCATION
1945–1946

Parent's Request Card

Please permit .... in Grade .. at .....
School to attend a class in Religious Education one period a week under the Auspices of the Champaign Council of Religious Education.

(Check which)

Date .... ( ) Interdenominational
( ) Protestant
( ) Roman Catholic
( ) Jewish

Signed ....
(Parent Name)

Parent's Church ....
Telephone No. .... Address ....

A fee of 25 cents a semester is charged each pupil to help cover the cost of material used.

If you wish your child to receive religious instruction, please sign this card and return to the school.

Mae Chapin, Director."

Mae Chapin, the Director, was not a school employee.

[4] "The superintendent testified that Jehovah's Witnesses or any other sect would be allowed to teach provided their teachers had proper educational qualifications, so that bad grammar, for instance, would not be taught to the pupils. A similar situation developed with reference to the Missouri Synod of the Lutheran Church. The evidence tends to show that during the course of the trial that group indicated it would affiliate with the Council of Religious Education.

"Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public

religious education course is determined by the members of the various churches on the council, not by the superintendent.[5] The evidence and findings set out in the two preceding notes convince me that the "approval and supervision" referred to above are not of the teachers and the course of studies but of the orderly presentation of the courses to those students who may elect the instruction. The teaching largely covered Biblical incidents.[6] The religious teachers and their teachings, in every real sense,

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school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system.

"The court feels from all the facts in the record that an honest attempt has been made and is being made to permit religious instruction to be given by qualified outside teachers of any sect to people of their own faith in the manner above outlined. The evidence shows that no sect or religious group has ever been denied the right to use the schools in this manner."

[5] A finding reads: "The curriculum of studies in the Protestant classes is determined by a committee of the Protestant members of the council of religious education after consultation with representatives of all the different faiths included in said council. The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions."

[6] It was found: "The testimony shows that sectarian differences between the sects are not taught or emphasized in the actual teaching as it is conducted in the schools. The testimony of the religious education teachers, the secular teachers who testified, and the many children, mostly from Protestant families, who either took or did not take religious education courses, is to the effect that religious education classes have fostered tolerance rather than intolerance."

The Supreme Court of Illinois said: "The religious education courses do not go to the extent of being worship services and do not include prayers or the singing of hymns." 396 Ill. 14, 21, 71 N. E. 2d 161, 164.

were financed and regulated by the Council of Religious Education, not the School Board.

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." [7] Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion. A reading of the general statements of eminent statesmen of former days, referred to in the opinions in this case and in *Everson* v. *Board of Education, supra,* will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning the judgment of the State of Illinois.[8]

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[7] 1 Annals of Congress 730.

[8] For example, Mr. Jefferson's striking phrase as to the "wall of separation between church and State" appears in a letter acknowledging "The affectionate sentiments of esteem and approbation" included in a testimonial to himself. In its context it reads as follows:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of

Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia,[9] was faced with the same problem that is before this Court today: the question of the constitutional limitation upon religious education in public schools. In his annual report as Rector, to the President and Directors of the Literary Fund, dated October 7, 1822, approved by the Visitors of the University of whom Mr. Madison was one,[10] Mr. Jefferson set forth his views at some length.[11] These suggestions of Mr. Jefferson were

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religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." 8 The Writings of Thomas Jefferson (Washington ed., 1861) 113.

[9] Acts of the Assembly of 1818–19 (1819) 15; *Phillips* v. *The Rector and Visitors of the University of Virginia*, 97 Va. 472, 474–75, 34 S. E. 66, 67.

[10] 19 The Writings of Thomas Jefferson (Memorial edition, 1904) 408, 409.

[11] *Id.*, pp. 414–17:

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal

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adopted [12] and ch. II, § 1, of the Regulations of the University of October 4, 1824, provided that:

> "Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour." [13]

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weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor. . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy: and could this jealousy be now alarmed, in the opinion of the legislature, by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."

Mr. Jefferson commented upon the report on November 2, 1822, in a letter to Dr. Thomas Cooper, as follows: "And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality." 12 Ford, *The Works of Thomas Jefferson*, (Fed. ed., 1905), 272.

[12] 3 Randall, Life of Thomas Jefferson (1858) 471.

[13] 19 The Writings of Thomas Jefferson (Memorial edition, 1904) 449.

Thus, the "wall of separation between church and State" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

Mr. Madison's *Memorial and Remonstrance against Religious Assessments,*[14] relied upon by the dissenting Justices in *Everson,* is not applicable here.[15] Mr. Madison was one of the principal opponents in the Virginia General Assembly of *A Bill Establishing a Provision for Teachers of the Christian Religion.* The monies raised by the taxing section [16] of that bill were to be appropriated "by the Vestries, Elders, or Directors of each religious society, . . . to a provision for a Minister or Teacher

[14] The texts of the *Memorial and Remonstrance* and the bill against which it was aimed, to wit, *A Bill Establishing a Provision for Teachers of the Christian Religion* are set forth in *Everson* v. *Board of Education,* 330 U. S. 1, 28, 63–74.

[15] See, generally, the dissent of MR. JUSTICE RUTLEDGE, 330 U. S. 1, 28.

[16] 330 U. S. at 72–73:

"*Be it therefore enacted by the General Assembly,* That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

"*And be it enacted,* That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books. . . ."

of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever . . . ." The conclusive legislative struggle over this act took place in the fall of 1785, before the adoption of the Bill of Rights. The *Remonstrance* had been issued before the General Assembly convened and was instrumental in the final defeat of the act, which died in committee. Throughout the *Remonstrance,* Mr. Madison speaks of the "establishment" sought to be effected by the act. It is clear from its historical setting and its language that the *Remonstrance* was a protest against an effort by Virginia to support Christian sects by taxation. Issues similar to those raised by the instant case were not discussed. Thus, Mr. Madison's approval of Mr. Jefferson's report as Rector gives, in my opinion, a clearer indication of his views on the constitutionality of religious education in public schools than his general statements on a different subject.

This Court summarized the amendment's accepted reach into the religious field, as I understand its scope, in *Everson* v. *Board of Education, supra.* The Court's opinion quotes the gist of the Court's reasoning in *Everson.* I agree, as there stated, that none of our governmental entities can "set up a church." I agree that they cannot "aid" all or any religions or prefer one "over another." But "aid" must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. "Prefer" must give an advantage to one "over another." I agree that pupils cannot "be released in part from their legal duty" of school attendance upon condition that they attend religious classes. But as Illinois has held that it is within the discretion of the School Board to permit absence from school for religious instruc-

tion no legal duty of school attendance is violated. 396 Ill. 14, 71 N. E. 2d 161. If the sentence in the Court's opinion, concerning the pupils' release from legal duty, is intended to mean that the Constitution forbids a school to excuse a pupil from secular control during school hours to attend voluntarily a class in religious education, whether in or out of school buildings, I disagree. Of course, no tax can be levied to support organizations intended "to teach or practice religion." I agree too that the state cannot influence one toward religion against his will or punish him for his beliefs. Champaign's religious education course does none of these things.

It seems clear to me that the "aid" referred to by the Court in the *Everson* case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society. This explains the well-known fact that all churches receive "aid" from government in the form of freedom from taxation. The *Everson* decision itself justified the transportation of children to church schools by New Jersey for safety reasons. It accords with *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370, where this Court upheld a free textbook statute of Louisiana against a charge that it aided private schools on the ground that the books were for the education of the children, not to aid religious schools. Likewise the National School Lunch Act aids all school children attending tax-exempt schools.[17] In *Bradfield* v. *Roberts,* 175 U. S. 291, this Court held proper the payment of money by the Federal Government to build an addition to a hospital, chartered by individuals who were members of a Roman Catholic sisterhood, and operated under the auspices of the Roman Catholic Church. This was done over the objection that it aided the establish-

[17] 60 Stat. 230, ch. 281, §§ 4, 11 (d) (3).

ment of religion.[18] While obviously in these instances the respective churches, in a certain sense, were aided, this Court has never held that such "aid" was in violation of the First or Fourteenth Amendment.

Well-recognized and long-established practices support the validity of the Illinois statute here in question. That statute, as construed in this case, is comparable to those in many states.[19] All differ to some extent. New York may be taken as a fair example.[20] In many states the pro-

[18] See *Selective Draft Law Cases*, 245 U. S. 366, 390; *Quick Bear* v. *Leupp*, 210 U. S. 50.

[19] Ed. Code of Cal. (Deering, 1944) § 8286; 6 Ind. Stat. Ann. (Burns, 1933) 1945 Supp. § 28–505a; 1 Code of Iowa ch. 299, § 299.2 (1946); Ky. Rev. Stat. (1946) § 158.220; 1 Rev. Stat. of Maine (1944) ch. 37, § 131; 2 Ann. Laws of Mass. (1945) ch. 76, § 1; Minn. Stat. (1945) § 132.05; N. Y. Education Law § 3210 (1); 8 Ore. Comp. Laws Ann. (1940) § 111–3014; 24 Pa. Stat. Ann. (Purdon, 1930) 1947 Supp. § 1563; 1 Code of S. D. (1939) § 15.3202; 1 Code of W. Va. (1943) § 1847.

[20] Education Law § 3210 (1) provides that: "a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

"b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

Acting under the authority of the New York law, the State Commissioner of Education issued, on July 4, 1940, these regulations:

"1 Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2 The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3 Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4 Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5 Such absence shall be for not more than one hour each week

gram is under the supervision of a religious council composed of delegates who are themselves communicants of various faiths.[21] As is shown by *Bradfield* v. *Roberts, supra,* the fact that the members of the council have religious affiliations is not significant. In some, instruc-

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at the close of a session at a time to be fixed by the local school authorities.

"6 In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

On November 13, 1940, rules to govern the released time program of the New York City schools were adopted by the Board of Education of the City of New York. Under these rules the practice of the religious education program is this: classes in religious education are to be held outside of school buildings; establishment of the program rests in the initiative of the church and home; enrollment is voluntary and accomplished by this technique: the church distributes cards to the parents and these are filled out and presented to the school; records of enrollment and arrangements for release are handled by school authorities; discipline is the responsibility of the church; and children who do not attend are kept at school and given other work. See Rules of the Board of Education of the City of New York adopted Nov. 13, 1940; Public Education Association, *Released Time for Religious Education in New York City's Schools* (1943); *id.* (1945).

Constitutional approval by the New York Court of Appeals of these practices was given before the passage of Education Law § 3210 (1). *People ex rel. Lewis* v. *Graves,* 245 N. Y. 195, 156 N. E. 663.

[21] The New York City program is supervised by The Greater New York Coordinating Committee on Released Time, a group of laymen drawn from Jews, Protestants and Roman Catholics. This Committee is an example of a broad national effort to bring about religious education of children through cooperative action of schools and groups of members of various religious denominations. The methods vary in different states and cities but are basically like the work of the New York City Committee. See *Brief Sketches of Weekday Church Schools,* Department of Weekday Religious Education, International Council of Religious Education, Chicago, Illinois (1944).

tion is given outside of the school buildings; in others, within these buildings. Metropolitan centers like New York usually would have available quarters convenient to schools. Unless smaller cities and rural communities use the school building at times that do not interfere with recitations, they may be compelled to give up religious education. I understand that pupils not taking religious education usually are given other work of a secular nature within the schools.[22] Since all these states use the facilities of the schools to aid the religious education to some extent, their desire to permit religious education to school children is thwarted by this Court's judgment.[23] Under it, as I understand its language, children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an "aid" in establishing religion; the use of public money for religion.

Cases running into the scores have been in the state courts of last resort that involved religion and the schools. Except where the exercises with religious significance partook of the ceremonial practice of sects or groups, their

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[22] See note 20 *supra*.

[23] The use of school buildings is not unusual. See Davis, *Weekday Classes in Religious Education*, U. S. Office of Education (Bulletin 1941, No. 3) 27; National Education Association, *The State and Sectarian Education*, Research Bulletin (Feb. 1946) 36. The International Council of Religious Education advises that church buildings be used if possible. Shaver, *Remember the Weekday*, International Council of Religious Education (1946).

"Today, approximately two thousand communities in all but two states provide religious education in cooperation with the public schools for more than a million and a half of pupils." Shaver, *The Movement for Weekday Religious Education*, Religious Education (Jan.–Feb. 1946), p. 7.

constitutionality has been generally upheld.[24] Illinois itself promptly struck down as violative of its own constitution required exercises partaking of a religious ceremony. *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 92 N. E. 251. In that case compulsory religious exercises—a reading from the King James Bible, the Lord's Prayer and the singing of hymns—were forbidden as "worship services." In this case, the Supreme Court of Illinois pointed out that in the *Ring* case, the activities in the school were ceremonial and compulsory; in this, voluntary and educational. 396 Ill. 14, 20–21, 71 N. E. 2d 161, 164.

The practices of the federal government offer many examples of this kind of "aid" by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for

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[24] Many uses of religious material in the public schools in a manner that has some religious significance have been sanctioned by state courts. These practices have been permitted: reading selections from the King James Bible without comment; reading the Bible and repeating the Lord's Prayer; teaching the Ten Commandments; saying prayers; and using textbooks based upon the Bible and emphasizing its fundamental teachings. When conducted in a sectarian manner reading from the Bible and singing hymns in the school's morning exercise have been prohibited as has using the Bible as a textbook. There is a conflict of authority on the question of the constitutionality of wearing religious garb while teaching in the public schools. It has been held to be constitutional for school authorities to prohibit the reading of the Bible in the public schools. There is a conflict of authority on the constitutionality of the use of public school buildings for religious services held outside of school hours. The constitutionality, under state constitutions, of furnishing free textbooks and free transportation to parochial school children is in conflict. See *Nichols* v. *Henry,* 301 Ky. 434, 191 S. W. 2d 930; *Findley* v. *City of Conneaut,* 12 Ohio Supp. 161. The earlier cases are collected in 5 A. L. R. 866 and 141 A. L. R. 1144.

the proceedings.[25] The armed forces have commissioned chaplains from early days.[26] They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion.[27] Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools.[28] The schools of the District of Columbia have opening exercises which "include a reading from the Bible without note or comment, and the Lord's prayer." [29]

In the United States Naval Academy and the United States Military Academy, schools wholly supported and completely controlled by the federal government, there are a number of religious activities. Chaplains are attached to both schools. Attendance at church services on Sunday is compulsory at both the Military and Naval Academies.[30] At West Point the Protestant services are

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[25] Rules of the House of Representatives (1943) Rule VII; Senate Manual (1947) 6, fn. 2.

[26] 3 Stat. 297 (1816).

[27] Army Reg., No. 60–5 (1944); U. S. Navy Reg. (1920), ch. 1, § 2 and ch. 34, §§ 1–2.

[28] 58 Stat. 289.

[29] Board of Education Rules, ch. VI, § 4.

[30] Reg. for the U. S. Corps of Cadets (1947) 47: "Attendance at chapel is part of a cadet's training; no cadet will be exempted. Each cadet will receive religious training in one of the three principal faiths: Catholic, Protestant, or Jewish." U. S. Naval Academy Reg., Art. 4301 (b): "Midshipmen shall attend church services on Sundays at the Naval Academy Chapel or at one of the regularly established churches in the city of Annapolis."

Morning prayers are also required at Annapolis. U. S. Naval Academy Reg., Art. 4301 (a): "Daily, except on Sundays, a Chaplain will conduct prayers in the messhall, immediately before breakfast." Protestant and Catholic Chaplains take their turn in leading these prayers.

held in the Cadet Chapel, the Catholic in the Catholic Chapel, and the Jewish in the Old Cadet Chapel; at Annapolis only Protestant services are held on the reservation, midshipmen of other religious persuasions attend the churches of the city of Annapolis. These facts indicate that both schools since their earliest beginnings have maintained and enforced a pattern of participation in formal worship.

With the general statements in the opinions concerning the constitutional requirement that the nation and the states, by virtue of the First and Fourteenth Amendments,[31] may "make no law respecting an establishment of religion," I am in agreement. But, in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided. Whatever may be the wisdom of the arrangement as to the use of the school buildings made with the Champaign Council of Religious Education, it is clear to me that past practice shows such cooperation between the schools and a non-ecclesiastical body is not forbidden by the First Amendment. When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion. For a non-sectarian organization to give the type of instruction here offered cannot be said to violate our rule as to the establishment of religion by the state. The prohibition of enactments respecting the establishment of religion do

[31] The principles of the First Amendment were absorbed by the Fourteenth Amendment. *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment—free speech, free press—are absolutes.[32] If abuses occur, such as the use of the instruction hour for sectarian purposes, I have no doubt, in view of the *Ring* case, that Illinois will promptly correct them. If they are of a kind that tend to the establishment of a church or interfere with the free exercise of religion, this Court is open for a review of any erroneous decision. This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population.[33] A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation.[34] Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text. The judgment should be affirmed.

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[32] See *Whitney* v. *California*, 274 U. S. 357, 371; *Reynolds* v. *United States*, 98 U. S. 145, 166; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Cox* v. *New Hampshire*, 312 U. S. 569, 574, 576; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Prince* v. *Massachusetts*, 321 U. S. 158.

[33] Cf. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28.

[34] *Higgins* v. *Smith*, 308 U. S. 473; *Helvering* v. *Clifford*, 309 U. S. 331; *Comm'r* v. *Tower*, 327 U. S. 280; *Lusthaus* v. *Comm'r*, 327 U. S. 293.

IN RE OLIVER.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 215. Argued December 16, 1947.—Decided March 8, 1948.

In obedience to a subpoena, petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a secret "one-man grand jury" investigation of crime. After petitioner had given certain testimony, the judge-grand jury, acting in the belief that his testimony was false and evasive (which belief was based partly on testimony given by at least one other witness in petitioner's absence), summarily charged him with contempt, convicted him, and sentenced him to sixty days in jail. These proceedings were secret and petitioner had no opportunity to secure counsel, to prepare his defense, to cross-examine the other grand-jury witness, or to summon witnesses to refute the charge against him. *Held:*

1. The secrecy of petitioner's trial for criminal contempt violated the due process clause of the Fourteenth Amendment. Pp. 266–273, 278.

(a) The reasons advanced to support the secrecy of grand-jury investigative proceedings do not justify secrecy in the trial of a defendant accused of an offense for which he may be fined or sent to jail. Pp. 264–266.

(b) An accused is entitled to a public trial, at least to the extent of having his friends, relatives and counsel present—no matter with what offense he may be charged. Pp. 271–272.

2. The failure to afford petitioner a reasonable opportunity to defend himself against the charge of giving false and evasive testimony was a denial of due process of law. Pp. 273–278.

(a) As a minimum, due process requires that an accused be given reasonable notice of the charge against him, the right to examine the witnesses against him, the right to testify in his own behalf, and the right to be represented by counsel. P. 273.

(b) The circumstances of this case did not justify denial of these rights on the ground that the trial was for contempt of court committed in the court's actual presence. *Ex parte Terry,* 128 U. S. 289, distinguished. Pp. 273–278.

318 Mich. 7, 27 N. W. 2d 323, reversed.

In a habeas corpus proceeding, the State Supreme Court denied petitioner's release from imprisonment upon a sentence for contempt. 318 Mich. 7, 27 N. W. 2d 323. This Court granted certiorari. 332 U. S. 755. *Reversed,* p. 278.

Osmond K. Fraenkel and *William Henry Gallagher* argued the cause for petitioner. With them on the brief were *Louis M. Hopping* and *Elmer H. Groefsema.*

Edmund E. Shepherd, Solicitor General, argued the cause for the State of Michigan, respondent. With him on the brief were *Eugene F. Black,* Attorney General, *H. H. Warner* and *Daniel J. O'Hara,* Assistant Attorneys General.

Harry G. Gault and *Wilber M. Brucker* filed a brief for the State Bar of Michigan as *amicus curiae.*

Patrick H. O'Brien and *Erwin B. Ellmann* filed a brief for the Detroit Chapter, National Lawyers Guild, as *amicus curiae,* urging reversal.

Mr. Justice Black delivered the opinion of the Court.

A Michigan circuit judge summarily sent the petitioner to jail for contempt of court. We must determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment.

In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a "one-man grand jury" investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain.

Two other circuit judges were present in an advisory capacity.[1] A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that the public was excluded—the questioning was secret in accordance with the traditional grand jury method.

After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story—that it did not "jell." This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-jury derived from the testimony of at least one other witness who had previously given evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed—that petitioner's story did not "jell"—the judge-grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross-examine the other grand jury witness or to summon witnesses to refute the charge against him.

Three days later a lawyer filed on petitioner's behalf in the Michigan Supreme Court the petition for habeas corpus now under consideration. It alleged among other

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[1] Under certain circumstances Michigan law permits circuit judges to sit with other circuit judges in an advisory capacity. Mich. Stat. Ann. § 27.188 (Henderson 1938); Mich. Comp. Laws 1929 § 13666.

things that the petitioner's attorney had not been allowed to confer with him and that, to the best of the attorney's knowledge, the petitioner was not held in jail under any judgment, decree or execution, and was "not confined by virtue of any legal commitment directed to the sheriff as required by law." An order was then entered signed by the circuit judge that he had while "sitting as a One-Man Grand Jury" convicted the petitioner of contempt of court because petitioner had testified "evasively" and had given "contradictory answers" to questions. The order directed that petitioner "be confined in the County Jail . . . for a period of sixty (60) days or until such time as he . . . shall appear and answer the questions heretofore propounded to him by this Court . . . ."

The Supreme Court of Michigan, on grounds detailed in the companion case of *In re Hartley,* 317 Mich. 441, 27 N. W. 2d 48,[2] rejected petitioner's contention that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chamber had deprived him of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment

[2] In giving reasons in its *Hartley* opinion for rejecting this petitioner's constitutional contentions, the State Supreme Court said it would have been an "idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one-man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.

"Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp. Laws of 1929, § 13912 (Stat. Ann. § 27.513). It was properly dealt with summarily. 3 Comp. Laws 1929, §§ 13910, 13911 (Stat. Ann. §§ 27.511, 27.512)." 317 Mich. at 444–445, 27 N. W. 2d at 50.

requires.[3] *In re Oliver,* 318 Mich. 7, 27 N. W. 2d 323. We granted certiorari to consider these procedural due process questions.

The case requires a brief explanation of Michigan's unique one-man grand jury system.[4] That state's first constitution (1835), like the Fifth Amendment to the Federal Constitution, required that most criminal prosecutions be begun by presentment or indictment of a grand jury. Art. I, § 11. This compulsory provision was left out of the 1850 constitution and from the present constitution (1908). However, Michigan judges may still in their discretion summon grand juries, but we are told by the attorney general that this discretion is rarely exercised and that the "One-Man Grand Jury" has taken the place of the old Michigan 16 to 23-member grand jury, particularly in probes of alleged misconduct of public officials.

The one-man grand jury law was passed in 1917 following a recommendation of the State Bar Association that, in

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[3] By a four to four vote the court also held that there was "evidence to support the finding" of the judge-grand jury that petitioner had testified falsely. Petitioner has argued here that there was not a shred of evidence which under any circumstances could have conceivably supported this finding and thus that he was deprived of his liberty without due process of law. In the view that we take of this case we find it unnecessary to consider this constitutional contention.

[4] The laws authorizing the system are found in Michigan Comp. Laws 1929, § 17217, *et seq.;* Mich. Stat. Ann. § 28.943, *et seq.* (Henderson 1938). A summary of the ten states' statutes which have some similarities to Michigan's appears in Winters, *The Michigan One-Man Grand Jury,* 28 J. Am. Jud. Soc. 137. See, *e. g.,* Conn. Gen. Stat. § 889f (Supp. 1941); *McCarthy* v. *Clancy,* 110 Conn. 482, 148 A. 551; Okla. Stat. Ann. tit. 37, § 83; tit. 21 § 951 (1937); *Ex parte Ballew,* 20 Okla. Cr. 105, 201 P. 525.

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the interest of more rigorous law enforcement, greater emphasis should be put upon the "investigative procedure" for "probing" and for "detecting" crime.[5] With this need uppermost in its thinking the Bar Association recommended a bill which provided that justices of the peace be vested with the inquisitorial powers traditionally conferred only on coroners and grand juries. The bill as passed imposed the recommended investigatory powers not only on justices of the peace, but on police judges and judges of courts of record as well. Mich. Laws 1917, Act 196.

Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than one hundred dollars, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within

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[5] Proceedings of the Twenty-sixth Annual Meeting of the Michigan State Bar Association 101–105 (1916).

its discretion then decides to commute or suspend his sentence.[6]

In carrying out this authority a judge-grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense,[7] all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich. Stat. Ann. § 28.944 (Henderson 1938). A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret.[8] And these secret interrogations can be carried on day or night, in a public place or a "hideout," a courthouse, an office building, a hotel room, a home, or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the "portable grand jury." [9]

It was a circuit court judge-grand jury before which petitioner testified. That judge-jury filed in the State Supreme Court an answer to this petition for habeas corpus. The answer contained fragments of what was apparently a stenographic transcript of petitioner's testimony given before the grand jury. It was these fragments of testimony, so the answer stated, that the "Grand

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[6] *In re Ward,* 295 Mich. 742, 747, 295 N. W. 483, 485. (First 60-day conviction May 31, 1940, followed by second 60-day conviction July 29, 1940. A $100 fine was also imposed in each instance.)

[7] *In re Investigation of Recount,* 270 Mich. 328, 331, 258 N. W. 776, 777; *In re Slattery,* 310 Mich. 458, 479, 17 N. W. 2d 251, 259.

[8] *People* v. *Wolfson,* 264 Mich. 409, 413, 250 N. W. 260, 262; *In re Watson,* 293 Mich. 263, 269, 291 N. W. 652, 655; *People* v. *Butler,* 221 Mich. 626, 631–632, 192 N. W. 685, 687.

[9] Winters, *The Michigan One-Man Grand Jury,* 28 J. Am. Jud. Soc. 137, 143; *Unprecedented Success in Criminal Courts,* 26 J. Am. Jud. Soc. 42–43.

Jury" had concluded to be "false and evasive." The petitioner then filed a verified motion with the State Supreme Court seeking to have the complete transcript of his testimony before the judge-jury produced for the habeas corpus hearing. He alleged that a full report of his testimony would disclose that he had freely, promptly, and to the best of his ability, answered all questions asked, and that the full transcript would refute the charge that he had testified evasively or falsely. In his answer to the motion the circuit judge did not deny these allegations. However, he asserted that the fragments contained in the original answer showed "all of the Grand Jury testimony necessary to the present proceeding" and that "the full disclosure of Petitioner's testimony would seriously retard Grand Jury activities." The State Supreme Court then denied the petitioner's motion. Thus, when that Court later dismissed the petition for habeas corpus it had seen only a copy of a portion of the record of the testimony given by the petitioner.

The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge, and therefore we do not concern ourselves with that question. It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy. See, *e. g.*, *Hale* v. *Henkel,* 201 U. S. 43, 58–66; *State* v. *Branch,* 68 N. C. 186. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a "no-bill" or an indictment.

They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all.[10] Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature,[11] the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both. Thus our first question is this:

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[10] See cases collected in 8 A. L. R. 1579–1580; Orfield, Criminal Procedure from Arrest to Appeal 161 (1947).

[11] *In re Slattery,* 310 Mich. 458, 466–468, 17 N. W. 2d 251, 254–255; *Kloka* v. *State Treasurer,* 318 Mich. 87, 90, 27 N. W. 2d 507, 508; *cf. Todd* v. *United States,* 158 U. S. 278, 284; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 481, 489; *United States* v. *Ferreira,* 13 How. 40, 44–48.

Can an accused be tried and convicted for contempt of court in grand jury secrecy?

First. Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal,[12] state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court [13] have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception.

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.[14] In this country the guarantee to an accused of

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[12] Cases within the jurisdiction of courts martial may be regarded as an exception. *Ex parte Quirin,* 317 U. S. 1, 43; *King* v. *Governor of Lewes Prison,* 61 Sol. J. 294, 30 Harv. L. Rev. 771. Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel.

[13] Under Michigan law contempt proceedings against a witness before a one-man grand jury are criminal in nature. *In re Wilkowski,* 270 Mich. 687, 259 N. W. 658. But this characterization is not material in resolving this due process question. *Cf. Gompers* v. *United States,* 233 U. S. 604, 610–611.

[14] Radin, *The Right to a Public Trial,* 6 Temp. L. Q. 381–384. Early commentators mention that public trials were commonly held without attempting to trace their origin. Sir Thomas Smith in 1565 in his De Republica Anglorum bk. 2, pp. 79, 101 (Alston ed. 1906); Sir Matthew Hale about 1670 in his History of The Common Law of

the right to a public trial first appeared in a state constitution in 1776.[15] Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions.[16] Today almost without exception [17] every state by consti-

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England 343–345 (Runnington ed. 1820). In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. Trial of John Lilburne, 4 How. St. Tr. 1270, 1274. "By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted." 2 Bishop, New Criminal Procedure § 957 (2d ed. 1913).

[15] Penn. Const., Declaration of Rights IX (1776); N. C. Const., Declaration of Rights IX (1776) (criminal convictions only by jury verdict in "open court").

[16] See, *e. g.*, Vt. Const., ch. I, Declaration of Rights, XI (1787); Del. Const., Art. I, § 7 (1792); Ky. Const., Art. XII, cl. 10 (1792); Tenn. Const., Art. XI, § 9 (1796); Miss. Const., Art. I, § 10 (1817); Mich. Const., Art. I, § 10 (1835); Tex. Const., Art. I, § 8 (1845).

[17] Four states, Massachusetts, New Hampshire, Virginia and Wyoming, appear to have neither statutory nor constitutional provisions specifically requiring that criminal trials be held in public, although all have constitutions guaranteeing an accused the right to a jury trial. Mass. Const., Pt. I, Art. XII; N. H. Const., Pt. First, Arts. 15th, 16th; Va. Const., Art. I, § 8; Wyo. Const., Art. 1, § 10. Massachusetts by implication has recognized that an accused has a right to a public trial as well. A statute of that state permits the exclusion of spectators in only a limited category of cases. Mass. Gen. Laws c. 278, § 16A (1932). In New Hampshire and Wyoming no statute or decision has been found in which the right of an accused to a public trial is mentioned. In Virginia, although no decision has been discovered, a statute provides: "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any or all persons whose presence is not deemed necessary." Va. Code Ann. § 4906 (1942).

tution,[18] statute,[19] or judicial decision,[20] requires that all criminal trials be open to the public.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition,[21] to the excesses of

[18] Forty-one states: Ala. Const., Art. I, § 6; Ariz. Const., Art. II, § 24; Ark. Const., Art. II, § 10; Cal. Const., Art. I, § 13; Colo. Const., Art. II, § 16; Conn. Const., Art. I, § 9; Del. Const., Art. I, § 7; Fla. Const., Declaration of Rights, § 11; Ga. Const., Art. I, § I, par. V; Idaho Const., Art. I, § 13; Ill. Const., Art. II, § 9; Ind. Const., Art. 1, § 13; Iowa Const., Art. I, § 10; Kan. Const., Bill of Rights, § 10; Ky. Const., § 11; La. Const., Art. I, § 9; Me. Const., Art. I, § 6; Mich. Const., Art. II, § 19; Minn. Const., Art. 1, § 6; Miss. Const., Art. 3, § 26; Mo. Const., Art. I, § 18; Mont. Const., Art. III, § 16; Neb. Const., Art. I, § 11; N. J. Const., Art. I, § 8; N. M. Const., Art. II, § 14; N. C. Const., Art. I, § 13 (no convictions for crime except by jury verdict in "open court"); N. D. Const., Art. I, § 13; Ohio Const., Art. I, § 10; Okla. Const., Art. II, § 20; Ore. Const., Art. I, § 11; Pa. Const., Art. I, § 9; R. I. Const., Art. I, § 10; S. C. Const., Art. I, § 18; S. D. Const., Art. 6, § 7; Tenn. Const., Art. I, § 9; Tex. Const., Art. I, § 10; Utah Const., Art. I, § 12; Vt. Const., ch. I, Art. 10th; Wash. Const., Art. I, § 22; W. Va. Const., Art. III, § 14; Wis. Const., Art. I, § 7.

[19] Two states: Nev. Comp. Laws Ann. § 10654 (1929); N. Y. Civil Rights Law § 12.

[20] The Maryland Court of Appeals has apparently interpreted the state constitution as prohibiting secret trials. *Dutton* v. *State,* 123 Md. 373, 386–388, 91 A. 417, 422–423.

[21] Radin, *The Right to a Public Trial,* 6 Temp. L. Q. 381, 389. The criminal procedure of the civil law countries long resembled that of the Inquisition in that the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret. Esmein, A History of Continental Criminal Procedure 183–382 (1913); Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure,* 23 J. Crim. L. & Criminology 372–386. The ecclesiastical courts of Great Britain, which intermittently exercised a limited civil and criminal jurisdiction, adopted a procedure described as "in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively

the English Court of Star Chamber,[22] and to the French monarchy's abuse of the *lettre de cachet*.[23] All of these institutions obviously symbolized a menace to liberty. In

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unimportant kind . . . ." 2 Stephen, History of the Criminal Law of England, 402 (1883). The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. See *e. g.*, 3 Blackstone, Commentaries *373; 1 Bentham, Rationale of Judicial Evidence, 594–595, 603 (1827). The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits. See, *e. g.*, *Scott* v. *Scott*, [1913] A. C. 417.

[22] *Davis* v. *United States*, 247 F. 394, 395; *Keddington* v. *State*, 19 Ariz. 457, 459, 172 P. 273; *Williamson* v. *Lacy*, 86 Me. 80, 82–83, 29 A. 943, 944; *Dutton* v. *State*, 123 Md. 373, 387, 91 A. 417, 422; Jenks, The Book of English Law 91 (3d ed. 1932). Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agree that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded. 5 Holdsworth, A History of English Law, 163, 165, 180–197 (2d ed. 1937); Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 386–388; Washburn, *The Court of Star Chamber*, 12 Am. L. Rev. 21, 25–31.

[23] Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 388. The *lettre de cachet* was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 *lettres de cachet* during his reign. This device was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others, denounced the use of the *lettre de cachet*, and it was abolished after the French Revolution, though later temporarily revived by Napoleon. 13 Encyc. Brit. 971; 3 Encyc. Soc. Sci. 137.

the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society,[24] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[25] One need not wholly agree with a statement made on the subject by

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[24] Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony. 6 Wigmore, Evidence § 1834 (3d ed. 1940); *Tanksley* v. *United States*, 145 F. 2d 58, 59.

(2) The spectators learn about their government and acquire confidence in their judicial remedies. 6 Wigmore, Evidence § 1834 (3d ed. 1940); 1 Bentham, Rationale of Judicial Evidence 525 (1827); *State* v. *Keeler*, 52 Mont. 205, 156 P. 1080; 20 Harv. L. Rev. 489.

[25] Jenks, The Book of English Law 91 (1932); Auld, *Comparative Jurisprudence of Criminal Process*, 1 U. of Toronto L. J. 82, 99; Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381; *Criminal Procedure in Scotland and England*, 108 Edinburgh Rev. 174, 181–182; Holmes, J. in *Cowley* v. *Pulsifer*, 137 Mass. 392, 394; *State* v. *Osborne*, 54 Ore. 289, 295–297, 103 P. 62, 64–66. *People* v. *Murray*, 89 Mich. 276, 286, 50 N. W. 995, 998: "It is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule [as to public trials] must be observed and applied to all." Frequently quoted is the statement in 1 Cooley, Constitutional Limitations (8th ed. 1927) at 647: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ."

Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: ". . . suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." [26]

In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial.[27] But, unless in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches.[28] And without exception all courts have held

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[26] 1 Bentham, Rationale of Judicial Evidence 524 (1827).

[27] Compare *People* v. *Murray,* 89 Mich. 276, 50 N. W. 995; and *People* v. *Yeager,* 113 Mich. 228, 71 N. W. 491, with *Reagan* v. *United States,* 202 F. 488. For collection and analysis of the cases, see 6 Wigmore, Evidence § 1834 (3d ed. 1940); Orfield, Criminal Procedure from Arrest to Appeal 385–387 (1947); Radin, *The Right to a Public Trial,* 6 Temp. L. Q. 381, 389–391; Note, 35 Mich. L. Rev. 474; 8 U. of Det. L. J. 129; 156 A. L. R. 265.

[28] "For the purposes contemplated by the provision of the constitution, the presence of the officers of the court, men whom [*sic*], it is safe to say, were under the influence of the court, made the trial no more public than if they too had been excluded." *People* v. *Hartman,* 103 Cal. 242, 244, 37 P. 153, 154.

that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.[29] In *Gaines* v. *Washington*, 277 U. S. 81, 85–86, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts,[30] but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

In the case before us, the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a "trial," the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to

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[29] See, *e. g.*, *State* v. *Beckstead*, 96 Utah 528, 88 P. 2d 461 (error to exclude friends and relatives of accused); *Benedict* v. *People*, 23 Colo. 126, 46 P. 637 (exclusion of all except witnesses, members of bar and law students upheld); *People* v. *Hall*, 51 App. Div. 57, 64 N. Y. S. 433 (exclusion of general public upheld where accused permitted to designate friends who remained). "No court has gone so far as affirmatively to exclude the press." Note, 35 Mich. L. Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, *The Right to a Public Trial*, 6 Temp. L. Q. 381, 394–395; 20 J. Am. Jud. Soc. 83.

[30] Cases are collected in 27 Ann. Cas. 35.

prison—still without any break in the secrecy. Even in jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was not the end of secrecy. His lawyer filed in the State Supreme Court this habeas corpus proceeding. Even there, the mantle of secrecy enveloped the transaction and the State Supreme Court ordered him sent back to jail without ever having seen a record of his testimony, and without knowing all that took place in the secrecy of the judge's chambers. In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Second. We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[31] Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge,

[31] The following decisions of this Court involving various kinds of proceedings are among the multitude that support the above statement: *Snyder* v. *Massachusetts,* 291 U. S. 97, 116; *Powell* v. *Alabama,* 287 U. S. 45, 68–70; *Hovey* v. *Elliott,* 167 U. S. 409, 418; *Holden* v. *Hardy,* 169 U. S. 366, 390–391; *Morgan* v. *United States,* 304 U. S. 1, 14–15, and cases there cited.

namely, a contempt of court, committed, the State urges, in the court's actual presence.

It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. *Ex parte Terry,* 128 U. S. 289, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The "violence and misconduct" of both the heckler and the marshal's assailant occurred within the "personal view" of the judge, "under his own eye," and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the *Terry* case the Court cited with approval its decision in *Anderson* v. *Dunn,* 6 Wheat. 204, which had marked the limits of contempt authority in general as being "the least possible power adequate to the end proposed." *Id.* at 231. And see *In re Michael,* 326 U. S. 224, 227.

That the holding in the *Terry* case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in *Cooke* v. *United States,* 267 U. S. 517, a contempt case arising in a federal district court. There it was pointed out that for a

court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the *Terry* rule as reaching only such conduct as created "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Id.* at 536.

Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the

Cooke case, that the accused be accorded notice and a fair hearing as above set out.

The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public. Furthermore, the answer of the judge-grand jury to the petition for habeas corpus showed that his conclusion that the petitioner had testified falsely was based, at least in part, upon the testimony given before him by one or more witnesses other than petitioner. Petitioner and one Hartley both testified the same day; both were pin-ball machine operators; both had bought or had in their possession certain so-called bonds purchased from one Mitchell; both were sent to jail for contempt the same day. *In re Hartley,* 317 Mich. 441, 27 N. W. 2d 48. The judge-grand jury pressed both petitioner and Hartley to state why they bought bonds which were patently worthless. The petitioner was also repeatedly asked what he had done with the worthless bonds. He answered every question asked him, according to the fragmentary portions of his testimony reported to the Michigan Supreme Court, most of which is included in that court's opinion. He steadfastly denied that he knew precisely what he had done with the worthless bonds, but made several different statements as to how he might have disposed of them, such as that he might have thrown them into the wastebasket, or trash can, or might have burned them.

In upholding the judge-grand jury's conclusion that petitioner had testified falsely and evasively, the majority of the Michigan Supreme Court gave as one reason a statement in the judge-grand jury's answer "That the Grand Jury, after investigation, is satisfied that the bonds

sold by the said Carman A. Mitchell to the said William D. Oliver are the same as those sold by the said Carman A. Mitchell to Leo Thomas Hartley." Nothing in the petitioner's testimony as reported could have remotely justified the judge-jury in drawing such a conclusion. The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The *Terry* case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the *Terry* case only if the judge there had not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify.

Nor is there any reason suggested why "demoralization of the court's authority" would have resulted from giving the petitioner a reasonable opportunity to appear and offer a defense in open court to a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts.[32] The practice that has always been followed with recalcitrant grand jury wit-

[32] See note 10 *supra*.

nesses is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other testimony to be perjurers have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of "demoralization of the court's authority."

It is "the law of the land" that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See *Chambers* v. *Florida,* 309 U. S. 227, 236–237. The petitioner was convicted without that kind of trial.

The judgment of the Supreme Court of Michigan is reversed and the cause is remanded to it for disposition not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE RUTLEDGE, concurring.

I join in the Court's opinion and decision. But there is more which needs to be said.

Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the rights "to be informed

of the nature and cause of the accusation;[1] to be confronted with the witnesses against him;[2] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." It takes away the security against being twice put in jeopardy for the same offense[3] and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.[4] U. S. Const. Amend. V and XIV.

This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. There is no semblance of due process of law in the scheme when it is used for those ends.[5]

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[1] The requirement, of course, contemplates that the accused be so informed sufficiently in advance of trial or sentence to enable him to determine the nature of the plea to be entered and to prepare his defense if one is to be made. Cf. *White* v. *Ragen*, 324 U. S. 760, 764; *Powell* v. *Alabama*, 287 U. S. 45.

[2] The only "witness" in this case was the grand jury-judge who, so far as the record discloses, did not submit to cross-examination.

[3] As the Court's opinion notes, the state supreme court has held that the witness may be reexamined and recommitted for a further 60-day period after serving the first sentence of that length, unless he reappears and answers the same questions to the satisfaction of the one-man grand jury. *In re Ward*, 295 Mich. 742, 747.

[4] Cf. *Cochran* v. *Kansas*, 316 U. S. 255. So far as appears, only persons committed or fined by a one-man grand jury are subjected in Michigan to this attenuated appellate procedure. Others convicted of crime, including criminal contempt, apparently are afforded rights to complete and nondiscretionary records on appeal.

[5] The immediate shift of the proceeding from inquisitorial to punitive function converts it from a grand jury investigation to a proceeding in criminal contempt.

The case demonstrates how far this Court departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights.[6] In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, "in spite of the absolutism of continental governments," their "ideas and processes of civil justice" in place of the time-tried "principles and institutions of the common law" [7] perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this case. It is the immediate offspring of *Hurtado* v. *California,* 110 U. S. 516, and later like cases.[8]

So long as they stand, so long as the Bill of Rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of a majority of this Court that the experiment violates fundamental notions of justice in civilized society.

I do not conceive that the Bill of Rights, apart from the due process clause of the Fifth Amendment, incorporates all such ideas. But as far as its provisions go, I know of no better substitutes. A few may be inconvenient. But restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive

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[6] Cf. *Adamson* v. *California,* 332 U. S. 46, dissenting opinion of MR. JUSTICE BLACK at 68.

[7] See *Hurtado* v. *California,* 110 U. S. 516, 531.

[8] *E. g., Twining* v. *New Jersey,* 211 U. S. 78; *Adamson* v. *California,* 332 U. S. 46.

one of it, are always inconvenient—to the authority so restricted. And in times like these I do not think substitutions imported from other systems, including continental ones, offer promise on the whole of more improvement than harm, either for the cause of perfecting the administration of justice or for that of securing and perpetuating individual freedom, which is the main end of our society as it is of our Constitution.

One cannot attribute the collapse of liberty in Europe and elsewhere during recent years solely to the "ideas and processes of civil justice" prevailing in the nations which have suffered that loss. Neither can one deny the significance of the contrast between their success in maintaining systems of ordered liberty and that of other nations which in the main have adhered more closely to the scheme of personal freedoms the Bill of Rights secures. This experience demonstrates, I think, that it is both wiser and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient, substitutions imported from alien traditions.[9]

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[9] I do not think it can be demonstrated that state systems, freed of the Bill of Rights' "inconveniences," have been more fair, just, or efficient than the federal system of administering criminal justice, which has never been clear of their restraints.

Notwithstanding *Betts* v. *Brady*, 316 U. S. 455, and its progeny, I cannot imagine that state denial of the right to counsel beyond that permissible in the federal courts or indeed of any other guaranty of the Sixth Amendment could bring an improvement in the administration of justice.

The guaranties seemingly considered most obstructive to that process are those of the Fifth Amendment requiring presentment or indictment of a grand jury and securing the privilege against self-incrimination; the rights to jury trial and to the assistance of counsel secured by the Sixth Amendment; and the requirements relating to suits at common law of the Seventh Amendment. Whatever inconveniences these or any of them may be thought to involve are far out-

The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments. They accepted it for themselves, in my opinion, when they ratified the Fourteenth Amendment. *Adamson* v. *California,* 332 U. S. 46, dissenting opinions, at 68, 123. It was good enough for our fathers. I think it should be good enough for this Court and for the states.

Room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, unless or until the people have authorized them by the constitutionally provided method. This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening.

It remains only to say that, in the face of so broad a departure from so many specific constitutional guaranties or, if the other view is to control, from their aggregate summarized in the concept of due process as representing fundamental ideas of fair play and justice in civilized society, such as the record in this case presents, this Court's eyes need not remain closed nor its hand idle until the case is returned to the state supreme court for reaffirmation of its position or confirmation of our views expressed in the Court's opinion. Neither *Rescue Army* v. *Municipal Court,* 331 U. S. 549, nor *Musser* v. *Utah,* 333 U. S. 95, presented a situation like the one tendered here, whether

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weighed by the aggregate of security to the individual afforded by the Bill of Rights. That aggregate cannot be secured, indeed it may be largely defeated, so long as the states are left free to make broadly selective application of its protections.

in relation to the disentanglement of constitutional issues from questions of state law or, consequently, in respect to the breadth and clarity of the state's departure from federal constitutional commands. Neither case therefore requires or justifies the disposition of this cause according to the procedure there followed. This case is neither unripe for decision nor wanting of sufficient basis in the record for exercise of that function.

MR. JUSTICE FRANKFURTER.

Under the Fourteenth Amendment, a State may surely adopt as its own a procedure which was the established method for prosecuting crime in nearly half the States which ratified that amendment. And so, it may abolish the grand jury,[1] or it may reduce the size of the grand

[1] In sustaining this power of the States, the Court enunciated a principle the force of which has not lessened with time: "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Hurtado* v. *California*, 110 U. S. 516, 530–31.

jury, and even to a single member. A State has great leeway in devising its judicial instruments for probing into conduct as a basis for charging the commission of crime. It may, at the same time, surround such preliminary inquiry with safeguards, not only that crime may be detected and criminals punished, but also that charges may be sifted in secret so as not to injure or embarrass the innocent.

Flouting of such a judicial investigatory system may be prevented by the hitherto constitutionally valid power to punish for contempt. There must, however, be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See *Ex parte Hudgings,* 249 U. S. 378. And the procedural safeguards of "due process" must be observed. Due notice of the charge and a fair opportunity to meet it, are indispensable. This involves an opportunity to canvass the charge in the open and not behind closed doors. So long as a man has ample opportunity to demonstrate his innocence before he is hustled off to jail, he cannot complain that a State has seen fit to devise a new procedure for satisfying that opportunity. Just as it is not violative of due process for a State to take private property for public use and leave to a later stage the constitutional vindication of the right to compensation, it does not seem to me that it would be violative of due process to allow the judge-grand juror of Michigan to find criminal contempt for conduct in his proceedings without the familiar elements of an open trial, provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding.

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes

handicapped with a finding against him which he did not have an adequate opportunity of resisting.

We are here dealing with the attempt of a State having the seventh largest population in the Union to curb or mitigate the commission of crimes by effective prosecution. This procedure has been in operation for over thirty years. It was not heedlessly entered into nor has it been sporadically pursued. In a series of cases it has had the sanction of the highest court of Michigan. While there are indications in the opinion of the Supreme Court of Michigan from which we could infer the constitutional inadequacy of the procedure pursued in this case, we should not decide constitutional issues and conclude that the Michigan system offends the Constitution of the United States, without a clearer formulation of what it is that actually happens under this system, or did happen here, than the case before us reveals.

It is to me significant that the precise issues on which this Court decides this case have never been explicitly challenged before, or passed on, by the Supreme Court of Michigan in the series of cases in which that court had adjudicated controversies arising under the Michigan grand jury system. If a State has denied the due process required by the Fourteenth Amendment, it is more consonant with the delicate relations between the United States and the courts of the United States, and the States and the courts of the States, that the courts of the States be given the fullest opportunity, by proper presentation of the issues, to make such a finding of unconstitutionality.

I do not think that we have had that in this case. For instance, while I could regard it inadmissible under the Fourteenth Amendment to have only a partial and mutilated record of the proceedings before the grand juror-judge when the contemnor for the first time has the opportunity to meet the accusation against him publicly, the petitioner himself in this case seems to repel the

suggestion that that is his complaint.[2] Certainly, as MR. JUSTICE JACKSON points out, the first ground of the Court's opinion was not made the basis for inviting our review here. I agree with him in concluding that in the light of our decision the other day in *Musser* v. *Utah,* 333 U. S. 95, in conjunction with *Rescue Army* v. *Municipal Court,* 331 U. S. 549, the cause should be returned to the Supreme Court of Michigan to enable that court to pass upon these issues.

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

The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not assigned for review in the petition for certiorari to this Court. Nor was it raised in the petition for writ of *habeas corpus* in the state courts. Therefore, it has not been litigated and the record has not been made with reference to it. On the other hand, the principal question raised by the petition to this Court and argued by the State is not decided by the Court's opinion.

When a case here from a state court involves a question not litigated below, not raised by petitioner here and which the state court has had no opportunity to pass upon, we should remand the case for its further consideration, as was just done in *Musser* v. *Utah,* 333 U. S. 95.

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[2] "Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. . . . The questions we present are much more basic,—the denial of due process in the original commitment. . . . [To] us it is much more shocking that an accused charged with contempt not committed in open court be denied *any* trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court." Petitioner's "Brief in Answer to Brief of State Bar of Michigan," pp. 13–14.

UNITED STATES *v.* LINE MATERIAL CO. ET AL.

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

No. 8. Argued April 29, 1947. Reargued November 12–13, 1947.—Decided March 8, 1948.

1. Arrangements between two patentees for cross-licensing of their interdependent product patents, and for licensing exclusively by one of them of other manufacturers to make and vend under both patents, which arrangements, together with those entered into separately with other licensees, were intended to and did control the prices at which products embodying both patents were sold in interstate commerce by the patentees and all licensees, *held* violative of § 1 of the Sherman Act. Pp. 288–299, 305–315.

   (a) *United States* v. *General Electric Co.*, 272 U. S. 476, distinguished. Pp. 299–305, 310–312.

   (b) Such a price-fixing arrangement between two or more patentees transcends the limits of the patent monopoly granted to each of them; and it violates § 1 of the Sherman Act, no matter how advantageous it may be to stimulate the broader use of the patents. Pp. 310–313, 314–315.

2. Licensees who, with knowledge of such arrangements, enter into licenses containing price-maintenance provisions are likewise subject to the prohibitions of the Sherman Act. P. 315.

64 F. Supp. 970, reversed.

The United States brought suit under § 4 of the Sherman Act to restrain an alleged violation of § 1 by the appellees. The District Court dismissed the complaint. 64 F. Supp. 970. The United States appealed directly to this Court under the Expediting Act. *Reversed and remanded,* p. 315.

Assistant Attorney General Berge argued the cause on the original argument for the United States. With him on the brief were *George T. Washington,* then Acting Solicitor General, *Charles H. Weston, Robert G. Seaks, Bartholomew A. Diggins* and *Leonard J. Emmerglick.*

Frederick Bernays Wiener argued the cause on the reargument for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett* and *Robert G. Seaks.*

John Lord O'Brian and *Albert R. Connelly* argued the cause for appellees. With them on the briefs were *Nester S. Foley, Gerhard A. Gesell, Louis Quarles, Maxwell H. Herriott, Clark J. A. Hazelwood, Charles F. Meroni, Needham A. Graham, Jr., W. F. Sonnekalb, Jr., Alexander C. Neave, Harry R. Puch, Jr., Wilder Lucas, Wilber Owen, John A. Dienner, Edward C. Grelle, George B. Turner* and *John J. O'Connell.*

MR. JUSTICE REED delivered the opinion of the Court.

The United States sought an injunction under §§ 1 and 4 of the Sherman Act [1] in the District Court against continuance of violations of that Act by an allegedly unlawful combination or conspiracy between appellees, through contracts, to restrain interstate trade in certain patented electrical devices. The restraint alleged arose from a cross-license arrangement between the patent owners, Line Material Company and Southern States Equipment Corporation, to fix the sale price of the devices,

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[1] 26 Stat. 209, as amended by 36 Stat. 1167:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

"Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ."

to which arrangement the other appellees, licensees to make and vend, adhered by supplemental contracts.[2]

The District Court, 64 F. Supp. 970, dismissed the complaint as to all defendants upon its conclusion that the rule of *United States* v. *General Electric Co.*, 272 U. S. 476, was controlling. That case approved as lawful a patentee's license to make and vend which required the licensee in its sales of the patented devices to conform to the licensor's sale price schedule. Appeal was taken directly to this Court, 32 Stat. 823, and probable jurisdiction noted here on October 21, 1946. We have jurisdiction.[3]

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[2] The names of appellees and the abbreviations hereinafter used as well as the percentage of production of the dropout fuse devices manufactured under the patents are listed below:

Appellee	*Abbreviated title*	*Percent*
General Electric Co.	General Electric	29.2
Line Material Co.	Line	25.4
James R. Kearney Corp.	Kearney	18.9
Southern States Equipment Corp.	Southern	7.9
Westinghouse Electric Corp.	Westinghouse	5.3
Schweitzer & Conrad, Inc.	Schweitzer & Conrad.	5.1
Railway & Industrial Engineering Co.	Railway	3.8
W. N. Matthews Corp.	Matthews	2.0
Porcelain Products Co.	Porcelain	1.5
Royal Electric Mfg. Co.	Royal	.5
Pacific Electric Mfg. Co.	Pacific	.2
T. F. Johnson	Johnson	.2
		100.0

All are corporations of various states except T. F. Johnson, doing business as Johnson Manufacturing Company, Atlanta, Georgia.

[3] The case was argued April 29, 1947, and at our request reargued November 12–13, 1947. *United States* v. *United States Gypsum Co.*, decided today, *post*, p. 364, considers related phases of Sherman Act legislation.

I. *The Facts.*

The challenged arrangements center around three product patents, which are useful in protecting an electric circuit from the dangers incident to a short circuit or other overload. Two of them are dropout fuse cutouts and the third is a housing suitable for use with any cutout. Dropout fuse cutouts may be used without any housing. The District Court found that 40.77% of all cutouts manufactured and sold by these defendants were produced under these patents. This was substantially all the dropout fuse cutouts made in the United States. There are competitive devices that perform the same functions manufactured by appellees and others under different patents than those here involved.

The dominant patent, No. 2,150,102, in the field of dropout fuse cutouts with double jointed hinge construction was issued March 7, 1939, to the Southern States Equipment Corporation, assignee, on an application of George N. Lemmon.[4] This patent reads upon a patent No. 2,176,227, reissued December 21, 1943, Re. 22,412, issued October 17, 1939 to Line Material Company, assignee, on an application by Schultz and Steinmayer.[5]

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[4] ". . . The Lemmon device consists essentially of an expulsion tube supported by a double jointed hinge at its lower end. As the tube moves into closed circuit position, the hinge is locked and a latch engages a terminal on top of the tube to hold the tube in place. The hinge is released by a relatively complicated and expensive solenoid mechanism when the current becomes excessive because of a short circuit or overload. Thereupon the circuit is broken in the tube and the tube drops downwardly, its upper end disengaging from the latch, which permits the tube to swing out and down. By reason of claims covering the double jointed hinge construction in cutouts, this patent dominates the manufacture of dropout fuse cutouts involved in this suit." Findings of Fact, No. 6.

[5] ". . . The Schultz patent covers a dropout fuse cutout which is an improvement on the device disclosed in the Lemmon patent, and is dominated by the Lemmon patent. In the Schultz structure an

The housing patent No. 1,781,876, reissued March 31, 1931, as Re. 18,020, and again February 5, 1935, as Re. 19,449, was issued November 18, 1930 to Line, assignee, on an application by W. D. Kyle. The Kyle patent covers a wet-process porcelain box with great dielectric strength, which may be economically constructed and has been commercially successful. We give no weight to the presence of the Kyle patent in the licenses.

The applications for the Lemmon and Schultz patents were pending simultaneously. They were declared in interference and a contest resulted. The decision of the Patent Office awarding dominant claims to Southern and subservient claims to Line on the Lemmon and the Schultz applications made it impossible for any manufacturer to use both patents when later issued without some cross-licensing arrangement. Cf. *Temco Electric Motor Co.* v. *Apco Mfg. Co.*, 275 U. S. 319, 328. Only when both patents could be lawfully used by a single maker could the public or the patentees obtain the full benefit of the efficiency and economy of the inventions. Negotiations were started by Line which eventuated in the challenged arrangements.

The first definitive document was a bilateral, royalty-free, cross-license agreement of May 23, 1938, between Southern and Line after the Patent Office award but before the patents issued. This, so far as here pertinent, was a license to Southern by Line to make and vend the prospective Schultz patented apparatus with the exclusive

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expulsion tube is supported by a double jointed hinge which is held rigid by a fuse link. On overload, the fuse melts, breaking the circuit in the tube and the hinge is released automatically, which permits the tube to drop down and then swing outwardly. This Schultz dropout fuse is much simpler, and can be manufactured at considerably less than the cost of a comparable solenoid operated cutout, and has met widespread commercial demand and use." Findings of Fact, No. 7.

right to grant licenses or sublicenses to others. Line also granted Southern the right to make and vend but not to sublicense the Kyle patent. Southern licensed Line to make and vend but not to sublicense the prospective Lemmon patent for defined equipment which included the Schultz apparatus. Sublicense royalties and expenses were to be divided between Line and Southern. Although a memorandum of agreement of January 12, 1938, between the parties had no such requirement, Line agreed to sell equipment covered by the Southern patent at prices not less than those fixed by Southern. Southern made the same agreement for equipment covered solely by the Line patent. No requirement for price limitation upon sales by other manufacturers under license was included.

Six of the other manufacturers[6] here involved were advised by Line by letter, dated June 13, 1938, that Southern had authority to grant licenses under the Schultz prospective patent. On October 3, 1938, Kearney took from Southern a license to practice the Lemmon and Schultz patents. The license had a price, term and condition of sale clause, governed by Southern's prices, which bound Kearney to maintain the prices on its sales of devices covered by the patents. On October 7, 1938, the five other manufacturers mentioned above were offered by Southern the same contract as the standard licensor's agreement. The Kearney contract was discussed at Chicago in October, 1938, by all of the above manufacturers except Railway. Pacific also participated. It never was enforced. The first patent involved in this case did not issue until March, 1939. Those manufacturers who were making double jointed open and enclosed drop-out cutouts wanted to and did explore cooperatively

[6] Schweitzer & Conrad, General Electric, Westinghouse, Railway, Kearney, Matthews.

(F. F. 15) the validity of the patents. They failed to find a satisfactory basis for attack. They were faced with infringement suits. Other reasons developed for the refusal of the six manufacturers to accept the Kearney form contracts (F. F. 16 & 17) unnecessary to detail here. One reason was that the prospective sublicensees preferred Line to Southern as licensor because of the fact that Line, as owner and manufacturer, would license the Kyle patent. New arrangements were proposed for the licensees. After mutual discussion between the licensees and patentees, these new agreements were submitted. A finding to which no objection is made states:

> "On October 24, 1939, General Electric, Westinghouse, Kearney, Matthews, Schweitzer and Conrad, and Railway met with Line in Chicago and jointly discussed drafts of the proposed license agreements under the Lemmon, Schultz, and Kyle patents. Thereafter, identical sets of revised licenses were sent by Line to General Electric, Westinghouse, Matthews, Schweitzer and Conrad, and the attorneys for Railway and Kearney."

A form for a proposed licensing agreement that contained the essential elements of the price provision ultimately included in the licenses had been circulated among prospective licensees by Line by letters under date of October 6, 1939.

To meet the various objections of the future licensees, the agreement of May 23, 1938, between Southern and Line was revised as of January 12, 1940. Except for the substitution of Line for Southern as licensor of other manufacturers, it follows generally the form of the earlier agreement. There were royalty-free cross-licenses of the Schultz and Lemmon patents substantially as before. Line was given the exclusive right to grant sublicenses to

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others for Lemmon.[7] Southern retained the privilege, royalty free, of making and vending the Kyle patent, also. Southern bound itself to maintain prices, so long as Line required other licensees to do so.[8] Even if it be assumed

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[7] "The Southern Corporation grants to the Line Company a fully paid license to make, use and sell, with the exclusive right to grant sub-licenses to others to make, use and sell, expulsion tube electric circuit interrupting equipment in which the circuit interruption is caused by the thermally initiated rupturing of a current carrying element in an expulsion tube, coming under claims 3, 4 to 10, inclusive, 15 to 22 inclusive, 25, and 27 to 30 of the patent to G. N. Lemmon, No. 2,150,102, dated March 7, 1939, entitled "Circuit Breaker" and/or any division, continuation, substitute, renewal and/or reissue thereof."

[8] "15. The licenses hereby granted or agreed to be granted are on the express condition that the prices, terms and conditions of sale of the Southern Corporation for electric fuse equipment made and sold under the licenses herein granted shall, so long as such electric fuse equipment continues to be covered by Letters Patent of the Line Company under which a license is granted by this agreement, be not more favorable to the customer than those established from time to time and followed by the Line Company in making its sales.

"It is the purpose and intent of this agreement that there shall not be directly, or indirectly, any modification of the prices set by the Line Company as they exist from time to time, as for instance, by including in the transaction other material or parts, or labor, or services, at less than the regular prices at which the party making the same is at the time selling such other material or parts or furnishing such labor or services or by making allowances for freight or terms of payment other than those employed by the Line Company.

"Prices, terms and/or conditions of sale may be changed by the Line Company from time to time through reasonable notice in writing to the Southern Corporation, but not less than ten (10) days' written notice shall be given before the change shall go into effect.

"It is agreed that if the Line Company shall grant a license to a third party under any of the patents of this agreement (but excepting from the provisions of this paragraph a license to be granted to General Electric Company of Schenectady, New York, under said Kyle reissue patent 19,449), without a provision for maintenance by

that the proper interpretation of the Line-Southern agreement permitted Southern to manufacture under its own Lemmon patent without price control, the practical result is that Southern does have its price for its products fixed because the only commercially successful fabrication is under a combination of the Lemmon and Schultz patents. Findings of Fact 7 and 10.

The price maintenance feature was reflected in all the licenses to make and vend granted by Line, under the Line-Southern contract, to the other appellees. There were variations in the price provisions that are not significant for the issues of this case. A fair example appears below.[9] The execution of these sublicenses by the

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said third party of prices, terms and conditions of sales as set forth in the first paragraph of this section, then Southern Corporation shall be relieved from its obligation under said section."

[9] In the Line-General Electric license agreement of March 15, 1940, the first under the revised Line-Southern contract, the price maintenance provision was as follows:

"9. The license hereby granted by the Licensor is subject to the express limitations that

> as to dropout fuse cutouts manufactured and sold by Licensee which are comparable in respect to general type and purpose, ampere and voltage rating, and rupturing capacity, to dropout fuse cutouts manufactured and sold by Licensor,

Licensee's prices, terms and conditions of sale of dropout fuse cutouts

> for use in the United States made under the license herein granted to Licensee under the aforesaid Letters Patent, Lemmon No. 2,150,102, and Schultz and Steinmayer No. 2,176,227, and as long as such dropout fuse cutouts continue to be covered by such Letters Patent,

shall be no more favorable to a customer of the Licensee than those established from time to time and followed by the Licensor in its sales. The prices, terms and conditions of sale as at present established and in force are those set forth in Schedule A annexed hereto and forming a part hereof. This schedule of prices may be changed

other appellees, except Johnson and Royal,[10] followed within a year. Licenses were executed by the two on June 15, 1943, and March 24, 1944, respectively. After August 1, 1940, since a number of the appellees had executed the license contracts, two consultations of the licensees and the patentees were held to classify the products of the various licensees in comparison with the licensor's devices.[11] The trial judge found that prices were not discussed. These were fixed by Line without discussion with or advice from any other appellee. There can be no doubt, however, that each licensee knew of the proposed price provisions in the licenses of other licensees from the circulation of proposed form of license on October 6, 1939, subsequent consultations among the licensees and an escrow agreement, fulfilled July 11, 1940. That

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from time to time by the Licensor upon ten (10) days' notice in writing to the Licensee.

"10. The spirit and intent of this license agreement, contemplates that in no transaction shall there be any modification of Licensee's prices, either directly or indirectly, as for instance by inclusion in the transaction of other material or parts or services or labor at less than the regular prevailing prices at which the party making the sale is at the time accustomed to sell such other material or parts or furnish such services or labor, as will serve in effect to reduce Licensee's prices below those named in Schedule A as it exists from time to time."

This was repeated in the Line-General Electric revised agreement of November 17, 1941. A variable appears in the Westinghouse and other licenses. In its price provisions, the Lemmon patent is not mentioned but the Lemmon patent was included in its grant of license and the subsidiary Schultz patent could not be practiced without the right to use the dominant Lemmon.

[10] These two produced an aggregate of less than one percent of the devices.

[11] All appellees, except Royal, Pacific and Johnson, attended one or another of these conferences. We do not find it necessary to determine whether or not the selling prices also of the licensees were before the conference. The agreements adequately show an intention to fix prices.

agreement was entered into after General Electric took its license and required for fulfillment the acceptance of identical licenses by Matthews, Kearney and Railway. The licenses that were the subject of the escrow contained the price provisions of General Electric's license. This awareness by each signer of the price provisions in prior contracts is conceded by appellees' brief. A price schedule became effective January 18, 1941. Thereafter, all the appellees tried to maintain prices. Where there was accidental variation, Line wrote the licensee calling attention to the failure.[12]

The licenses were the result of arm's length bargaining in each instance. Price limitation was actively opposed *in toto* or restriction of its scope sought by several of the licensees, including General Electric, the largest producer of the patented appliances. A number tried energetically to find substitutes for the devices. All the licensees, however, were forced to accept the terms or cease manufacture. By accepting they secured release from claims for past infringement through a provision to that effect in the license. The patentees through the licenses sought system in their royalty collections and pecuniary reward for their patent monopoly. Undoubtedly one purpose of the arrangements was to make possible the use by each manufacturer of the Lemmon and Schultz patents. These patents in separate hands produced a deadlock. Lemmon by his basic patent "blocked" Schultz's improvement. Cross-licenses furnished appellees a solution.

On consideration of the agreements and the circumstances surrounding their negotiation and execution, the District Court found that the arrangements, as a whole, were made in good faith, to make possible the manufacture by all appellees of the patented devices, to gain a legiti-

[12] The licenses contained provisions for records of sale, inspection thereof and cancellation of the license for breach.

mate return to the patentees on the inventions; and that, apart from the written agreements, there was no undertaking between the appellees or any of them to fix prices.[13] Being convinced, as we indicated at the first of this opinion, that the *General Electric* case controlled and permitted such price arrangements as are disclosed in

[13] Findings of Fact:

"32. The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly. Each of the licenses granted to the licensee-defendants was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order that the licensee could continue lawfully to manufacture and sell its dropout fuse cutouts. Apart from the written license agreements here in evidence, there was no agreement, express or implied, between the licensor and any licensee, or between any two or more licensees, with respect to the prices of licensed dropout fuse cutouts.

"33. All of the devices for which minimum prices were established by Line were comparable to, and competitive with, devices which Line manufactured and sold regularly or which it was ready to manufacture and sell to its customers on special order.

"34. The cross-license agreements between Line and Southern were limited to the commercially practicable device covered by the subservient Schultz patent, and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements. The inflexible intention to insist upon price limitation existed independently in each of the patent owners prior to any discussions or arrangements between them. Such cross-license agreements were entered into in good faith, not for the purpose of fixing prices in the industry but to permit the manufacture and sale of the cheaper device covered by the subservient patent, to facilitate the negotiation of licenses, and to provide royalty income. There was no agreement, express or implied, between Line and Southern with respect to prices on cutouts other than the written cross-license agreements.

"35. The license agreements here in evidence did not restrain trade but promoted it by making available several sources where the patented devices could be obtained, thus increasing competition in such

the contracts, the District Court dismissed the complaint. The Government attacks the rationale of the *General Electric* case and urges that it be overruled, limited and explained or differentiated.

II. *The General Electric Case.*

That case was decided in 1926 by a unanimous Court, Chief Justice Taft writing. It involved a bill in equity to enjoin further violations of the Sherman Act. While violations of the Act by agreements fixing the resale price of patented articles (incandescent light bulbs) sold to dealers also were alleged in the bill, so far as here material the pertinent alleged violation was an agreement between General Electric and Westinghouse Company through which Westinghouse was licensed to manufacture lamps under a number of General Electric's patents, including a patent on the use of tungsten filament in the bulb, on condition that it should sell them at prices fixed by the licensor. On considering an objection to the fixing of prices on bulbs with a tungsten filament, the price agreement was upheld as a valid exercise of patent rights by the licensor.

Speaking of the arrangement, this Court said: "If the patentee . . . licenses the selling of the articles [by a licensee to make], may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." P. 490. This proviso must be read as directed at agreements between a patentee and a licensee

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devices, particularly with respect to design, quality and service. Competition among the defendants for business in these devices continued to be vigorous after the making of the license agreements.

"36. There was no combination or conspiracy among the defendants, or any of them, to fix, maintain or control prices of dropout fuse cutouts or parts thereof, or to restrain trade or commerce therein."

to make and vend. The original context of the words just quoted makes clear that they carry no implication of approval of all a patentee's contracts which tend to increase earnings on patents. The opinion recognizes the fixed rule that a sale of the patented article puts control of the purchaser's resale price beyond the power of the patentee. P. 489. Compare *United States* v. *Univis Lens Co.*, 316 U. S. 241. Nor can anything be found in the *General Electric* case which will serve as a basis to argue otherwise than that the precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is freed from competition of price, service, quality or otherwise. Compare *Mercoid Corporation* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 665, 666; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277–78, 280; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, 510.

General Electric is a case that has provoked criticism and approval. It had only bare recognition in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456. That case emphasized the rule against the extension of the patent monopoly, p. 456, to resale prices or to avoid competition among buyers. Pages 457–58. We found it unnecessary to reconsider the rule in *United States* v. *Masonite Corp.*, 316 U. S. 265, 277, although the arrangement there was for sale of patented articles at fixed prices by dealers whom the patentee claimed were *del credere* agents. As we concluded the patent privilege was exhausted by a transfer of the articles to certain agents who were part of the sales organization of competitors, discussion of the price-fixing limitation was not required. In *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 398, where a suit was brought to recover royalties on a license with price limitations, this Court refused to examine the *General Electric* rule because of the claimed illegality of the Katzinger patent. If the patent were invalid, the price-fixing

agreement would be unlawful. We affirmed the action of the Circuit Court of Appeals in remanding the case to the District Court to determine the validity of the patent. The *General Electric* case was cited with approval in *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27, 31. Other courts have explained or distinguished the *General Electric* rule.[14] As a reason for asking this Court to reexamine the rule of the *General Electric* case, the Government states that price maintenance under patents through various types of agreements is involved in certain pending cases.[15] Furthermore, the

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[14] For illustration and without implication as to this Court's position on the issues, we call attention to the following:

Barber-Colman Co. v. *National Tool Co.*, 136 F. 2d 339. In a suit by the licensor against the licensee, injunctive relief to compel compliance with a price-fixing provision in the patent license was denied. The *General Electric* case was held not to permit the patentee to fix prices on unpatented hobs which were produced under a process patent by a patented machine.

Cummer-Graham Co. v. *Straight Side Basket Corp.*, 142 F. 2d 646. Licensee was denied relief in an action against licensor for failing to require other licensees to comply with price-fixing provisions; licensor of a patent on an attachment to a basket-making machine may not fix prices on baskets produced by the machine.

United States v. *Vehicular Parking, Ltd.*, 54 F. Supp. 828. Antitrust proceeding against patent holding company and manufacturing licensees in parking meter industry. The patent licenses fixed the prices at which parking meters could be sold and contained restrictive provisions on marketing practices. In ordering compulsory licensing at a reasonable royalty, the court distinguished the *General Electric* case principally on the ground that the patentee in this case did not itself manufacture the parking meters; other distinctions noted were the number and active concert of licensees, the weakness of the patents, the fixing of prices on unpatented articles, and the existence of marketing restrictions.

[15] For example, such price arrangements under the type of agreement indicated are in litigation as follows:

United States v. *Allegheny Ludlum Steel Corp.*, D. N. J. Civil 45–83, stainless steel company owning patents on a particular type of stain-

point is made that there is such a "host of difficult and unsettled questions" arising from the *General Electric* holding that the simplest solution is to overrule the prece-

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less steel allegedly issued licenses fixing prices on all types of stainless steel.

United States v. *American Optical Co.*, S. D. N. Y. Civil 10–391, optical patents owned by patent holding company which gave exclusive licenses; exclusive licensee sublicensed to other manufacturers who agreed to maintain prices and comply with marketing restrictions.

United States v. *Bausch & Lomb Optical Co.*, S. D. N. Y. Civil 10–394, patent holding company issued licenses to two licensees to manufacture bifocal lenses, the licenses fixing prices at which the bifocal lenses were to be sold and the selection of wholesalers and retailers for the lenses.

United States v. *Catalin Corporation of America*, D. N. J. Civil 7743, manufacturer of phenolic resins licensed other manufacturers under its process patents, the licensees agreeing to sell at prices established by the licensor.

United States v. *General Cable Corp.*, S. D. N. Y. Civil 40–76, cross licenses among holders of patents on fluid filled cable, the licensees agreeing to adhere to uniform prices and to observe territorial marketing limitations.

United States v. *General Electric Co.*, D. N. J. Civil 1364, cross-licensing agreements between manufacturers of electrical bulbs providing for price and quantitative restrictions.

United States v. *General Electric Co., Fried. Krupp*, S. D. N. Y. Cr. 110–412, cross-licensing of tungsten carbide patents with price and territorial restrictions.

United States v. *General Instrument Corp.*, D. N. J. Cr. 3960–C, Civil 8586, owners of variable condenser patents assigned patents to holding company and took back licenses with price-fixing provisions; explicit price-fixing provisions subsequently removed but allegedly continued by tacit agreement.

United States v. *Phillips Screw Co.*, N. D. Ill. Civil 47–C–147, holder of patents on cross recessed head screws granted exclusive license to leading screw manufacturer who sublicensed to other manufacturers; patent holder, exclusive licensee, and sublicensees agreed on price terms for all screws produced.

dent on the power of a patentee to establish sale prices of a licensee to make and vend a patented article.[16]

Such a liquidation of the doctrine of a patentee's power to determine a licensee's sale price of a patented article would solve problems arising from its adoption. Since 1902, however, when *Bement* v. *National Harrow Co.*, 186 U. S. 70, was decided, a patentee has been able to control his licensee's sale price within the limits of the patent monopoly.[17] Litigation that the rule has engendered proves that business arrangements have been repeatedly, even though hesitatingly, made in reliance upon the contractors' interpretation of its meaning. Appellees urge that Congress has taken no steps to modify the rule.[18] Such legislative attitude is to be weighed with the counterbalancing fact that the rule of the *General Electric* case grew out of a judicial determination.

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[16] The United States lists: Uncertainty as to the nature of the patent, process or product, which justifies price control; extent of patent domination over the device; may a patent pooling corporation control all licensees' sale prices; extent of price control in an industry. U. S. Brief 65 *et seq.*

[17] In earlier cases involving the National Harrow Company the lower courts held that an industry-wide combination to fix prices was illegal. *National Harrow Co.* v. *Hench*, 83 F. 36; *National Harrow Co.* v. *Quick*, 67 F. 130, *affirmed on other grounds*, 74 F. 236. Compare *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 F. 358, and *Indiana Manufacturing Co.* v. *J. I. Case Threshing Machine Co.*, 154 F. 365, upholding industry-wide price fixing, with *Blount Manufacturing Co.* v. *Yale & Towne Manufacturing Co.*, 166 F. 555, holding such price fixing illegal.

[18] Bills have been introduced which would outlaw price limitation in patent licenses: H. R. 22345, 62d Cong., 2d Sess. (1912); S. 2730, 77th Cong., 2d Sess. (1942); S. 2491, 77th Cong., 2d Sess. (1942), and Hearings thereon; H. R. 7713, 77th Cong., 2d Sess. (1942); H. R. 109, 78th Cong., 1st Sess. (1943); H. R. 1371, 78th Cong., 1st Sess. (1943); H. R. 3874, 78th Cong., 1st Sess. (1943); H. R. 97, 79th Cong., 1st Sess. (1945); H. R. 3462, 79th Cong., 1st Sess. (1945);

The writer accepts the rule of the *General Electric* case as interpreted by the third subdivision of this opinion. As a majority of the Court does not agree with that position, the case cannot be reaffirmed on that basis. Neither is there a majority to overrule *General Electric.* In these circumstances, we must proceed to determine the issues on the assumption that *General Electric* continues as a precedent. Furthermore, we do not think it wise to undertake to explain, further than the facts of this case require, our views as to the applicability of patent price limitation in the various situations listed by the Government. On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee. The assumption is stated in this way so as to leave aside the many variables of the *General Electric* rule that may arise. For example, there may be an aggregation of patents to obtain dominance in a patent field, broad or narrow, or a patent may be used as a peg upon which to attach contracts with former or prospective competitors, touching business relations other than the making and vending of patented devices. Compare *United States* v. *United States Gypsum Co., post,* p. 364, decided today; *United States* v. *Masonite Corp.,* 316 U. S. 265.

It may be helpful to specify certain points that either are not contested or are not decided in this case. The agreements, if illegal, restrain interstate commerce contrary to the Sherman Act. No issue of monopoly is

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S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947).

See Final Report of Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941), p. 36; Report of the National Patent Planning Commission, H. R. Doc. No. 239, 78th Cong., 1st Sess. (1943), p. 9.

involved. (F. F. 31.) Cf. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788. That is to say, the complaint charges restraint of trade under § 1 and does not charge "monopoly" under § 2 of the Sherman Act, so that we need not deal with the problems of consolidation, merger, purchase of competitors or size of business as tending toward attaining monopoly. See *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, 44–55; *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 427–31; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 181–83; *United States* v. *United States Steel Corp.,* 251 U. S. 417, 451. We are not dealing with a charge of monopoly or restraint because of the aggregation of patents, by pooling or purchase, by an owner or owners, in a single industry or field. See *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32. Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes. It is stipulated by the United States that the validity of the patents is not in issue. With these points laid aside, we proceed to the issues presented by this record.

III. *The Determination of the Issue.*

Under the above-mentioned assumption as to *General Electric,* the ultimate question for our decision on this appeal may be stated, succinctly and abstractly, to be as to whether in the light of the prohibition of § 1 of the Sherman Act, note 1, *supra,* two or more patentees in the same patent field may legally combine their valid patent monopolies to secure mutual benefits for themselves through contractual agreements, between themselves and other licensees, for control of the sale price of the patented devices.

The appellees urge that the findings of the District Court, quoted in note 13 *supra,* stand as barriers to a con-

clusion here that § 1 of the Sherman Act has been violated by the licenses. Since there was material evidence to support the District Court's finding of the evidentiary facts and the Court necessarily weighed the credibility of the witnesses and the probative value of their testimony to establish appellees' contentions, appellees insist that the inferences or conclusions as to violations of the Sherman Act, drawn by the District Court, must be accepted by us.[19] As to the evidentiary facts heretofore stated, there is no dispute. From them the District Court made findings of fact Nos. 32 to 36, inclusive, hereinbefore set out in note 13. Even though we accept, as we do, these findings on preliminary facts as correct, the last sentence in findings 32 and 34 crumbles their asserted bar to an examination by us as to whether the agreements are violative of the Sherman Act. Those sentences are to the effect that there was an agreement to fix prices between all parties in the language of the contracts as set out in notes 8 and 9 *supra.* If the patent rights do not empower the patentees to fix sale prices for others, the agreements do violate the Act. The previous summary in this opinion of the agreements which compose these arrangements demonstrates that the agreements were intended to and did fix prices on the patented devices. Compare *Interstate Circuit* v. *United States,* 306

[19] Rules of Civil Procedure, Rule 52:

Findings by the Court.—"(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

U. S. 208, 226. While Line's sublicenses to others than General Electric, note 9, gave to Line the power which it exercised to fix prices only for devices embodying its own Schultz patent, the sublicense agreements licensed the use of the dominant Lemmon patent. As the Schultz patent could not be practiced without the Lemmon, the result of the agreement between Southern and Line for Line's sublicensing of the Lemmon patent was to combine in Line's hands the authority to fix the prices of the commercially successful devices embodying both the Schultz and Lemmon patents. Thus, though the sublicenses in terms followed the pattern of *General Electric* in fixing prices only on Line's own patents, the additional right given to Line by the license agreement of January 12, 1940, between Southern and Line, to be the exclusive licensor of the dominant Lemmon patent, made its price fixing of its own Schultz devices effective over devices embodying also the necessary Lemmon patent. See note 9. By the patentees' agreement the dominant Lemmon and the subservient Schultz patents were combined to fix prices. In the absence of patent or other statutory [20] authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act.[21] This is true whether

[20] *E. g.*, Miller-Tydings Act, 50 Stat. 693.

[21] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8; *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 58; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 222–24; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394.

Appalachian Coals v. *United States*, 288 U. S. 344, cannot be cited to support a contrary view. In that case, this Court held that "The plan cannot be said either to contemplate or involve the fixing of market prices." P. 373. See the *Socony-Vacuum* case, *supra*, 214 *et seq.* Perhaps arbitrary or monopoly prices were in mind in Appalachian. Pp. 358, 359, 365, 371.

the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale.

It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly.[22] By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act. See *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20; *United States* v. *United States Gypsum Co., post,* p. 364. During its term, a valid patent excludes all except its owner from the use of the protected process or product. *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, 58; *Special Equipment Co.* v. *Coe,* 324 U. S. 370, 378. This monopoly may be enjoyed exclusively by the patentee or he may assign the patent "or any interest therein" to others. Rev. Stat. § 4898, as amended 55 Stat. 634. As we have pointed out, a patentee may license others to make and vend his invention and collect a royalty therefor. Thus we have a statutory monopoly by the patent and by the Sherman Act a prohibition, not only of monopoly or attempt to monopolize, but of every agreement in restraint of trade. Public policy has condemned monopolies for centuries. *The Case of Monopolies, Darcy* v. *Allein,* 11 Co. Rep. 84–b. See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 428–49. See Employment Act of 1946, § 2, 60 Stat. 23. Our Constitution allows patents. Art. I, § 8, cl. 8. The progress of our economy has often been said to owe much to the stimulus

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[22] *United States* v. *National Lead Co.,* 332 U. S. 319; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 406; *Standard Oil Co.* v. *United States,* 283 U. S. at 169 and cases cited; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 48–49. See *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.,* 329 U. S. 637, 641, 647, and cases cited.

to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception. *Bement* v. *National Harrow Co., supra,* 92, 21 Cong. Rec. 2457. Public service organizations, governmental and private, aside, our economy is built largely upon competition in quality and prices. *Associated Press* v. *United States,* 326 U. S 1, 12–14. Validation by Congress of agreements to exclude competition is unusual.[23] Monopoly is a protean threat to fair prices. It is a tantalizing objective to any business compelled to meet the efforts of competitors to supply the market. Perhaps no single fact manifests the power and will to monopolize more than price control of the article monopolized. There can be no clearer evidence of restraint of trade. Whatever may be the evil social effect of cutthroat competition on producers and consumers through the lowering of labor standards and the quality of the produce and the obliteration of the marginal to the benefit of the surviving and low-cost producers, the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each industry an opportunity to choose employment conditions and consumers a selection of product and price, have been considered to overbalance the disadvantages. The strength of size alone, the disappearance of small business are ever-present dangers in competition. Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpreta-

[23] The Interstate Commerce Act authorizes carriers to pool revenues and authorizes mergers of carriers, provided that approval of the Interstate Commerce Commission is obtained. The antitrust laws are inapplicable to such agreements. 49 U. S. C. § 5 (1), (2) and (11).

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tions of the Sherman Act that competition on prices is the rule of congressional purpose and that, where exceptions are made, Congress should make them. The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 452, 455; *United States* v. *Univis Lens Co.,* 316 U. S. 241; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386. It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly.

The development of patents by separate corporations or by cooperating units of an industry through an organized research group is a well known phenomenon. However far advanced over the lone inventor's experimentation this method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research. It may be true, as Carlyle said, that "Genius is an infinite capacity for taking pains." Certainly the doctrine that control of prices, outside the limits of a patent monopoly, violates the Sherman Act is as well understood by Congress as by all other interested parties.

We are thus called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act. That adjustment has already reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the *General Electric* case and that the grant of patent rights is the limit of freedom from competition under the cases first cited at note 22.

With the postulates in mind that price limitations on patented devices beyond the limits of a patent monopoly violate the Sherman Act and that patent grants are to be

construed strictly, the question of the legal effect of the price limitations in these agreements may be readily answered. Nothing in the patent statute specifically gives a right to fix the price at which a licensee may vend the patented article. 35 U. S. C. §§ 40, 47. While the *General Electric* case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds good. The stimulus to seek competitive inventions is reduced by the mutually advantageous price-fixing arrangement. Compare, as to acts by a single entity and those done in combination with others, *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *United States* v. *Reading Co.,* 226 U. S. 324, 357; *Eastern States Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600; *Binderup* v. *Pathé Exchange,* 263 U. S. 291. The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods.

If the objection is made that a price agreement between a patentee and a licensee equally restrains trade, the answer is not that there is no restraint in such an arrangement but, when the validity of the *General Electric* case

is assumed, that reasonable restraint accords with the patent monopoly granted by the patent law. Where a patentee undertakes to exploit his patent by price fixing through agreements with anyone, he must give consideration to the limitations of the Sherman Act on such action. The patent statutes give an exclusive right to the patentee to make, use and vend and to assign any interest in this monopoly to others. The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price. There is no suggestion in the patent statutes of authority to combine with other patent owners to fix prices on articles covered by the respective patents. As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly.

We turn now to the situation here presented of an agreement where one of the patentees is authorized to fix prices under the patents. The argument of respondents is that if a patentee may contract with his licensee to fix prices, it is logical to permit any number of patentees to combine their patents and authorize one patentee to fix prices for any number of licensees. In this present agreement Southern and Line have entered into an arrangement by which Line is authorized to and has fixed prices for devices produced under the Lemmon and Schultz patents. It seems to us, however, that such argument fails to take into account the cumulative effect of such multiple agreements in establishing an intention to restrain. The obvious purpose and effect of the agreement was to enable Line to fix prices for the patented devices. Even where the agreements to fix prices are limited to a small number of patentees, we are of the opinion that it crosses the barrier erected by the Sherman

Act against restraint of trade though the restraint is by patentees and their licensees.

As early as 1912, in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, this Court unanimously condemned price limitation under pooled [24] patent licenses.[25] As the arrangement was coupled with an agreement for limitation on jobbers' resale prices, the case may be said to be indecisive on patent license agreements for price control of a product without the jobber's resale provision. No such distinction appears in the opinion. This Court has not departed from that condemnation of price fixing. Even in *Standard Oil Co.* v. *United States,* 283 U. S. 163, where an arrangement by which the patentees pooled their oil cracking patents and divided among themselves royalties from licensees fixed by the pooling contracts was upheld, the theory was reiterated that a price limitation for the product was unlawful *per se.* Pp. 170, 173, 175. Of course, if a purpose or plan to monopolize or restrain trade is found, the arrangement is unlawful.

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[24] The words "patent pool" are not words of art. The expression is used in this opinion to convey the idea of a linking of the right to use patents issued to more than one patentee.

[25] 226 U. S. at 48:

"The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the *Bement Case.* There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry* v. *A. B. Dick Co.,* 224 U. S. 1, which contravenes the views herein expressed."

P. 174. The Government's contention in that case that the limitation on royalties in itself violated the Sherman Act by fixing an element in the price was dismissed because the Court was of the view that controlled royalties were effective as price regulators only when the patentees dominated the industry. P. 174. This domination was thought by this Court not to have been proven.

When a plan for the patentee to fix the sale prices of patented synthetic hardboard on sales made through formerly competing manufacturers and distributors, designated as *del credere* agents,[26] came before this Court on allegations that the plan was in violation of the Sherman Act, we invalidated the scheme. We said that the patentee could not use its competitor's sales organization as its own agents so as to control prices. The patent monopoly, under such circumstances, we said, was exhausted on disposition of the product to the distributor. We reasoned that such an arrangement was a restriction on our free economy, "a powerful inducement to abandon competition," and that it derogated "from the general law [against price limitation] beyond the necessary requirements of the patent statute." *United States* v. *Masonite Corp.*, 316 U. S. 265, 281, 280.

We think that this general rule against price limitation clearly applies in the circumstances of this case. Even if a patentee has a right in the absence of a purpose to restrain or monopolize trade, to fix prices on a licensee's sale of the patented product in order to exploit properly his invention or inventions, when patentees join in an agreement as here to maintain prices on their several products, that agreement, however advantageous it may be to stimulate the broader use of patents, is unlawful *per se* under the Sherman Act. It is more than an exploitation of patents. There is the vice that patentees

[26] Cf. *United States* v. *General Electric Co., supra.*

have combined to fix prices on patented products. It is not the cross-licensing to promote efficient production which is unlawful. There is nothing unlawful in the requirement that a licensee should pay a royalty to compensate the patentee for the invention and the use of the patent. The unlawful element is the use of the control that such cross-licensing gives to fix prices. The mere fact that a patentee uses his patent as whole or part consideration in a contract by which he and another or other patentees in the same patent field arrange for the practice of any patent involved in such a way that royalties or other earnings or benefits from the patent or patents are shared among the patentees, parties to the agreement, subjects that contract to the prohibitions of the Sherman Act whenever the selling price, for things produced under a patent involved, is fixed by the contract or a license authorized by the contract. Licensees under the contract who as here enter into license arrangements, with price-fixing provisions, with knowledge of the contract, are equally subject to the prohibitions.

The decree of the District Court is reversed and the case is remanded for the entry of an appropriate decree in accordance with this opinion.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join, concurring.

While I have joined in the opinion of the Court, its discussion of the problem is for me not adequate for a full understanding of the basic issue presented. My view comes to this—it is a part of practical wisdom and good law not to permit *United States* v. *General Electric Co.*,

272 U. S. 476, to govern this situation, though if its premise be accepted, logic might make its application to this case wholly defensible. But I would be rid of *United States* v. *General Electric Co.* My reasons for overruling it start with the Constitution itself.

The Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, Cl. 8. It is to be noted first that all that is secured to inventors is "the exclusive right" to their inventions; and second that the reward to inventors is wholly secondary, the aim and purpose of patent statutes being limited by the Constitution to the promotion of the progress of science and useful arts. *United States* v. *Masonite Corp.*, 316 U. S. 265, 278 and cases cited.

Congress, faithful to that standard, has granted patentees only the "exclusive right to make, use, and vend the invention or discovery." Rev. Stat. § 4884, 35 U. S. C. § 40. And as early as 1853 the Court, speaking through Chief Justice Taney, defined the narrow and limited monopoly granted under the statutes as follows: "The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee." *Bloomer* v. *McQuewan,* 14 How. 539, 549. But the ingenuity of man has conceived many ways to graft attractive private perquisites onto patents. The effort through the years has been to expand the narrow monopoly of the patent. The Court, however, has generally been faithful to the standard of the Constitution, has recognized that the public interest comes first and reward to inventors second, and has refused to let the self-interest of patentees come into the ascendency. As we stated in *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495,

498, "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant." From *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, which overruled *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, to *International Salt Co.* v. *United States*, 332 U. S. 392, decided only the other day, the Court has quite consistently refused to allow the patentee's "right to exclude" to be expanded into a right to license the patent on such conditions as the patentee might choose. For the power to attach conditions would enable the patentee to enlarge his monopoly by contract and evade the requirements of the general law applicable to all property. The philosophy of those decisions was summed up in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 666, where we said:

> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. . . . The patent is a privilege. But it is a privilege which is conditioned by a public purpose. It results from invention and is limited to the invention which it defines. When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts."

The Court, however, allowed an exception in this long line of cases. In *United States* v. *General Electric Co.*, *supra*, decided in 1926, it followed *Bement* v. *National*

Harrow Co., 186 U. S. 70, decided in 1902, and sustained a price-fixing provision of a license to make and vend the patented invention. By that decision price-fixing combinations which are outlawed by the Sherman Act (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150) were held to be lawful when the property involved was a patent. By what authority was this done?

The patent statutes do not sanction price-fixing combinations. They are indeed wholly silent about combinations. So far as relevant here, all they grant, as already noted, is the "exclusive right to make, use, and vend the invention or discovery." Rev. Stat. § 4884, 35 U. S. C. § 40. There is no grant of power to combine with others to fix the price of patented products. Since the patent statutes are silent on the subject, it would seem that the validity of price-fixing combinations in this field would be governed by general law. And since the Sherman Act outlaws price-fixing combinations it would seem logical and in keeping with the public policy expressed in that legislation to apply its prohibitions to patents as well as to other property. The Court made an exception in the case of these price-fixing combinations in order to make the patent monopoly a more valuable one to the patentee. It was concerned with giving him as high a reward as possible. It reasoned that if the patentee could not control the price at which his licensees sold the patented article, they might undersell him; that a price-fixing combination would give him protection against that contingency and therefore was a reasonable device to secure him a pecuniary reward for his invention. Thus the *General Electric* case inverted Cl. 8 of Art. I, § 8 of the Constitution and made the inventor's reward the prime rather than an incidental object of the patent system.

In that manner the Court saddled the economy with a vicious monopoly. In the first place, this form of

price fixing underwrites the high-cost producer. By protecting him against competition from low-cost producers, it strengthens and enlarges his monopoly. It is said in reply that he, the patentee, has that monopoly anyway—that his exclusive right to make, use, and vend would give him the right to exclude others and manufacture the invention and market it at any price he chose. That is true. But what he gets by the price-fixing agreement with his competitors is much more than that. He then gets not a benefit inherent in the right of exclusion but a benefit which flows from suppression of competition by combination with his competitors. Then he gets the benefits of the production and marketing facilities of competitors without the risks of price competition. Cf. *United States* v. *Masonite Corp., supra.* In short, he and his associates get the benefits of a conspiracy or combination in restraint of competition. That is more than an "exclusive right" to an invention; it's an "exclusive right" to form a combination with competitors to fix the prices of the products of invention. The patentee creates by that method a powerful inducement for the abandonment of competition, for the cessation of litigation concerning the validity of patents, for the acceptance of patents no matter how dubious, for the abandonment of research in the development of competing patents. Those who can get stabilized markets, assured margins, and freedom from price cutting will find a price-fixing license an attractive alternative to the more arduous methods of maintaining their competitive positions. Competition tends to become impaired not by reason of the public's preference for the patented article but because of the preference of competitors for price fixing and for the increased profits which that method of doing business promises.

Price fixing in any form is perhaps the most powerful of all inducements for abandonment of competition. It offers security and stability; it eliminates much of the uncertainty of competitive practices; it promises high profits. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear. The prices charged by the regimented industry are determined not by representatives of the public, as in the case of electric, water, and gas rates, but by private parties who incline to charge all the traffic will bear. And the type of combination in this case has the power to inflict precisely the type of public injury which the Sherman Act condemns. This price-fixing scheme does far more than secure to inventors "the exclusive right" to their discoveries within the meaning of Cl. 8 of Art. I, § 8 of the Constitution. It gives them a leverage on the market which only a combination, not a patent by itself, can create. Yet it is "every" combination in restraint of trade which § 1 of the Sherman Act condemns, price-fixing combinations dealing with patents not excluded.

Congress has much to say as to the pattern of our economic organization. But I am not clear that Congress could expand "the exclusive right" specified in the Constitution into a right of inventors to utilize through a price-fixing combination the production and marketing facilities of competitors to protect their own high costs of production and eliminate or suppress competition. It is not apparent that any such restriction or condition promotes the progress of science and the useful arts. But however that may be, the Constitution places the rewards to inventors in a secondary role. It makes the public interest the primary concern in the patent system. To allow these price-fixing schemes is to reverse the order and place the rewards to inventors first and the public

second. This is not the only way a patentee can receive a pecuniary reward for his invention. He can charge a royalty which has no relation to price fixing. Or he can manufacture and sell at such price as he may choose. Certainly if we read the patent statutes so as to harmonize them as closely as possible with the policy of anti-trust laws, we will strike down a combination which is not necessary to effectuate the purpose of the patent statutes. If we did that in this case we would overrule the *General Electric Co.* case.

This Court, not Congress, was the author of the doctrine followed in that case. The rule it sanctions is another of the private perquisites which the Court has written into the patent laws. See *Special Equipment Co.* v. *Coe,* 324 U. S. 370, 383. Since we created it, we should take the initiative in eliminating it. It is hard for me to square it with the standards which the Constitution has set for our patent system It plainly does violence to the competitive standards which Congress has written into the Sherman Act.

MR. JUSTICE BURTON, with whom THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER concur, dissenting.

This dissent is impelled by regard for the soundness, authority and applicability to this case of the unanimous decisions of this Court in *Bement* v. *National Harrow Co.,* 186 U. S. 70, and *United States* v. *General Electric Co.,* 272 U. S. 476.

The complaint charges violation of § 1 of the Sherman Antitrust Act [1] by the defendant patent owners and cross-licensors, Line Material Company and Southern States Equipment Corporation (here called respectively Line

[1] 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. § 1.

and Southern), and also by the ten defendants who hold licenses under the two complementary patents, owned respectively by Line and Southern. These patents are for dropout fuse cutouts. Southern's patent is the dominant patent but the product made under it alone has not been commercially successful. Line's patent is for an improvement of that product which has made it commercially successful. Each of the twelve defendants has received and exercised authority under both patents to make and sell this improved product, but the Government charges them with having engaged in an unlawful combination and conspiracy in restraint of trade to fix, maintain and control the prices at which they have sold, in interstate commerce, their respective products under these patents. It is not disputed that the sales were made in interstate commerce. The trial court's findings of fact demonstrate, however, that there have been no agreements between any of the defendants with respect to the prices of these products other than the price-limiting provisions contained in their respective licenses.[2] The findings of fact show also that, unless the Government

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[2]

"32. . . . Apart from the written license agreements here in evidence, there was no agreement, express or implied, between the licensor and any licensee, or between any two or more licensees, with respect to the prices of licensed dropout fuse cutouts.

. . . . . .

"34. . . . There was no agreement, express or implied, between Line and Southern with respect to prices on cutouts other than the written cross-license agreements.

. . . . . .

"36. There was no combination or conspiracy among the defendants, or any of them, to fix, maintain or control prices of dropout fuse cutouts or parts thereof, or to restrain trade or commerce therein." (Findings of fact.)

sustains its contention that those provisions constitute, *per se,* an unlawful restraint of trade, its complaint should be dismissed.[3]

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[3] In addition to the findings quoted in note 2, *supra,* the trial court found:

"9. The validity of the United States letters patent involved in the licenses of the defendants is not contested by the plaintiff in this action, and therefore is not here in issue.

. . . . . .

"27. None of the license agreements aforesaid restrains trade in any article moving in interstate commerce, and none of them was entered into as a result of any conspiracy to restrain such trade.

"28. . . . The prices listed in Schedule A are Line's own selling prices, determined solely by Line without discussion with or advice from any other defendant.

"29. Under the cross-licenses with Southern and its licenses to others, Line established minimum prices only for structures within the ambit of the claims of its own patents. The classification schedules attached to the license agreements were only such as were reasonably necessary to protect the business of the licensor and implement the license agreement so as to prevent evasion by a licensee of lawful price limitation provisions. Line did not establish minimum selling prices for any device not covered by a claim of its Schultz patent Re. 22,412 or its Kyle patent Re. 19,449.

. . . . . .

"31. There is no charge of monopoly by the defendants. There was no fixing of resale prices on licensed dropout fuse cutouts by the defendants or any of them. . . .

"32. The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly. Each of the licenses granted to the licensee-defendants was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order that the licensee could continue lawfully to manufacture and sell its dropout fuse cutouts. . . .

. . . . . .

"34. The cross-license agreements between Line and Southern

The question thus presented is: do the price-limiting provisions in some or all of the licenses under Line's or Southern's patents constitute a restraint of trade in violation of § 1 of the Sherman Act? We agree with the court

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were limited to the commercially practicable device covered by the subservient Schultz [Line's] patent, and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements. . . . Such cross-license agreements were entered into in good faith, not for the purpose of fixing prices in the industry but to permit the manufacture and sale of the cheaper device covered by the subservient patent, to facilitate the negotiation of licenses, and to provide royalty income. . . .

"35. The license agreements here in evidence did not restrain trade but promoted it by making available several sources where the patented devices could be obtained, thus increasing competition in such devices, particularly with respect to design, quality and service. Competition among the defendants for business in these devices continued to be vigorous after the making of the license agreements."

That the patents did not represent an industry-wide control appears from the following finding:

"5. The defendants are all manufacturers of electrical devices of various kinds. The dropout fuse cutouts manufactured by the defendants under the patent licenses have been and are in open competition with many other devices which perform the same functions and are not manufactured under the patent licenses, such as open single hinge dropout fuse cutouts; open non-dropout fuse cutouts; non-dropout fuse cutouts enclosed in materials other than cast wet-process porcelain, such as Prestite; automatic circuit breaker cutouts; and others listed in Defendants' Exhibit L–23. The average aggregate annual sales of licensed dropout fuse cutouts manufactured by all the defendants from 1940 to 1944 was $1,918,247.78 and constituted only 40.77% of the average aggregate annual sales of all licensed and competitive cutouts manufactured and sold by all the defendants, and were distributed among the defendants as follows: General Electric, 29.2%; Line [,] 25.4% [;] Kearney, 18.9%; Southern, 7.9%; Westinghouse, 5.3%; Schweitzer and Conrad, 5.1%; Railway, 3.8%; Matthews, 2%; Porcelain, 1.5%; Royal, 0.5%; Pacific, 0.2%; and Johnson, 0.2%."

below that they do not.[4] The price-limiting provisions in this case are comparable to those which, in the *Bement* and *General Electric* cases, *supra,* were held not to violate the Sherman Act. This Court sustained the agreement in the *Bement* case because the Sherman Act—

> "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers." (At p. 92.)

The license in that case was issued under several patents and, as here, it limited the prices at which the licensee was authorized to sell articles produced by the licensee under that license. In the *General Electric* case, this Court, in speaking of the patent holder's right to limit the selling prices of his licensee's products, said:

> "We think he [the patent holder] may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold." (At p. 490.)

In the present case, there are two types of license agreements. The price-limiting provisions are the same in each. The first type is that of the cross-licensing agreement between Line and Southern. In it Line granted

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[4] "2. The cross-licenses and the license agreements entered into between the various defendants, as set forth in the preceding Findings of Fact, are lawful agreements." (Conclusions of law.)

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to Southern a nonexclusive, royalty-free license to make and sell the products here in question. Line also prescribed that Southern's prices, terms and conditions of sale should be "not more favorable to the customer than those established from time to time and followed by the Line Company in making its sales." The difference between this license agreement and Line's agreements with each of the other defendants is that Southern, in return for this license, instead of paying cash royalties to Line, issued to Line a limited cross-license under Southern's complementary patent on a dropout fuse cutout. Southern also granted to Line an exclusive right to issue sublicenses under that patent. Southern inserted no price limitation in its cross-license to Line and Line made no commitment to insert price limitations in any sublicense which it might issue under Southern's patent. As far as price limitations were concerned, they all were contained in the royalty-free, nonexclusive license from Line to Southern and were applicable only to products made and sold by the latter under Line's patent. Assuming that the limitations thus placed by Line on the price of Southern's products, made and sold by it under Line's complementary patent, were reasonable limitations, especially in relation to Line's own operations under the same patent, they represented a lawful protection of Line's patent interests. They evidenced a normal exercise by a manufacturing patentee "of the exclusive right of a patentee . . . to acquire profit by the price at which the article is sold." [5] In some ways, they were even more natural and reasonable provisions for insertion by Line than would have been a bare provision for royalties. Line evidently needed these price limitations to enable it to continue to make and sell the product which its own improvement had converted from a commercial failure

[5] *United States* v. *General Electric Co., supra,* at p. 490.

into a commercial success. It will be demonstrated later that Line's receipt of a royalty-free, unconditional cross-license under Southern's complementary patent, as consideration for Line's license to Southern, did not, *per se,* convert this otherwise lawfully limited license into an invalid license violating the Sherman Act.

The other type of license that was used by Line was that of a direct license issued separately to each of the ten other licensee-defendants. These licenses closely resembled each other. Each was a nonexclusive license calling for the payment of a modest royalty to Line on each product made and sold by the licensee under Line's patent. Each included price limitations comparable to those in Line's license to Southern. These price-limiting licenses from Line are, as such, entirely comparable to those in the *Bement* and *General Electric* cases. Each license, however, also included a sublicense issued by Line under Southern's complementary patent. The royalties on the products made and sold under the two complementary patents were to be divided equally between Line and Southern. It will be demonstrated later that this sublicense under Southern's complementary patent and the agreement by Line to divide with Southern the royalties received upon products made and sold under the two patents did not, *per se,* convert these otherwise lawfully limited licenses into invalid licenses violating the Sherman Act.

Line also granted to certain licensee-defendants desiring it, a license under Line's so-called "Kyle patent" for enclosed fuse boxes. Some of these licenses carried price limitations on products made and sold by the licensee under the Kyle patent. These licenses are entirely comparable to those in the *Bement* and *General Electric* cases. They are well within the scope of those precedents and carry no suggested basis for a distinction claimed to con-

vert them into invalid licenses violating the Sherman Act.

The Government now asks this Court to overrule the *Bement* and *General Electric* cases. The opinion by MR. JUSTICE REED rejects that request but seeks to justify a reversal of the judgment below by distinguishing this case from those precedents. This dissent undertakes not only to emphasize the soundness of the *Bement* and *General Electric* decisions, but to demonstrate that the basic principles which sustain those decisions apply to this case with at least equal force. This initial discussion will omit the consideration of the cross-license from Southern to Line, the grant from Southern to Line of the exclusive right to issue sublicenses under the Southern patent and the agreement for the division of royalties between Southern and Line. The *Bement* and *General Electric* decisions are authority for upholding the remaining portions of such agreements in the light of the previously mentioned findings of fact which show that the agreements "arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor" [6] and that "the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." [7] This dissent accordingly re-examines the foundation for those decisions and emphasizes the development, nature and effect of the patent rights which are decisive of the main issue both in those cases and in this.

PATENT RIGHTS.

An understanding of the historical development and of the nature of patent rights in the United States is

[6] *Bement* case, *supra*, at p. 92.

[7] *General Electric* case, *supra*, at p. 490.

essential to a discussion of the relation between them and the restraints of trade prohibited by the Sherman Act. American patent rights find their origin in Great Britain. That nation appears to have been the first to issue "patents" to secure to inventors for limited times exclusive rights to their respective discoveries. These "patents" were called *"literae patentes," i. e.,* "open letters," because they were not sealed up but were exposed to view with the Great Seal pendant at the bottom. They were addressed by the sovereign to all subjects of the realm. Such instruments were, and to a degree still are, the common form used for making grants of dignities, such as peerages, appointments to certain offices and grants of privilege of various kinds. Their form, therefore, was similar to that of the "patents" used to grant exclusive rights or "monopolies" to trade guilds, corporations and, in some cases, individuals, permitting them to exclude competitors from the conduct of certain lines of profitable business.[8]

The contrast between these two kinds of exclusive rights in their relation to the public was reflected later in acts of the British Parliament and in the Constitution and statutes of the United States. A patent to an inventor took nothing from the public which the public or the inventor's competitors already had. By hypothesis, it dealt with a new asset available to civilization only through its inventor. The royal patent served to encourage the inventor to disclose his invention. By grant-

[8] An early patent for the establishment of a new industry was granted to a Flemish weaver in 1331. There are records of a merchant, in 1347, having a monopoly for exporting Cornish tea and of an individual, in 1376, having a monopoly to sell sweet wines in the City of London. The first patent for a new invention that has been found in the records dates from 1561 and covers the manufacture of saltpetre. Meinhardt, Inventions, Patents and Monopoly, pp. 30, 35 (London, 1946).

ing to the inventor the right to exclude all others from making, using or selling the invention for a limited time, it was felt that the public was well served by the invention's disclosure, its early availability under the patent and its later general availability to everyone. This procedure was popular. On the other hand, royal patents securing exclusive rights to private parties to conduct profitable enterprises to the exclusion of existing or available competitors were issued to show royal favor or to secure funds at the expense of the public. Such patents became highly unpopular. The courts, at an early date, held them invalid.[9]

As early as 1602, Francis Bacon, in the House of Commons, supported the principle that a monopoly should be granted only for a "new manufacture." In 1623, there was enacted the Statute of Monopolies (21 Jac. I, c. 3, § I; 1 Walker on Patents, pp. 18–21 (Deller's ed. 1937)) which declared void all monopolies and letters patent "of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, ..." However, § VI of this Act made an express exception in favor of patents for inventions.[10] That Section has become the

[9] In 1602, in *The Case of Monopolies, Darcy* v. *Allein*, 6 Co. Rep., [Q. B.] 159, Part XI–84b; 1 Am. & Eng. Pat. Cas. (Abbott) 1; Webs. Pat. Cas. 1; a royal grant of exclusive right to manufacture playing cards within the realm was held void as violating the common law and several Acts of Parliament. And see 1 Walker on Patents, pp. 12–16 (Deller's ed. 1937).

[10] "VI. Provided also, and be it declared and enacted, That any Declaration before-mentioned shall not extend to any Letters Patents and Grants of Privilege for the Term of fourteen Years or under, hereafter to be made, of the sole Working or Making of any manner of new Manufactures within this Realm, to the true and first Inventor and Inventors of such Manufactures, which others at the Time of Making such Letters Patents and Grants shall not use, so as also they be not contrary to the Law,

foundation of the patent law securing exclusive rights to inventors not only in Great Britain but throughout the world.

The result, historically and in principle, has not been a conflict between two legislative mandates. It has been rather a long standing approval, both by the British Parliament and the Congress of the United States, of the unique value of the exercise, for limited periods, of exclusive rights by inventors to their respective inventions, paralleled by an equally sustained and emphatic disapproval of certain other restraints of trade not representative of exclusive rights of inventors to their inventions.

The long and unfaltering development of our patent law often has been touched upon in our decisions. However, in the face of the direct attack now made upon some of its underlying principles, the infinite importance of our inventions justifies a brief review here of the development

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nor mischievous to the State, by raising Prices of Commodities at home, or Hurt of Trade, or generally inconvenient: The said fourteen Years to be accounted from the Date of the first Letters Patents, or Grant of such Privilege hereafter to be made, but that the same shall be of such Force as they should be, if this Act had never been made, and of none other." 21 Jac. I, c. 3 (1623).

"The Statute of Monopolies created no new right either in the Crown or the people; it was simply declaratory of the common law and enacted into statute law, which bound the Sovereign, the doctrines that the courts had repeatedly affirmed, and reiterated those principles of the Magna Charta (9 Henry III, Ch. XXXVII, A. D. 1225) which declared that the liberties of his subjects shall not be infringed or broken by royal usurpation, and it limited the royal prerogative to certain definite terms and conditions under which it might be lawfully exercised. It is to be noted that there was a reservation of Letters Patent and grants of the privilege of the sole working or making of any new manufactures within the realm to the true and first inventor; conferring upon him an exclusive privilege for the term of fourteen years." 1 Walker on Patents, *supra*, at p. 22.

and nature of the patent rights attacked. The decision in this case must turn upon this Court's understanding of the relation between the licenses before it, the patent rights to which they relate and the Sherman Act. As interpreter of the Congressional Acts that have expressed the patent policy of this nation since its beginning, this Court is entrusted with the protection of that policy against intrusions upon it. The crucial importance of the development of inventions and discoveries is not limited to this nation. As the population of the world has increased, its geographical frontiers have shrunk. However, the frontiers of science have expanded until civilization now depends largely upon discoveries on those frontiers to meet the infinite needs of the future. The United States, thus far, has taken a leading part in making those discoveries and in putting them to use.

The Constitution of the United States provides that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, *by securing for limited Times to* Authors and *Inventors the exclusive Right to their respective* Writings and *Discoveries; . . .*" (Italics supplied.) Art. I, § 8.

The statutes primarily implementing this provision state:

> "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, . . . not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the

fees required by law, and other due proceeding had, obtain a patent therefor." R. S. § 4886, as amended, 46 Stat. 376, 53 Stat. 1212, 35 U. S. C. § 31.

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a *grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery* . . . throughout the United States and the Territories thereof, referring to the specification for the particulars thereof. . . ." (Italics supplied.) R. S. § 4884, as amended, 46 Stat. 376, 35 U. S. C. § 40.[11]

"*Every* application for patent or *patent or any interest therein shall be assignable* in law by an in-

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[11] The first Act to implement the constitutional provision was approved April 10, 1790. It provided:

"Section 1. . . . , That upon the petition of any person or persons to the Secretary of State, the Secretary for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefor, it shall and may be lawful to and for the said Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States, to bear teste by the President of the United States, reciting the allegations and suggestions of the said petition, and describing the said invention or discovery, clearly, truly and fully, and thereupon *granting to such petitioner or petitioners, his, her or their heirs, administrators or assigns for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery; . . . .*" (Italics supplied.) 1 Stat. 109–110.

strument in writing, and the applicant or patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent or patent to the whole or any specified part of the United States. . . ." (Italics supplied.) R. S. § 4898, as amended, 55 Stat. 634, 35 U. S. C. (Supp. V, 1946) § 47.

Conway P. Coe, Commissioner of Patents of the United States from 1933 to 1945, discussed the historical significance of the early establishment of the American patent system in his testimony before the Temporary National Economic Committee in 1939. He said:

"The American patent system was established at a time when mechanical inventions had already begun to affect not only the industrial conditions, but also the economic, social, and political status of Europe and the new Nation just erected on this continent. The significance of the inventions put to work in England and the States of the Confederation was realized by the American statesmen of that era. It is agreed that their recognition of the value of these new economic factors prompted them to write into the Constitution the provision of article I, section 8, empowering Congress 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries.' This provision, by the way, is impressive not only because it is included in the Constitution as one of the major grants of power to Congress, but equally because it bestows on patentees a complete monopoly, and therefore raises a question as to the constitutionality of an attempt to compel the owner of a patent to share with others the title, use, and avail of his property. I do not presume to determine the point; but

I must contemplate it as an issue to be met here or hereafter.

"The authors of our patent system, judging by the language of article I, section 8, held the *exclusiveness* of the rights vested in a patentee as a powerful aid to progress in arts and sciences." [12] Hearings before the Temporary National Economic Committee, 76th Cong., 1st Sess. 839–840 (1939).

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[12] The Commissioner referred to the special interest of President Jefferson in this subject:

"No American among his contemporaries or his successors has achieved a greater reputation as an opponent of monopoly than Thomas Jefferson. Yet he not merely sanctioned, he eloquently advocated the form of monopoly represented in patents. I cite his commentary on an early act of Congress, presumably that of 1790, in the administration of which he collaborated with Henry Knox, Secretary of War, and Edmund Randolph, Attorney General.

'An act of Congress authorizing the issue of patents for new discoveries has given a spring to invention beyond my conception. Being an instrument of granting the patents, I am acquainted with their discoveries.

. . . . . .

'In the arts, and especially in the mechanical arts, many ingenious improvements are made in consequence of the patent-right giving *exclusive* use of them for 14 years.

'Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time. Nobody wishes more than I do that ingenuity should receive liberal encouragement.' " Hearings before the Temporary National Economic Committee, *supra*, at p. 840.

Some conception of the degree to which the present patent system has been resorted to is found in Commissioner Coe's testimony that, up to 1939, over 2,000,000 patents had been issued, apart from design patents and reissues. The figure is now approximately 2,500,000 of which all but about 100,000 have been issued since 1870. He showed also that only about 60% of the applications filed are finally granted. (*Id.* at p. 844, and Exhibits 179 and 180.) See also, Official Gazette, U. S. Pat. Off., Vol. 605, p. 714 (Dec. 30, 1947).

After the final report of the Temporary National Economic Com-

He analyzed the "patent rights" granted to the inventor and stated his reasons for concluding that the "monopoly"

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mittee, the President issued Executive Order No. 8977, December 12, 1941, 1 C. F. R. Cum. Supp. 1040, establishing the National Patent Planning Commission to conduct a comprehensive survey and study of the American patent system and, among other things, to—

> "consider whether the system now provides the maximum service in stimulating the inventive genius of our people in evolving inventions and in furthering their prompt utilization for the public good; . . . whether there are obstructions in our existing system of patent laws, and if so, how they can be eliminated; . . . and what methods and plans might be developed to promote inventions and discoveries which will increase commerce, provide employment, and fully utilize expanded defense industrial facilities during normal times."

The President appointed Charles F. Kettering, Chairman, Chester C. Davis, Francis P. Gaines, Edward F. McGrady and Owen D. Young as members of the Committee. The Report of the Committee, transmitted by the President to Congress June 18, 1943 (H. R. Doc. No. 239, 78th Cong., 1st Sess. 1), contained the following:

> "The American patent system established by the Constitution giving Congress the 'power to promote the progress of science and useful arts,' is over 150 years old. The system has accomplished all that the framers of the Constitution intended. It is the only provision of the Government for the promotion of invention and discovery and is the basis upon which our entire industrial civilization rests.
>
> "The American people and their Government should recognize the fundamental rightness and fairness of protecting the creations of its inventors by the patent grant. The basic principles of the present system should be preserved. The system has contributed to the growth and greatness of our Nation; it has—
>
> (1) Encouraged and rewarded inventiveness and creativeness, producing new products and processes which have placed the United States far ahead of other countries in the field of scientific and technological endeavor;
>
> (2) Stimulated American inventors to originate a major portion of the important industrial and basic inventions of the past 150 years;
>
> (3) Facilitated the rapid development and general appli-

vested in a patentee is not in conflict with our antitrust laws as follows:

> "It occurs to me that a great deal of misapprehension results from the failure to distinguish between the monopoly or privilege vested in a patentee and the sort of monopoly that British sovereigns once conferred. It is only when we appreciate this distinction that we can understand how Jefferson could consistently advocate the monopoly of patents for inventions while condemning the traditional form of monopoly.
>
> "Americans generally detest monopoly in the true sense of the term because it makes possible the ruthless exercise of power. Indeed, the American Revolution was precipitated by popular resentment of the monopoly on tea held by the East India Co. It would, therefore, have been exceedingly strange if,

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cation of new discoveries in the United States to an extent exceeding that of any other country;

(4) Contributed to the achievement of the highest standard of living that any nation has ever enjoyed;

(5) Stimulated creation and development of products and processes necessary to arm the Nation and to wage successful war;

(6) Contributed to the improvement of the public health and the public safety; and

(7) Operated to protect the individual and small business concerns during the formative period of a new enterprise.

The strongest industrial nations have the most effective patent systems and after a careful study, *the Commission has reached the conclusion that the American system is the best in the world.*" (Italics supplied.)

In its summary of findings and recommendations it added:

"The patent system is the foundation of American enterprise and has demonstrated its value over a period coextensive with the life of our Government. The principle of recognizing a property right in intellectual creation is sound and should be continued as contemplated in the Constitution." (*Id.* at p. 9.)

only a few years later, the delegates sent to the Constitutional Convention by Massachusetts and the other Colonies had been willing to sanction an equivalent form of monopoly under the new government they were creating. In the sixteenth and seventeenth centuries a king or queen of England could reward a favorite by granting him a monopoly on salt or some other necessary of life. This beneficiary of royal favor was not, of course, the discoverer of salt. That came ready-made from the hands of the Creator eons before the advent of man. What the darling of his or her majesty received was the power to compel others to use salt solely of his supplying and only on terms of his dictation.

"But a patent is no such monopoly. It is a reward for the invention or discovery of something new, something before unknown, something added to the sum total of human knowledge, utility, well-being; something which the inventor or discoverer, despising the lure of money or fame, might have withheld from his fellow men. By the monopoly that goes with a patent, then, the Government recompenses and, for a limited time, protects the inventor or discoverer who gives to the world the use and benefit of his invention or discovery. This is a kind and a degree of mutuality that negatives monopoly in the old or the current concept. Monopoly in the latter sense of the term gave to an individual or a group complete dominion of something already existent. A patent awards monopoly to the producer of something original, something superadded to the common store. So it is that two things bearing the same name need not be of the same nature.

"It has been contended that there sometimes occurs a clash between the antitrust laws and the patent

> statutes. I might suggest that since the first antitrust legislation in 1890, the patent laws and the antitrust laws have coexisted without any irreconcilable conflicts between them. They have each of them at least one common objective, namely, the retention by the public of a right once acquired by it. As a matter of fact, patents accomplish more than the retention of the acquired rights. Their influence is creative; they operate to multiply and expand acquisitions by the public." (*Id.* at pp. 840–841.)

A comparable analysis of the nature of the grant to inventors of the exclusive right to their respective inventions or discoveries for a limited time has been made by this Court.

> "Though often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent. *Seymour* v. *Osborne,* 11 Wall. 516, 533. The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus a monopoly takes something from the people. An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge. *United States* v. *Bell Telephone Co.,* 167 U. S. 224, 239; *Paper Bag Patent Case,* 210 U. S. 405, 424; *Brooks* v. *Jenkins,* 3 McLean 432, 437; *Parker* v. *Haworth,* 4 McLean 370, 372; *Allen* v. *Hunter,* 6 McLean 303, 305–306; *Attorney General* v. *Rumford Chemical Works,* 2 Bann. & Ard. 298, 302. He may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the com-

munity, the patent is granted. An exclusive enjoyment is guaranteed him for seventeen years, but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use. *Kendall* v. *Winsor,* 21 How. 322, 327; *United States* v. *Bell Telephone Co., supra,* p. 239. To this end the law requires such disclosure to be made in the application for patent that others skilled in the art may understand the invention and how to put it to use." *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 186–187.[13]

[13] In *Grant* v. *Raymond,* 6 Pet. 218, 241–242, 243, Chief Justice Marshall said:

"The law farther declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The emendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received: if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . .

. . . . . .

"The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of

This constitutional and legislative policy toward inventions is specific in contrast with the generality of the language in the Sherman Act of 1890. The constitutional and long standing statutory approval of the exclusive rights of an inventor to make, use and sell products of his invention for a limited time was an ample guaranty that the Sherman Act did not directly or impliedly repeal such approval. The prohibition of unreasonable restraints of trade and the approval of exclusive rights of inventors to their inventions for limited periods of time continued to exist together. This was nothing new. As long as the inventors kept within their statutory exclusive rights, they were not engaging in unreasonable restraints of trade violating the Sherman Act.

There was nothing to indicate an intent that the general language of the Sherman Act was to change the nation's traditional and specifically stated policy towards inventions. That policy had been widely regarded as having made a major contribution to the nation's exceptional economic progress. The Sherman Act unquestionably applied to any abuse of a patentee's exclusive rights which exceeded the limit of those rights and which amounted to an unreasonable restraint of interstate trade. However, there was nothing to indicate that the Sherman Act restricted the traditional patent rights. *Bement* v. *National Harrow Co., supra,* at p. 92.

LIMITED LICENSE AGREEMENTS.

The primary issue in this case, therefore, is to determine whether or not Line by the issuance of its restricted licenses has thereby sought to exercise any right that is in excess of the exclusive right secured to Line by the

individuals, and the means it employs are the compensation made to those individuals for the time and labour devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

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patent laws of the United States. If it has done so, then such licenses, like other agreements, must be scrutinized to determine whether or not they create an unreasonable restraint of trade in violation of the Sherman Act.

The first consideration is the relation of the Sherman Act to provisions in a license agreement which place limitations—as in the *Bement* and *General Electric* cases—upon the prices which may be charged by the licensee for products made and sold by it under the protection of its license. The issue corresponds to that raised by the Westinghouse license in the *General Electric* case.[14] The Sherman Act's invalidation of agreements in restraint of trade applies only to those in unreasonable restraint of trade and the definition of such unreasonableness depends largely upon the common law meaning of restraint of trade.[15] This permits such invalidation where, for example, a license is a mere subterfuge for price fixing which otherwise would amount to unreasonable restraint of trade in violation of the Sherman Act. See *United States* v. *U. S. Gypsum Co., post,* p. 364, decided concurrently with this case.[16]

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[14] There is no issue here corresponding to the other issue examined and upheld in the *General Electric* case, namely, that involving the validity of the patentee's agency system of sales of its patented article. Another system for making sales of a patented article has been held invalid where the "agencies" were found not to be bona fide agencies. *United States* v. *Masonite Corp.,* 316 U. S. 265. That case, in turn, did not reach the issue raised by the Westinghouse license in the *General Electric* case. The Court there said (p. 277): "we need not reach the problems presented by *Bement* v. *National Harrow Co.,* 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company."

[15] *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179–180. See also, *Standard Oil Co.* v. *United States,* 221 U. S. 1.

[16] The instant case also is to be distinguished sharply from those in which the parties to a license have sought to fix prices for the resale by the licensee of patented products previously sold to the licensee by

The Sherman Act's prohibition of unreasonable restraints of trade, accordingly, would not invalidate an unconditional, nonexclusive license agreement which served only to release the licensee from the right of the patent holder to exclude him from making, using or selling a patented article. The original, exclusive right of the patent holder, being secured to him through the terms of his patent, was not in violation of the Sherman Act. Accordingly, his release or waiver of a part of that exclusive right by issuance of an unconditional, nonexclusive license, *per se,* decreased rather than increased the statutory restraint of trade to which he was entitled.

The next question is whether the insertion in such a license of some limitation upon the licensee's right to sell the articles made by the licensee under the patent, *per se,* converts this otherwise lawful agreement into an unreasonable restraint of trade violative of the Sherman Act. The answer is no. Just as an unlimited license is a partial, but lawful, relaxation of the lawful restraint of trade imposed by the patent, so a limited license is but a correspondingly less relaxation of that same restraint.

The fact that the limitation in the license is a limitation on the price which may be charged by the licensee in making sales of the article made by the licensee under the protection of the patent does not change the answer, provided the price prescribed is "normally and reasonably adapted to secure pecuniary reward for the

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the patentee or others. *United States* v. *Univis Lens Co.,* 316 U. S. 241, 252; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 452, 456–457; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502, 516; *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490, 500–501; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1, 16–17. See also, *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169; *United Shoe Mach. Co.* v. *United States,* 258 U. S. 451, 463–464; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 48–49; *Adams* v. *Burke,* 17 Wall. 453, 455–456.

patentee's monopoly." [17] Here again, the restraint of trade imposed by the patent itself is lawful. Therefore, as long as the license agreement has only the effect of reducing the lawful restraint imposed by the patent, such agreement merely converts the original lawful restraint into a lesser restraint, equally lawful.

Such agreements should be carefully scrutinized to make sure that they do not introduce new restrictions which, as judicially construed, unreasonably restrain trade and thus violate the Sherman Act. In the instant case the findings eliminate such possibilities and thus reduce the issue here to one comparable with the issue in the *Bement* and *General Electric* cases.

This brings us to a further discussion of the nature of the license in the present case and of the precise limitations contained in it. This requires, first of all, a consideration of the nature of the exclusive right to make, use and sell the patented product. The precise nature of such a "patent right" has been described as follows by Chief Justice Taft in a unanimous opinion of this Court:

> "It is the fact that the patentee has invented or discovered something useful and thus has the common law right to make, use and vend it himself which induces the Government to clothe him with power to exclude everyone else from making, using or vending it. In other words, the patent confers on such common law right the incident of exclusive enjoyment and it is the common law right with this incident which a patentee or an assignee must have [in order to bring a suit for infringement]. That is the implication of the descriptive words of the grant 'the exclusive right to make, use and vend the invention.' The Government is not granting the common law right to make, use and vend, but it is granting the incident of exclusive ownership of that com-

[17] *General Electric* case, *supra*, at p. 490.

> mon law right, which can not be enjoyed save with the common law right. A patent confers a monopoly. So this Court has decided in the *Paper Bag Case, supra* [210 U. S. 405], and in many other cases. The idea of monopoly held by one in making, using and vending connotes the right in him to do that thing from which he excludes others." *Crown Co.* v. *Nye Tool Works,* 261 U. S. 24, 36–37.

This analysis is the key to the issue before us. It demonstrates that the common law right to make, use and sell the product of an unpatented invention exists without any right to exclude others from so making, using or selling such product. The additional "exclusive right," or so-called "patent right," which is added to the common law right of the inventor is added by authority of the Constitution and of the federal statutes, so as to promote the progress of science, the useful arts and, no doubt, the general welfare. The patent or any interest therein may be assigned. R. S. § 4898, as amended, 55 Stat. 634, 35 U. S. C. (Supp. V, 1946) § 47.[18] An assignee, exercising

[18] In discussing this patent monopoly and the patent laws of the United States this Court long ago said:

> "The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either, 1st, the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. . . . Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler* v. *Wilder,* 10 How. 477, 494, 495; *Moore* v. *Marsh,* 7 Wall. 515." *Waterman* v. *Mackenzie,* 138 U. S. 252, 255.

This was quoted with approval in *Crown Co.* v. *Nye Tool Works,* 261 U. S. 24, 37, and was enlarged upon in the *General Electric* case, *supra,* at p. 489.

his right to exclude others during the life of the patent from making, using or selling articles under protection of the patent, does not practice a restraint of trade in violation of the Sherman Act any more than would his assignor if the assignment had not been made.

Any attempted assignment or transfer short of those indicated in the statute "is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement." [19] The legal position of the holder of a simple, unconditional, nonexclusive license is important.[20] Before his receipt of his license, he had the common law right to make, use and sell the patented article as well as other articles, *except to the important extent prevented by the patentee's exclusive rights.* The license changed that position by withdrawing from the licensee, to the extent of the license, the restriction which the patent placed upon him. Accordingly, to the extent of his license, the restraint placed upon trade by the patent was diminished. In relation to the Sherman Act his license, instead of creating an added ground for asserting a violation of the Sherman Act, thus, *per se,* relaxed an existing restraint of trade. The previous restraint imposed by the patent was not a violation of the Sherman Act and, therefore, the mere lessening of that restraint was not a violation of that Act. The important point is the need to see to it that the lessening of the restraint resulting from the issuance of either an absolute license or a limited license is, in fact, no more than a mere withdrawal of the lawful restraint imposed by the patent and is not either directly or indirectly an imposition of a new restraint not within the ambit of the patent

[19] See note 18, *supra.*

[20] " 'As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,' . . . ." Quoted with approval by Chief Justice Taft in a unanimous opinion of the Court in *De Forest Co.* v. *United States,* 273 U. S. 236, 242.

right. An unconditional, nonexclusive and royalty-free license presents, *per se,* no need for special scrutiny under the Sherman Act. A royalty-yielding license presents the issue suggested by the language in the *General Electric* case. In order not to violate the Sherman Act, the royalty must be "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." [21] However, as well explained in that case, a royalty may not, by itself, satisfy the needs of the patent holder. Limitations on the price of sales by the licensee of products made by the licensee under the patent may be the best, or even the only, condition that is thus "normally and reasonably adapted" to the situation.

The following statements illustrate the directness with which this Court repeatedly has decided in favor of the validity of limited licenses when that question has been before it:

> ". . . the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." *Bement* v. *National Harrow Co., supra,* at p. 91.
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> "As was said in *United States* v. *General Electric Co.,* 272 U. S. 476, 489, the patentee may grant a license 'upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' The re-

[21] *General Electric* case, *supra,* at p. 490.

> striction here imposed [upon the licensee to manufacture and to sell the patented article for certain uses only] is of that character. The practice of granting licenses for a restricted use is an old one, see *Rubber Company* v. *Goodyear,* 9 Wall. 788, 799, 800; *Gamewell Fire-Alarm Telegraph Co.* v. *Brooklyn,* 14 F. 255. So far as appears, its legality has never been questioned." *General Talking Pictures Corp.* v. *Western Electric Co.,* 305 U. S. 124, 127.

The normality, reasonableness and practical necessity for inserting a price-limiting condition in certain licenses, without trespassing upon the prohibited area of unlawful restraints of trade, is effectively summarized in the *General Electric* case, at p. 490:

> "If the patentee goes further, and licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself.' He does not thereby sell outright to the licensee the articles the latter may make and

sell, or vest absolute ownership in them. He restricts the property and interest the licensee has in the goods he makes and proposes to sell." [22]

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[22] Chief Justice Taft, at pp. 490–491, made the following significant references to the *Bement* case:

"This question was considered by this Court in the case of *Bement* v. *National Harrow Company*, 186 U. S. 70. A combination of manufacturers owning a patent to make float spring tool harrows, licensed others to make and sell the products under the patent, on condition that they would not during the continuance of the license sell the products at a less price, or on more favorable terms of payment and delivery to purchasers, than were set forth in a schedule made part of the license. That was held to be a valid use of the patent rights of the owners of the patent. It was objected that this made for a monopoly. The Court, speaking by Mr. Justice Peckham, said (p. 91):

" 'The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.'

"Speaking of the contract, he said (p. 93):

" 'The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.' "

Judge Westenhaver, whose judgment in the District Court was affirmed by this Court in the *General Electric* case, said:

"If both licensor and licensee are making and selling, it is quite conceivable that the owner of the patent could not safely grant licenses at all on any other terms; otherwise, he would risk having

During the hearings of the Temporary National Economic Committee, testimony was received from the Commissioner of Patents and manufacturers familiar with the commercial development of patented products bearing on the reasonableness and propriety of price limitations in patent licenses comparable to those in the present case. It was to the effect that commercially successful mechanical inventions, such as those in the electrical, communications and automotive industries, usually represent not only the intrinsic merit of the inventions themselves but a substantial investment in research, experimentation and promotion. If, after the disclosure of the invention, others are to be licensed to make the patented article, the costs of production by such licensees will reflect none of the investments above-mentioned. If the patentee is to be reimbursed for his expenditures, he will need, therefore, to secure the benefit of a royalty sufficient to accomplish this or of a restriction on the price at which licensees may sell their products under the patent. This price would have to be one that would enable the patentee to manufacture and sell the article in such quantities and at such prices as would produce a return to him commensurate with his investment in it. He might prescribe both a royalty and a restriction. As long as the royalties and the prices were "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" [23] they would perform much the same function.[24]

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his business destroyed, and hence, as a matter of ordinary business prudence, would feel obliged to keep his patent monopoly wholly within his own hands. And it was so held in *Bement* v. *National Harrow Co.*, 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058." *United States* v. *General Electric Co.*, 15 F. 2d 715, 718.

[23] *General Electric* case, *supra*, at p. 490.

[24] Hearings before the Temporary National Economic Committee, *supra;* Conway P. Coe, Commissioner of Patents, pp. 839, *et seq.*, 857,

In cases where patents are owned by comparatively small industrial producers but licenses are to be issued by them to comparatively large industrial producers in the same field, the necessity for early reimbursement of the patent owners for their development costs is clear and the danger that a large licensee will undersell his smaller licensor is obvious. This is the situation in the present case. The General Electric Company and the Westinghouse Electric Corporation are among the licensees of the much smaller patent holders, Line and Southern. Similarly, where outside capital is needed to finance the development of an invention, it is normal and reasonable for the investors to require not only a valid patent but also to insist that any licenses issued during the initial operating period shall contain such price limitations as will allow the patent holder to amortize his original investment within a reasonable time. In this case, finding of fact No. 32 shows that "The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly." [25]

The following statement by Conway P. Coe, Commissioner of Patents, before the Temporary National Eco-

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et. seq.; I. Joseph Farley, Patent Counsel, Ford Motor Co., Detroit, Michigan, p. 262, *et seq.;* Dr. Vannevar Bush, President, Carnegie Institution, Washington, D. C., p. 898, *et seq.;* Ralph E. Flanders, President, Jones & Lamson, Springfield, Vermont (now U. S. Senator from Vermont), p. 928, *et seq.;* John A. Graham, President, Motor Improvements, Inc., Newark, New Jersey, p. 938, *et seq.;* Dr. Frank B. Jewett, President, Bell Telephone Laboratories, Inc., New York City, p. 958, *et seq.;* Maurice H. Graham, Independent Inventor, Minneapolis, Minnesota, p. 1076, *et seq.;* and George Baekeland, Vice President, Bakelite Corporation, New York City, p. 1082, *et seq.*

[25] See note 3, *supra.*

nomic Committee in 1939, reinforces the above conclusions:

> "Speculative capital must be encouraged to fall in behind a new enterprise and this is true whether the enterprise is wholly new or represents merely an expansion of an established organization. Some testimony has been offered to this committee by representatives of large corporations that they would continue to invent, and invent, and invent, and research, research, and research whether or not they were rewarded by the patent grant, but, if you will investigate, I believe you will find that whenever these large corporations, themselves firmly established, undertake a new development, that development is likely to be founded upon patent protection. Whatever opinions have been expressed to this committee or may hereafter be expressed as to whether or not the inventor will continue to invent without the patent system, I think I can present to you indisputable evidence that speculative capital will not back new inventions without the patent protection. And in the final analysis this is the crux and the most important thing in the whole patent question." [26] Hearings before the Temporary National Economic Committee, *supra,* at pp. 857–858.

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[26] In 1939, the Commissioner of Patents testified that of the patents issued, exclusive of design patents and reissues, large corporations (having respectively over $50,000,000 of assets) received but 17.2%, small corporations (having respectively less than $50,000,000 of assets) 34.5%, foreign corporations 5.4% and individuals 42.9%. Subsequent assignments did not materially affect these proportions. Hearings before the Temporary National Economic Committee, *supra,* at p. 846.

Clarence C. Carlton, president of the Automotive Parts and Equip-

The foregoing supports the conclusions reached in the *Bement* and *General Electric* cases, *supra*. The basis for such support is sufficiently broad to lead to the same result in the present case.

SUBLICENSES AND CROSS-LICENSES.

Under the foregoing principles and authorities, a simple price-limiting patent license, in which the price limitations meet the test stated in the *General Electric* case, is a lawful agreement. Such a license would involve, as a possible restraint of trade, only the exclusive right to make, use and sell the patented product. That restraint would exist by virtue of the statute and constitutional provision long antedating the Sherman Act. If the limitations in a license reach beyond the scope of the statutory patent rights, then they must be tested by the terms of the Sherman Act. Assuming that in the instant case the price limitations do not reach beyond the restraint of the patent, the next question is: does the additional sublicense issued by Line under the Southern patent make a difference? The answer is no.

The sublicense, *per se, further diminishes* the statutory restraint of trade imposed by the patent law. It adds a release from the restraint of Southern's patent. Line's authority to issue the sublicense was an express grant by Southern to Line of an exclusive right to issue it. *Per se,* this sublicense certainly amounts to no more than another license under another patent. In the in-

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ment Manufacturers Association, testified that in the automotive parts industry:

> "Patents are valued so much more by the small manufacturer than they are by the large manufacturer. . . . if anything happened to this patent system the fellow who would be hurt more than anyone else would be the smaller manufacturer." (*Id.* at pp. 1057, 1058.)

stant case it is under a complementary patent without which Line's license would be without commercial value. For that very reason it is a reasonable and necessary part of the transaction. In both the *Bement* and *General Electric* cases, the license in question was issued not merely under one, but under many patents held by the licensor. In those cases, apparently, it was not thought necessary to question the relation of those patents to one another or the authority of the licensor to issue the license under each of them. In any event, there hardly could have existed in those cases any closer relationship between the patents involved or a more essential and normal reason, of a patent nature, for combining rights under them than existed here between Line's and Southern's complementary patents. Except for the cross-licensing feature, to be next considered, the situation in relation to the Sherman Act is the same here as though Line had received an assignment of Southern's patent and issued licenses under it as well as under Line's patent.

In the present case, there are ten licensee-defendants instead of one as in each of the *Bement* and *General Electric* cases. In view of the positive finding that there was no agreement or understanding among the licensees amounting to an unreasonable restraint of trade, this mere multiplication of one license by ten produces a repetition of the same issue rather than a different issue. It is apparent also from the record in the *General Electric* case that, in that case, in addition to the Westinghouse license, there were licenses to 13 other manufacturers, which had been issued by the licensor, although the licensees under them were not made parties to the suit. 15 F. 2d 715, 716.

It is suggested also that the *Bement* and *General Electric* rule does not apply because there is a cross-licensing agreement between Line and Southern. The suggestion apparently is that such an agreement, *per se,* reaches

beyond the scope of the exclusive rights of the parties under the patents and converts the price limitations in the respective licenses into unreasonable restraints of trade violating the Sherman Act.

The cross-license from Southern carries no price-limiting feature. At most it is a royalty-free cross-license issued to Line in consideration of Line's license to Southern. It is accompanied by a grant from Southern to Line of an exclusive license to grant sublicenses under Southern's patent. Provision is made also for the equal division between Southern and Line of such royalties as shall be received by Line upon products made and sold by the respective licensees under the Southern and Line patents.

These sublicenses and the royalties derived from them do not, however, increase the restraints on trade beyond those restraints which are inherent in the respective patents. In fact, each original license decreased those restraints under Line's patent and each sublicense did the same under Southern's patent. Because of the complementary relationship between the patents, these sublicenses have served substantially to remove the restraints which the respective patents, when held separately, put in the way of production. The two patents together completely covered the product. If the price limitations were valid under Line's licenses, the issuance by Line of the sublicenses under Southern's patent has no more effect on the question involved in this case than if Southern, instead of granting to Line an exclusive right to issue sublicenses under Southern's patent, had assigned that patent to Line and Line had then issued original licenses under it on the same terms as Line issued the sublicenses.

The next consideration is the effect of the cross-license by Southern to Line, coupled with the grant of the exclusive right to issue the above-mentioned sublicenses under

Southern's patent and the division of certain royalties received by Line. Where, as here, there is no agreement, course of dealing or other circumstance than the existence of the cross-licenses between complementary patent holders, the cross-licensing agreements do not, *per se*, reach beyond the scope of the patent rights.

Patent pools, especially those including unrelated or distantly related patents and involving the issuance of many forms of royalty-free, royalty-bearing or price-limiting licenses and cross-licenses, might present a different picture from that in this case. Such arrangements might be but a screen for, or incident to, an unlawful agreement in restraint of trade violating the Sherman Act. Here we have no such facts. The findings eliminate all bases for the claim of invalidity except the terms of the license agreements, *per se*. We are not here confronted with the effect of cross-licenses between unrelated patents. Here we have only that natural situation, common under our patent laws, where two or more complementary patents are separately owned. One is for an improvement that is commercially essential to the other. In such a case one solution is to combine the ownership of the two by purchase and complete assignment. That, *per se*, would not involve an unlawful restraint of trade.

The solution in the instant case was even more natural than a consolidation of the patents by purchase. It conduced even more to the maintenance of competition. Each patentee granted to the other a nonexclusive, royalty-free license. This cross-licensing amounted to a waiver by each patent holder of his right to exclude the other from making, using or selling the patented product. This resulted in a diminution of the restraint created by the patent statute. This, *per se*, was, therefore, well within the scope of the patent and not a violation of the Sherman Act. Both patentees became producers.

Unless the terms of the cross-licenses reach beyond those that are normally and reasonably adapted to the patent relationships of the parties, the cross-licenses are no more outside of the protection of the patent law than would be direct licenses. A reasonable price-limiting provision in at least one of two cross-licenses is just as normal and reasonable a patent provision as it would be in a direct license. In the present case the validity of the price limitation in Line's license to Southern is entitled to the same judicial support and for the same reasons as if no cross-license had been issued in exchange.

In the present case, the need for the price-limiting provisions, both in the license to Southern and in the licenses to the other ten defendants, rests upon the need of the patent holder to protect its opportunity to continue the manufacture of its own patented product. The substance of the situation is that the patent holder needs to protect itself precisely as much and in the same way as in the case of a direct license standing alone. The Sherman Act traditionally tests its violation not by the form but by the substance of the transaction.

In distinction from patent pools and from cross-licenses between holders of competing or even noncompeting but unrelated patents, we have here a case of a cross-license and a division of royalties between holders of patents which are complementary and vitally dependent upon each other. We have here complementary patents each of which alone is commercially of little value, but both of which, together, spell commercial success for the product. Cross-licenses between their holders, on terms within the needs of their patent monopolies, are essential to the realization of the benefits contemplated by the patent statutes. Far from being unlawful agreements violative of the Sherman Act, such agreements pro-

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vide in fact the only reasonable means for releasing to the public the benefits intended for the public by the patent laws. A cross-license between mutually deadlocked complementary patents is, *per se,* a desirable procedure. *Standard Oil Co.* v. *United States,* 283 U. S. 163, 170, *et seq.* Its validity must depend upon the terms and substance of the surrounding circumstances.

The record in the *General Electric* case discloses that the license agreement between the General Electric Company and Westinghouse which was there upheld was itself a cross-licensing agreement.[27] In fact, the opinion of the lower court in the instant case commented on that cross-license as follows:

> "A cross-license agreement existed between General Electric and Westinghouse which contained agreements even more restrictive than the price pro-

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"As a part consideration for the granting of the foregoing licenses, the Licensee [Westinghouse] hereby grants and agrees to grant to the Licensor [General Electric] a non-exclusive license under the United States patents which it now owns or controls and under those which may issue on pending applications now owned or controlled by it, and under any United States patents which the Licensee may own or control, during the term of this agreement, for improvements in incandescent lamps specified in paragraphs *a, b, c* and *d* of Article 2, to make, use and sell throughout the United States and the territories thereof incandescent lamps of the kinds specified in said paragraphs of Article 2 hereof, such license being personal, non-assignable, indivisible and non-transferable except to successors to substantially the entire good will and business of the Licensor, and to continue for the period during which the licenses from the Licensor to the Licensee remain in force." Par. (8) of Agreement between General Electric Company and Westinghouse Electric & Manufacturing Company, March 1, 1912, Exhibit A, at p. 117 of the record in the Supreme Court of the United States, No. 113, O. T. 1926.

> tection provisions of the cross-licenses involved in the case at bar." *United States* v. *Line Material Co.*, 64 F. Supp. 970, 975.

The opinion in the *General Electric* case makes no distinction between cross-licenses and direct licenses. That case, therefore, is itself a precedent for upholding a cross-licensing agreement under facts characterized below as being "even more restrictive" than those here presented.

The acquisition by a single party of patents on noncompeting machines has been held not to be, *per se*, a violation of the Sherman Act. In *United States* v. *Winslow*, 227 U. S. 202, 217, Mr. Justice Holmes, in a unanimous opinion of the Court, said:

> "The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case*, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, . . . they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. . . . we can see no greater objection to one corporation manufacturing seventy per cent. of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree."

See also, *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32, 45, 51, *et seq.*; *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451, 463–464.

In *Standard Oil Co.* v. *United States*, 283 U. S. 163, 170–171, 175, Mr. Justice Brandeis spoke as follows for

a unanimous Court (except for Mr. Justice Stone who took no part in the case):

> "The Government concedes that it is not illegal for the primary defendants to cross-license each other and the respective licensees; and that adequate consideration can legally be demanded for such grants. But it contends that the insertion of certain additional provisions in these agreements renders them illegal. It urges, first, that the mere inclusion of the provisions for the division of royalties, constitutes an unlawful combination under the Sherman Act because it evidences an intent to obtain a monopoly. This contention is unsound. Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. . . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation.[28]. . .
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> . . . . . .
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> "But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a

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[28] In that *Standard Oil* case the footnote at this point stated (p. 171):

> "This is often the case where patents covering improvements of a basic process, owned by one manufacturer, are granted to another. A patent may be rendered quite useless, or 'blocked,' by another unexpired patent which covers a vitally related feature of the manufacturing process. Unless some agreement can be reached, the parties are hampered and exposed to litigation. And, frequently, the cost of litigation to a patentee is greater than the value of a patent for a minor improvement."

> monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce."

In the above context, and for the reasons previously presented, it is evident that the agreements effecting a price fixation which thus may violate the Sherman Act are only those which "impose . . . an unreasonable restraint upon interstate commerce," within the meaning of the Sherman Act read in the light of the patent laws.[29] The agreements which remain within the ambits of the patents to which they relate still are lawful agreements by virtue of the patent laws, just as they have been throughout the life of our patent system.

JUDICIAL AND LEGISLATIVE HISTORY SINCE THE GENERAL ELECTRIC CASE.

Neither the *Bement* nor the *General Electric* case, *supra,* has been overruled and the reasoning upon which they are based has not been directly or indirectly rejected by this Court. On the other hand, this Court repeatedly has recognized the existence of the principles announced in them. See, for example, *Carbice Corp.* v. *American Patents Development Corp.,* 283 U. S. 27, 31; *General Talking Pictures Corp.* v. *Western Electric Corp.,* 305 U. S. 124, 127:

> "Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it." (Citing the *Bement* and *General Electric* cases.) *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 228.

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[29] Before making this statement, Mr. Justice Brandeis already had joined in the opinion of the Court in the *General Electric* case, *supra,* and written the opinion in *Carbice Corp.* v. *American Patents Development Corp.,* 283 U. S. 27.

And see *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252; *United States* v. *Masonite Corp.*, 316 U. S. 265, 277.

The rule of *stare decisis* applies to the interpretation given to the patent statutes and to the Sherman Act by the *Bement* and *General Electric* cases. There is no occasion here for such a relaxation of that rule as was suggested by Mr. Justice Brandeis in cases interpreting broad constitutional phrases. See his dissent in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 410. To the extent that the present holdings are based upon opinions of this Court, that element is inherent in the rule of *stare decisis*.

The exceptional recent activity in seeking, by statutory amendment, a change in the patent laws as interpreted in the *Bement* and *General Electric* cases indicates a widespread understanding that, if such interpretation is to be changed, the remedy calls for congressional action. The resistance to such a change which has been shown by Congress is impressive.[30] It indicates no dissatisfac-

[30] Many bills relating to these issues have been introduced in Congress and referred to appropriate committees. Not one has been reported back to either House of Congress.

As early as 1912, H. R. 22345, 62d Cong., 2d Sess., proposed that a patentee be not permitted to fix the price of articles to be sold by others under his patent.

During the hearings held by the Temporary National Economic Committee, the Department of Justice recommended many fundamental as well as minor changes in the patent law. These included the prohibition of price-limiting patent licenses comparable to those here at issue. Preliminary Report, Temporary National Economic Committee, Sen. Doc. No. 95, 76th Cong., 1st Sess. 16–17 (1939). The Department of Commerce took an opposite position. It submitted recommendations for retaining but improving the patent system substantially in accordance with its traditional underlying policies. The Final Report of the Temporary National Economic Committee incorporated the substance of the proposals of the De-

tion with the interpretation of existing law as expressed in the *Bement* and *General Electric* cases.

There appears, therefore, to be neither adequate reason nor authority for overruling the *Bement* and *General Electric* cases or for distinguishing this case from them.

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partment of Justice. It included a recommendation that patentees be not permitted to limit the price at which a licensee might sell a product made under the license. Final Report, Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. 36–37 (1941).

In 1941, the President appointed the National Patent Planning Commission to submit recommendations on questions dealt with in the report. (See note 12, *supra.*) In 1943, among the examples of the proposed reforms which it concluded "would not be a beneficial innovation in our patent system," it listed "outlawing certain limitations in patent licenses, ..." This evidently referred to the above-mentioned proposals of the Temporary National Economic Committee to outlaw price restrictions and other limitations in patent licenses. Report of the National Patent Planning Commission, H. R. Doc. 239, 78th Cong., 1st Sess. 9 (1943).

Bills to the same general effect as the proposals of the Temporary National Economic Committee have been introduced and referred to Committees of Congress but have advanced no further. Among them have been the following:

S. 2491 (§ 4), S. 2730 (§ 3), H. R. 7713 (§ 3), 77th Cong., 2d Sess. (1942); H. R. 109 (§ 3), H. R. 1371 (§ 29), H. R. 3874 (§ 29), 78th Cong., 1st Sess. (1943); H. R. 97 (§ 29), H. R. 3462 (§ 29), 79th Cong., 1st Sess. (1945); S. 2482, 79th Cong., 2d Sess. (1946); S. 72, 80th Cong., 1st Sess. (1947). Section 3 of S. 2730, *supra,* proposed that—

> "Every sale, assignment, or conveyance of a patent and every grant of a license thereunder, in connection with any condition, agreement, or understanding which restricts the price at which the purchaser, assignee, grantee, or license [licensee] may sell any article producible under the patent and customarily marketed in interstate commerce, is hereby declared to be illegal."

UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL.

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

No. 13. Argued November 14–15, 1947.—Decided March 8, 1948.

A complaint in a suit by the United States to restrain alleged violations of the Sherman Act charged that the defendants had violated §§ 1 and 2 of the Act by a conspiracy to restrain and monopolize interstate trade in gypsum products. It alleged that the defendants acted in concert in entering into patent licensing agreements; that one of the defendants, dominant in the industry, granted patent licenses and the other defendants accepted licenses with the knowledge that all other concerns in the industry would accept similar licenses; and that, as a result of such concert of action, competition was eliminated by fixing the price of patented board, eliminating the production of unpatented board, regulating the distribution of patented board, and stabilizing the price of unpatented plaster. Upon conclusion of the Government's case the District Court granted the defendants' motion to dismiss. On direct appeal to this Court, *held:*

1. The evidence established a violation of the Sherman Act. Pp. 368–386, 388–393, 400–402.

2. The plan of the conspiracy to control prices and distribution was not within the protection of the patent monopoly. *United States* v. *General Electric Co.,* 272 U. S. 476, distinguished. Pp. 389–391, 400–402.

3. The industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, under which control was exercised over prices and methods of distribution, were sufficient to establish a *prima facie* case of conspiracy. Pp. 388–389.

4. Patent exploitation of the kind here attempted is within the prohibition of the Sherman Act, regardless of the motives of the participants. Pp. 391–393.

5. With the conspiracy fully established, the declarations and acts of the various participants, even though made or done prior to the adherence of some to the conspiracy, became admissible against all as declarations or acts of co-conspirators in aid of the conspiracy. Pp. 388–393.

6. When a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. P. 394.

7. Under Rule 52 (a) of the Rules of Civil Procedure, a finding of fact by the trial court is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Pp. 394–395.

8. Where denials by alleged conspirators that they had acted in concert are in conflict with documentary evidence, they can be given little weight, particularly when the crucial issues involve mixed questions of fact and law. Pp. 395–396.

9. The finding by the trial court that defendants had not associated themselves in a plan to blanket the industry under patent licenses and stabilize prices is set aside as clearly erroneous. Pp. 393–394.

10. The provision in the patent licensing agreements for payment of royalties on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board; and the testimony in this case is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid. P. 397.

11. Where the purpose is to prevent competition by uncontrolled resale prices, an arrangement for the elimination of jobbers does not fall within the protection of the patent grant. Findings by the trial court that defendants had not conspired to eliminate jobbers are here set aside. Pp. 397–398.

12. Findings by the trial court that defendants had not stabilized the price of unpatented plaster sold in conjunction with patented board are here set aside. Pp. 398–399.

13. The *General Electric* case does not authorize a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which an industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized. Pp. 400–401.

14. The "rule of reason" is applicable to efforts to monopolize through patents. Pp. 400–401.

15. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it

would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in the industry under patent licenses in order to organize the industry and stabilize prices. P. 401.

16. In a suit to restrain alleged violations of the Sherman Act, in which the defendants rely upon patents, the Government is entitled to an opportunity to prove that the patents are invalid. Pp. 386–388.

53 F. Supp. 889, 67 F. Supp. 397, reversed.

The United States brought suit in the District Court to restrain alleged violations of §§ 1 and 2 of the Sherman Act by the appellees. Under the Expediting Act, a three-judge court was constituted to hear the case. Upon presentation of the Government's case, the District Court dismissed the complaint. 53 F. Supp. 889, 67 F. Supp. 397. The United States appealed directly to this Court under the Expediting Act. *Reversed,* p. 402.

Roscoe T. Steffen argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Edward Knuff* and *Robert L. Stern.*

Bruce Bromley argued the cause for appellees. With him on the brief were *George S. Collins, Cranston Spray, Hugh Lynch, Jr., Elmer E. Finck, Nicholas J. Chase, Donald N. Clausen, Herbert W. Hirsh, Charlton Ogburn, Andrew J. Dallstream, Walter G. Moyle, Ralph P. Wanlass, Frederic H. Stafford, Benjamin P. DeWitt, James O'Donnell, Jr., Joseph S. Rippey, D. I. Johnston* and *George E. H. Goodner.*

Mr. Justice Reed delivered the opinion of the Court.

The United States instituted this suit on August 15, 1940, in the District Court of the United States for the District of Columbia against United States Gypsum Com-

pany, five other corporate defendants, and seven individual defendants, as a civil proceeding under the Sherman Act. The complaint charged that the appellees had violated both §§ 1 and 2 of the Sherman Act by conspiring to fix prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors.

The Attorney General filed an expediting certificate on December 16, 1941, and on September 17, 1942, a three-judge court was constituted to hear the case. By amendment to the complaint the government charged that the article claims of five patents owned by United States Gypsum were invalid and void. The appellees moved to strike the amendment to the complaint or in the alternative for partial judgment dismissing the amendment. On November 15, 1943, the court granted appellees' motion for partial judgment on the ground that the government had no standing to attack the validity of the patents in an antitrust proceeding. The case thereupon went to trial and upon conclusion of the government's case on April 20, 1944, the appellees moved to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure upon the ground that on the facts and the law the government had shown no right to relief. On June 15, 1946, the court filed an opinion holding that the motion should be granted, and on August 5, 1946, the court filed findings of fact and conclusions of law and entered judgment dismissing the complaint. The government appealed directly to this Court, 32 Stat. 823, and probable jurisdiction was noted on December 16, 1946. The decisions below are reported as *United States* v. *United States Gypsum Co.*, 53 F. Supp. 889 and 67 F.

Supp. 397. *United States* v. *Line Material Co.*, decided today, *ante*, p. 287, will be of value to the reader in considering this opinion.

I.

The appellees are engaged in the production of gypsum and the manufacture of gypsum products, including gypsum plasterboard, gypsum lath, gypsum wallboard, and gypsum plaster. At the time of the alleged conspiracy, appellees sold nearly all of the first three products which were marketed in states east of the Rocky Mountains, and a substantial portion of the plaster sold in the same area. Gypsum products are widely used in the construction industry. In 1939, the sales value of gypsum products was approximately $42,000,000, of which $23,000,000 was accounted for by gypsum board (plasterboard, lath, and wallboard), $17,000,000 by gypsum plaster and the remainder by gypsum block and tile and other products. Over 90% of all plaster used in building construction in the United States is made with gypsum.

Gypsum is found in numerous deposits throughout the country. Gypsum board is made by taking the crushed and calcined mineral, adding water, and spreading the gypsum slurry between two paper liners. When the gypsum hardens, the mineral adheres to the paper and the resulting product is used in construction. Plasterboard and lath have a rough surface and are used as a wall and ceiling base for plaster; wallboard has a finished surface and does not require the addition of plaster.

Since its organization in 1901, United States Gypsum has been the dominant concern in the gypsum industry. In 1939, it sold 55% of all gypsum board in the eastern area. By development and purchase it has acquired the most significant patents covering the manufacture of gypsum board, and beginning in 1926, United States Gypsum offered licenses under its patents to other con-

cerns in the industry, all licenses containing a provision that United States Gypsum should fix the minimum price at which the licensee sold gypsum products embodying the patents. Since 1929, United States Gypsum has fixed prices at which the other defendants have sold gypsum board.

The other corporate appellees are National Gypsum Co., Certain-teed Products Corp., Celotex Corp., Ebsary Gypsum Co., and Newark Plaster Co. Appellee Gloyd is the owner of an unincorporated business trading under the name of Texas Cement Plaster Co. National produced 23% of all gypsum board sold in the eastern area in 1939, Certain-teed 11%, and the other four companies correspondingly smaller amounts. Seven companies which were active when the licensing plan was evolved in 1929 and before have been acquired by other companies, and defendant Celotex entered the industry in 1939 when the licensing plan was fully in effect by acquiring the assets and licenses of American Gypsum Company. The seven individual defendants are presidents of the corporate defendants. The tabulation on the next page lists the corporate and individual defendants, and shows the corporate changes which have taken place.[1]

Prior to 1912, gypsum board was manufactured with an open edge, leaving the gypsum core exposed on all four sides. In 1912, United States Gypsum received as assignee a patent issued to one Utzman, No. 1,034,746, covering both process and product claims on board with closed side edges, the lower paper liner being folded over the exposed gypsum core. Closed-edge board was superior in quality to open-edge board, as it was cheaper to produce, did not break so easily in shipment, and was less subject to crumbling at the edges when nailed in place. United States Gypsum also acquired a

[1] See p. 370.

FOOTNOTE 1

Name of firm	Date entered gypsum board industry	Sales of board in eastern area in 1939	Individual defendants	Companies acquired
United States Gypsum Co	1901	$10,600,000	Sewell L. Avery, president, 1920–36; chairman of board, 1936 to date. Oliver M. Knode, president, 1936 to date.	Niagara Gypsum Co. (1929).
National Gypsum Co	1925	4,500,000	Melvin H. Baker, president	Universal Gypsum and Lime Co. (1935); Atlantic Gypsum Products Corp. (1936).
Certain-teed Products Corp	1926	2,100,000	Henry J. Hartley, president	Beaver Products Co. (1928); Beaver Board Co. (1928).
Newark Plaster Co	1937	750,000	Frederick Tomkins, president	Kelley Plasterboard Co. (1937).
Ebsary Gypsum Co	1928	670,000	Frederick G. Ebsary, president	
Celotex Corp	1939	585,000		American Gypsum Co. (1939).
Texas Cement Plaster Co. (unincorporated).	1924	230,000	Samuel M. Gloyd, owner	

number of other patents relating to the process of making closed-edge board. In 1917, United States Gypsum sued a competitor claiming infringement of the Utzman patent and in 1921 the Circuit Court of Appeals affirmed a judgment holding that the Utzman patent was valid and infringed.[2] United States Gypsum settled with an infringer, Beaver Products Co., in 1926, by granting Beaver a license to practice the closed-edge board patent with a provision that United States Gypsum should fix the price at which Beaver sold patented board. Shortly before the settlement with Beaver, United States Gypsum instituted suits against American Gypsum Co., Universal Gypsum and Lime Co., and gave notice of infringement to Niagara Gypsum Co. Universal did not contest the suit but accepted a license with price-fixing provisions, and two other small companies followed suit in 1927. American and Niagara would not settle, and in 1928 judgment was entered against American holding that American's partially closed-edge board infringed one of United States Gypsum's patents. United States Gypsum also instituted suits for infringement against National Gypsum Co. in 1926 and 1928 which were settled by the execution of a license and payment of damages as part of the industry-wide settlement with all other defendants in 1929. In that year, two sets of license agreements were signed in which United States Gypsum licensed all but two companies manufacturing gypsum board in substantially identical terms and from that date United States Gypsum has maintained rigid control over the price and terms of sale of virtually all gypsum board. Since 1937 the control has been complete.

Up to this point there is no dispute as to the facts. The government charged that the defendants acted in concert in entering into the licensing agreements, that

[2] *Bestwall Mfg. Co.* v. *United States Gypsum Co.*, 270 F. 542.

United States Gypsum granted licenses and the other defendants accepted licenses with the knowledge that all other concerns in the industry would accept similar licenses, and that as a result of such concert of action, competition was eliminated by fixing the price of patented board, eliminating the production of unpatented board, and regulating the distribution of patented board. To support its allegations, the government introduced in evidence the license agreements, more than 600 documentary exhibits consisting of letters and memoranda written by officers of the corporate defendants, and examined 28 witnesses, most of whom were officers of the corporate defendants. Since the appellees' motion to dismiss when the government had finished its case was sustained, the appellees introduced no evidence. They did cross-examine the government's witnesses. The documentary exhibits present a full picture of the circumstances surrounding the negotiation of the patent license agreements, and are chiefly relied on by the government to prove its case.

Although the industry-wide network of patent licenses was not achieved until 1929, the government claims that the documentary exhibits show that the process of formulation of the plan began in 1925. On December 12, 1925, Augustus S. Blagden, president of Beaver, sent a memorandum to Sewell Avery, president of United States Gypsum. Beaver had been adjudged an infringer of the Utzman patent, and Blagden and Avery had negotiated terms for settling the suit. Blagden testified that Avery had offered to settle with Beaver by granting Beaver a license with a price-fixing limitation and provision that Beaver should pay damages for past infringement and acknowledge the validity of United States Gypsum's patents. In the memorandum Blagden analyzed in detail the consequences that would flow from five possible

decisions of the Circuit Court of Appeals if the decree adjudging Beaver an infringer were appealed. Blagden noted that whether the court upheld or denied United States Gypsum's claim, United States Gypsum "would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices." The memorandum further pointed out that if the suit were settled on the terms offered by Avery, the result would be more favorable to United States Gypsum than any possible decision by the Court of Appeals. Beaver would accept a license and "would agree to use its best endeavors" to induce other manufacturers to accept similar licenses; if Beaver were successful in persuading other manufacturers to execute licenses, United States Gypsum could "maintain a lawful price control and avoid the necessity of a reduction by plaintiff [United States Gypsum] of current prices to meet competition." Under such circumstances, United States Gypsum "would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses."

Although there is no proof that Avery approved Blagden's memorandum, Blagden did accept a license on the terms offered by Avery in July, 1926, and Blagden testified that he talked to a number of representatives from other companies and urged them to accept licenses from United States Gypsum. Frank J. Griswold, general manager of American Gypsum Company, also was active in promoting a scheme of industry-wide licensing. On May 12, 1926, Griswold wrote a letter to the president of American, stating that he had talked to Blagden, and added that "This matter will be discussed by all independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon." Griswold concluded the letter with the statement: "According to the plans we

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have we figure that there is a possibility of us holding the price steady on wall board for the next fourteen or fifteen years which means much to the industry."

Blagden and Griswold did not succeed in persuading other manufacturers to accept licenses in 1926. Universal accepted a license in September, 1926, but there is no evidence that Blagden and Griswold played any part in negotiating the settlement. Griswold suggested to Avery that United States Gypsum offer a shorter term license, but Avery was unwilling to make such a concession. During 1927 Griswold and Blagden continued their negotiations. Griswold and Samuel M. Gloyd, owner of the Texas Cement Plaster Co., corresponded with each other in regard to the licensing proposal. When Griswold informed Gloyd that Atlantic Gypsum Co. had signed a long-term license with United States Gypsum, Gloyd replied that he would apply for a license right away. Previously Gloyd had been trying to secure a shorter term license. Gloyd and Atlantic both signed licenses similar to the original license granted to Beaver.

In January 1928 Certain-teed Products Corp. purchased the assets of Beaver. Certain-teed had previously been making open-edge board and selling it at lower prices than the closed-edge board manufactured by United States Gypsum and its licensees. Certain-teed refused to accept the license agreement of Beaver and United States Gypsum filed suit to compel Certain-teed to accept the license. Certain-teed posted a million dollar bond and commenced to make open-edge board at all Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without result. The government introduced in evidence a memorandum written by Brown, dated March 1, 1928, in which Brown expressed confidence that he could make open-edge board and sell it in competition with United States Gypsum,

and that he was afraid to sign up a license with price-fixing provisions because his competitors would grant secret rebates. Brown concluded that Certain-teed should answer the suit of United States Gypsum to enforce the Beaver license by claiming that the suit was filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown concluded with the statement that United States Gypsum's "determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed." Certain-teed did file an answer to the suit couched in those terms. Griswold testified that in a conversation with Brown in the following month Brown stated that he might possibly consider taking out a license if "all of the other manufacturers, or certain ones of them" took out a license. Griswold also wrote the president of American that he had had a conference with Brown at which Brown had said that "they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred percent."

No settlement was reached between United States Gypsum and Certain-teed in 1928, and no other license agreements were signed. A meeting of representatives of the principal non-licensee manufacturers took place in October, and in November the board of directors of National adopted a resolution authorizing the officials of the company to enter into a license agreement. Besides Certain-teed and National, American, Ebsary, Niagara, and Kelley Plasterboard Company manufactured gypsum board but did not hold licenses from United States Gypsum.

The patent licenses in force at the beginning of 1929 provided that United States Gypsum could fix prices only during the term of the principal Utzman patent, which

was scheduled to expire on August 6, 1929, although the remaining features of the agreements were to remain in force until the expiration of the last patent included under the license, which was in 1937. In negotiations in 1929, various defendants expressed concern over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent. In a letter dated January 9, J. F. Haggerty, president of National, wrote Eugene Holland, president of Universal, asking his views as to possibility of continuing price control after the expiration of the Utzman patent. Holland in reply wrote as follows:

> "You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the Utzman patent expires next August is not a practical reason for continuing the conflict."

Holland also stated: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." In point of fact, Holland's interpretation of Avery's views was incorrect; several months later licenses were granted to four unlicensed manufacturers but not to American or Kelley. Other exhibits suggest that the prospective licensees were interested in accepting licenses at the same time. In his letter of January 9, Haggerty wrote as follows:

> "The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point."

On May 14, 1929, the board of directors of National held a meeting "for the purpose of discussing the license agree-

ment submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." The minutes of the meeting further quoted the chairman as saying that "he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board." The board of directors authorized the execution of the proposed license contract.

Two days later National signed the license agreement. On the following day National sent a telegram to Avery as follows:

> "Our contract signed and in mail Reeb [of Niagara] ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like."

On May 18 Avery dispatched identical telegrams to United States Gypsum's licensees, and to Certain-teed and Ebsary, as follows:

> "Mr. Kling [of American] has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license."

On May 20 Avery wrote Gloyd of Texas Cement Plaster, a licensee since 1927, stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorably "to this adjustment" and "it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter."

On the following day, a meeting of representatives of all but one of the licensed manufacturers, and all unlicensed manufacturers except American and Kelley, took place in Chicago. The three unlicensed manufacturers who were present—Certain-teed, Ebsary and Niagara—signed license agreements.

At the same meeting, Avery explained to the licensees that United States Gypsum had acquired applications for a patent covering so-called "bubble board" and suggested that the licensees take out licenses under these applications. The applications covered a process for making gypsum board by introducing a soap foam in the gypsum slurry which would result in a lighter and cheaper board. Avery subsequently mailed proposed license agreements under the "bubble board" applications to the licensees. George M. Brown of Certain-teed on June 4th acknowledged receipt of the license proposal in a noncommittal reply, but composed a memorandum for his own files in which he commented that the savings resulting from taking a license would be doubtful, and then added:

> "They would have a price control of our business, which might be to our advantage and might be to our disadvantage in future. They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we would proceed at once."

On June 6th the licensees met again in Chicago to discuss the question of accepting a license under the

"bubble board" patents. Shortly thereafter Certain-teed agreed to take out a license. National also agreed to accept a license; the minutes of the meeting of the board of directors on July 23 read in part as follows:

> "The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wall board known as the 'Bubble System.' The license agreements submitted to each of the wall board manufacturers contain price fixing clauses and under the agreements submitted the prices of wall board would be fixed for the whole Industry for the term of approximately seventeen years."

The board passed a resolution authorizing the executive committee to negotiate a license agreement, "provided that the United States Gypsum Company, by virtue of the agreement with this Corporation and with other manufacturers of gypsum wall board, shall control the price of wall board sold in the United States and its possessions."

Two days later another conference of licensees was held in Chicago. C. O. Brown, vice-president of Certain-teed, prepared a memorandum for George M. Brown, president of Certain-teed, describing what happened at that meeting. According to the memorandum, National and Universal were unwilling to accept "bubble board" licenses until they had settled their litigation over National's infringement of Universal's starch patent. That patent included process and product claims on wallboard made with starch. Brown noted that United States Gypsum was working on a proposal to combine the starch and "bubble board" processes; although such a combination would have technological advantages, Brown commented on the fact that the starch patent had already been issued

"so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be no Patent control. There is, of course, considerable benefit to having Patent control continue without a break." Brown further noted that Avery was trying to work out a proposition with Holland to buy the starch patent or to license the industry under both processes.

Another meeting of licensees was held in Chicago on August 6, the day on which the Utzman patent expired. In a memorandum summarizing what happened at the meeting, C. O. Brown said that it had been agreed that Universal would assign the starch patent to United States Gypsum, and the latter company would issue a single license contract covering all patents and patent applications. Brown further reported that "All of the Independent Gypsum Companies are willing to sign on this basis" and that "The Attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty." On August 27 the board of directors of National held a meeting at which the president was authorized to sign a license with United States Gypsum covering the "bubble board" and starch patents "provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Soon thereafter, National, Certain-teed, Ebsary, Niagara and Atlantic executed licenses with United States Gypsum, to become effective on the date when Universal's receiver transferred the starch patents to United States Gypsum. On November 5 the starch patents were assigned to United States Gypsum, and on the same date

Universal also accepted a license. On November 25 American settled its litigation with United States Gypsum and accepted a license. All manufacturers of gypsum board were now licensed by United States Gypsum, except Kelley Plasterboard Co., and that concern accepted a license in April of the following year. Texas Cement Plaster, a licensee under the Utzman patent, did not accept a license under the starch and "bubble board" patents until 1937 when the original license expired. Texas was thus free to sell board at any price from 1929 to 1937.

The contracts which became effective in November 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of "all plaster board and gypsum wallboard of every kind" whether or not made by patented processes or embodying product claims. The contract covered fifty patents and seven patent applications, including the starch patent and the "bubble board" applications; the contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless United States Gypsum gave its consent as to each prospective purchaser. As in the previous contracts, United States Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered

to sell. The more important provisions of the license to this litigation are set forth in an appendix to this opinion, *post*, p. 404. Nothing has been omitted that appears to be significant on the issues considered.

In 1934 and 1935 United States Gypsum offered supplemental licenses to practice a patent covering metallized board, which was accepted by almost all licensees, and in 1936 United States Gypsum offered licenses under its perforated lath patent which were also accepted by most licensees. These supplemental licenses contained provisions allowing United States Gypsum to fix the minimum price on board made according to the patents which were licensed.

The government charged that the execution of the license agreements in May and November 1929 marked a turning point in the gypsum industry. The government introduced evidence tending to show that the price of first quality wallboard was raised, that United States Gypsum standardized the type of board sold by requiring its licensees to sell No. 2 wallboard and seconds at the same price as standard wallboard, and standardized the methods of sale so that no licensee could offer more favorable terms to a customer than any other licensee.

Although the license contracts gave the licensor the right only to fix the minimum price at which the licensee should sell, United States Gypsum issued a series of bulletins which defined in minute detail both the prices and terms of sale for patented gypsum board. They are printed on nearly a thousand pages of the record. The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination. The freight was to be computed on specified uniform billing weights, in order to prevent variations in freight arising from the differences in weight of

board made by different manufacturers, and each licensee was directed to charge exactly the same switching, cartage, and extra delivery charges. Specified board sizes and minimum quantities were prescribed, licensees were forbidden to employ commission salesmen without the written consent of the licensor, regulations were prescribed as to the size, quantity and markings of gypsum board used for packing shipments, granting of long-term credit was prohibited, sales on consignment were enjoined and licensees were forbidden to deliver board directly to a building site.

It is not practicable to quote one of the hundreds of comprehensive bulletins on prices and terms. The industry accepted directions for distribution of product as corollary to price control, so that prices would not be infringed by variations of seller contracts. The detail of directives is well illustrated by the directive for computation of freight to be added to the mill price and the provision against subtle price reduction. The excerpts below are from the Board License Bulletin of June 10, 1939.[3]

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[3] "In computing the delivered minimum price hereunder, rail freight, wherever mentioned in this bulletin, shall mean rail freight in accordance with rail rates published in regular freight tariffs, using the weights shown above, and shall include all stopover, switching, cartage and other extra delivery charges applicable to the shipment. . . .

"Rebates, Allowances, Etc.:

"Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price by granting the customer rebates, unearned or unwarranted refunds, credits or discounts, by reducing the price of other products, by hiring customers' trucks, by granting allowances for advertising or other purposes, by splitting of salesmen's compensation or commissions with customers, by overshipment of patented products, by including board under the guise of dunnage, or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price."

In order to insure compliance with the price bulletins, United States Gypsum established a wholly owned subsidiary in 1932 named Board Survey, Inc. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect United States Gypsum's rights under the license agreements and patents. Although the record discloses no instance in which Board Survey took or even threatened to take legal action against any licensee, there are many instances in which Board Survey sent letters to licensees requesting an explanation as to alleged violations. Meetings of licensees were held at which doubtful provisions of the price bulletins were explained. The trial court found that "in the main" licensees complied with the bulletin conditions.

The government further charged that the defendants had discontinued the production of unpatented open-edge board, eliminated jobbers by requiring jobbers to purchase board at the same price as board sold to dealers, induced manufacturing distributors to observe bulletin prices upon resale of board purchased from licensees, and stabilized the price of gypsum plaster and other unpatented products.

It is undisputed that after 1929 the defendants ceased to manufacture open-edge board; the government claims that production of the unpatented board was discontinued in order to protect the patented board from competition. Prior to 1929 open-edge board had sold at lower prices than closed-edge board, and the government's exhibits show that the officers of the corporate defendants realized that there could be no effective stabilization of

prices on closed-edge board as long as open-edge board was sold without price control. The license agreements provided that royalties should be paid on the sales of all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board. Although the government produced no evidence of any agreement between the defendants to eliminate production of open-edge board, corporate officers of the licensees testified that they anticipated that one result of industry-wide licensing would be the elimination of open-edge board.

The May 1929 licenses required licensees to obtain the consent of the licensor before selling board to manufacturing distributors or to jobbers and a price bulletin issued under those licenses allowed licensees to grant a 10% discount to both classes. The November 1929 licenses, however, eliminated the consent requirement with respect to jobbers, although it was retained with respect to manufacturing distributors.

The jobbers' discount was continued in bulletins issued under the later licenses until August 8, 1930, when United States Gypsum ordered that the discount be eliminated. Although jobbers could still buy board if they so desired, jobbers could remain in business only by selling to dealers at an advance over the bulletin prices. The court below found that some jobbers were able to remain in business by selling board in odd lots to dealers who did not wish to buy the minimum lot required in the price bulletins. The government points to the definition of "jobber" in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail," and points to uncontradicted testimony that jobbers as so defined were eliminated.

We do not stop to set forth the evidence upon which the government relied to support its charge that the defendants fixed prices at which manufacturing distributors sold gypsum board which they had purchased from United States Gypsum or its licensees, as that issue is not necessary for a decision of the case. To support the charge of stabilizing the price of unpatented plaster, the government cited letters written by officers of the corporate defendants showing that they anticipated that price stabilization in patented board would be accompanied with stabilization of all gypsum products. The trial court found that the price of plaster and miscellaneous gypsum products in fact did increase after 1929. The government charged that plaster prices were stabilized by requiring licensees who sold plaster together with patented board to sell plaster at prevailing prices. Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with Board Sales."

II.

Appellees admit that in the absence of whatever protection is afforded by valid patents the licensing arrangements described would be in violation of the Sherman Act.

Accordingly, the government sought to amend its complaint to allege that the "bubble board" patents were not valid. The trial court held that the government was estopped to attack the validity of the patents in the present proceeding, on the ground that such attack would constitute a review of action by the Commissioner of Patents, which was not authorized by statute.[4] The trial court thought that the issue was controlled by *United States* v. *Bell Telephone Co.*, 167 U. S. 224, in which the United States was held without standing to bring a suit in equity to cancel a patent on the ground of invalidity.

While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent. *Hurn* v. *Oursler,* 289 U. S. 238, 240. We cannot agree with the conclusion of the trial court. The United States does not claim that the patents are invalid because they have been employed in violation of the Sherman Act and that a decree should issue canceling the patents; rather the government charges that the defendants have violated the Sherman Act because they granted licenses under patents which in fact were invalid. If the government were to succeed in showing that the patents were in fact invalid, such a finding would not in itself result in a judgment for cancellation of the patents.[5]

In an antitrust suit instituted by a licensee against his licensor we have repeatedly held that the licensee may attack the validity of the patent under which he was licensed, because of the public interest in free competition, even though the licensee has agreed in his license not to do so. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.,* 329

[4] 53 F. Supp. 889.

[5] Compare *Becher* v. *Contoure Laboratories,* 279 U. S. 388.

U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. In a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the same opportunity to show that the asserted shield of patentability does not exist. Of course, this appeal must be considered on a record that assumes the validity of all the patents involved.

III.

The trial court ruled that, on motion to dismiss pursuant to Rule 41 (b), the court should weigh the evidence and grant the motion if the government failed to establish its case by a preponderance of the evidence, and the court further ruled that the government had the burden of proving both the charge of conspiracy and the charge that the licensing agreements were not within the protection of the patent grant.[6] We do not stop to consider those rulings. They are not of importance in this case as we think the preponderance of evidence at the conclusion of the government's case indicated a violation of the Sherman Act.

We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration.[7] A consideration of that point really involves the heart of the case since the treatment of the declarations may vitally affect the outcome. Some may have doubts as to whether the agreements and bulletins alone are sufficient to establish a conspiracy but the admission of the separate declarations against all greatly strengthens the government's

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[6] 67 F. Supp. 397, 417, 441.

[7] See discussion of "The rule concerning admissibility of declarations of alleged co-conspirators," 67 F. Supp. at 451, and "Significance of the evidence, assuming the declarations connected," *id.*, at 500.

position. We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy. Each licensee, as is shown by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses, could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry-wide. The license agreements themselves, on their face, showed this purpose. The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements. See the Appendix, *post,* p. 404. Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and licensees to fix prices and regulate operations in the gypsum board industry.

If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position stemmed logically from its understanding of

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United States v. *General Electric Co.*, 272 U. S. 476.[8] The opinions in *United States* v. *Line Material Co.*, decided today, *ante*, p. 287, whatever may be the different views expressed, make clear that the District Court's interpretation of *General Electric* differs from that of this Court. With its interpretation of the rule of *General Electric*, the District Court was not required to balance the privileges of United States Gypsum and its licensees under the patent grants with the prohibitions of the

[8] To the District Court the *General Electric* case establishes "that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement ordinarily, and, when the prices are (as in the General Electric case) a part of the license contract, necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof, with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (*i. e.*, a divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiation and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no one such would be willing to suffer competitive disadvantages; no one such would be willing to sign in the dark as to the terms to be

Sherman Act against combinations and attempts to monopolize. Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege.

Under its view of the *General Electric* case, the District Court concluded that only a lack of good faith by defendants in the execution of what that court considered legitimate exploitation of the patents could justify in this case a determination adverse to the defendants.[9] The trial

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extended to the others; ordinarily, moreover, there will be discussion at large, *i. e.*, within the trade, of the advantages and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of such a plurality constitute a 'combination' to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a 'combination' to the same end, such a 'combination' is not stigmatized by the law—provided in purpose and effect it does not secure to the patent owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom that monopoly is divided more than the advantages which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the General Electric case." 67 F. Supp. at 439–40.

Referring to the evidence above, the District Court said, *id.*, p. 457: "These items do not prove the conspiracy charged because they do not show that the licenses were not bona fide or that they were executed to accomplish restraints outside the proper limits of a patent monopoly."

[9] 67 F. Supp. 500–501:

"But in view of the importance of this case and the consequent probability that it will reach a higher tribunal, we think it desirable also to state our views as to the meaning of the evidence when the declarations are considered as binding not merely upon the declarant but also upon all of the alleged co-conspirators. We have considered the evidence in this light, and we think the Government still has not proved that the license agreements were executed not as bona fide license agreements reasonably designed to secure to USG the pecuniary rewards of its patent monopoly but only as sham agreements

court held that an association of defendants in a common plan to organize the gypsum industry and stabilize prices through a network of patent licenses was legally permissible, and that in any event the government failed to prove that the defendants had associated themselves in such a plan. The trial court further found that the license agreements were entered into in good faith, in reliance upon *United States* v. *General Electric, supra,* and *Bement* v. *National Harrow Co.,* 186 U. S. 70, and were intended to bind the parties to the promises made; that the explicit terms in the licenses were within the scope of the patent grant, and that the government had failed to prove any agreement among the defendants to take actions which were outside the scope of the patent grant. Specifically, the trial court found that there was no agreement among the defendants to raise the price of board to arbitrary and non-competitive levels, to standardize the production of board by pricing No. 2 board and seconds out of the market, to eliminate the production of open-edge board, to eliminate jobbers, to control the resale price of board sold to manufacturing distributors, or to stabilize the price of unpatented gypsum products. The court

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to give color of legality to the illegal purposes alleged in the complaint, and has not proved that the operations of the defendants were carried beyond the proper limits of the USG patent monopoly, and therefore has not proved the combination and conspiracy charged. The evidence discussed in topics V and VI no more proves lack of bona fides in the execution of the license agreements, or operations beyond the limits of the patent monopoly, when the declarations are regarded as binding upon all of the alleged co-conspirators, than it does when such declarations are considered as binding only upon the declarant. This is necessarily so—in the view we take of the significance of the declarations. Since, as demonstrated in topics V and VI, they fail to convict the declarants themselves of lack of bona fides in the execution of the licenses, or of operations beyond the proper limits of the USG patent monopoly, they cannot convict others thereof."

further held that as to all those charges except the last two the defendants would have been acting within the scope of the patent grant even if they had agreed to do the things charged. We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted. The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act. With the conspiracy thus fully established, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.[10] We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929.

IV.

We turn now to a different phase of the case—the correctness of the findings. The trial court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the trial court found that the evidence "fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices." The opinion indicates that in making this finding the trial court assumed *arguendo* that declarations of one defendant were admissible against all. 67 F. Supp. at 500. In examining the finding we

[10] *Van Riper* v. *United States,* 13 F. 2d 961, 967; *Lefco* v. *United States,* 74 F. 2d 66, 68; *Deacon* v. *United States,* 124 F. 2d 352, 358; *United States* v. *Compagna,* 146 F. 2d 524, 530.

follow *Interstate Circuit* v. *United States,* 306 U. S. 208, and *United States* v. *Masonite Corp.,* 316 U. S. 265, as to the quantum of proof required for the government to establish its claim that the defendants conspired to achieve certain ends. In those cases, as here, separate identical agreements were executed between one party and a number of other parties. This Court, in *Interstate Circuit,* concluded that proof of an express understanding that each party would sign the agreements was not a "prerequisite to an unlawful conspiracy." We held that it was sufficient if all the defendants had engaged in a concert of action within the meaning of the Sherman Act to enter into the agreements. In *Masonite* the trial court found that the defendants had not acted in concert and that finding was reversed by this Court. One of the things those two cases establish is the principle that when a group of competitors enters into a series of separate but similar agreements with competitors or others, a strong inference arises that such agreements are the result of concerted action. That inference is strengthened when contemporaneous declarations indicate that supposedly separate actions are part of a common plan.

In so far as Finding 118 and the subsidiary findings were based by the District Court on its belief that the *General Electric* rule justified the arrangements or because of a misapplication of *Masonite* or *Interstate Circuit,* errors of law occurred. These we can, of course, correct. In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all

actions tried upon the facts without a jury, to make applicable the then prevailing equity practice.[11] Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies[12] or by a jury,[13] this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.[14] A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert

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[11] H. R. Doc. No. 588, 75th Cong., 3d Sess., Notes to the Rules of Civil Procedure; Report of the Advisory Committee, Supreme Court of the United States, on Rules of Civil Procedure, April, 1937, Rule 59 and notes; Preliminary Draft, Rules of Civil Procedure for the District Court of the United States, May 1936, Rule 68 and notes.

[12] *Corn Products Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, 739; *Labor Board* v. *Greyhound Lines,* 303 U. S. 261, 268.

[13] *Lawrence* v. *McCalmont,* 2 How. 426, 453; *Reconstruction Finance Corp.* v. *Bankers Trust Co.,* 318 U. S. 163, 170.

[14] 2 Street, Federal Equity Practice (1909) §§ 1510, 1514; *Furrer* v. *Ferris,* 145 U. S. 132; *Tilghman* v. *Proctor,* 125 U. S. 136, 149–50; *District of Columbia* v. *Pace,* 320 U. S. 698, 701; *Virginian R. Co.* v. *United States,* 272 U. S. 658, 675.

in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous.

In Findings 54, 56, 62, 63, 64, 65, 66, 89 and 90, the trial court made findings adverse to the government's claim that the defendants conspired to eliminate the production of open-edge board.[15] The tenor of those findings is that there was no agreement among the licensees to discontinue the production of open-edge board,

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[15] We quote Findings 54 and 89 as typical:

"54. The fact that for the privilege of using the patents, royalties are fixed in the license agreements at an amount equivalent to a designated percentage of the selling price of the licensees of all gypsum board manufactured by them, whether or not patented, does not establish an agreement to make only the patented product and does not establish that the license agreements were executed in bad faith. The patents were numerous and covered not only the patented board but machines and processes in the manufacture of board, and the rights and privileges granted were of great value to the manufacturers of gypsum board. This royalty provision is in effect a provision for a percentage of gross sales, and as such is but a convenient means of measuring the amount to be paid for the privilege of using the patents. It might with equal propriety have been a lump sum. This provision in the license agreements was not an attempt to impose a royalty upon an unpatented product, nor was it intended to drive open-edge board off the market, nor did it have that effect."

"89. The defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, accomplish any improper standardization of gypsum board or its method of production, as charged by the Government."

although the trial court conceded that it might be "inferred" that each licensee did not expect to continue the manufacture of open-edge board. The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid.

In Findings 75–79, 99–102,[16] the trial court considered the problem of jobbers. Those findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers. We are unable to agree to these holdings. Since the defendants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was undertaken by United States Gyp-

[16] We quote Findings 75 and 77 as typical:

"75. The license agreements were not executed with an intent to effectuate improper restriction upon the distribution of gypsum board, plaster or miscellaneous gypsum products, specifically, to 'eliminate' jobbers through the discontinuance of a sales discount."

"77. There was no agreement or understanding between any of the parties to the license agreements in the instant case whereby jobbers would be eliminated from the gypsum board distributive system. Nor was there any understanding or agreement that jobbers' discounts would be discontinued. The issuance of the bulletin of August 8, 1930 (Exhibit 430) making the price to jobbers the same as to dealers was the exercise of the right of USG to establish a price for the patented product."

sum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers.

In Findings 73, 94–97,[17] the trial court dealt with the government's charge that the defendants had stabilized the price of unpatented gypsum products. Those find-

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[17] We quote Findings 73 and 95 as typical:

"73. There was at no time any understanding or agreement among any of the parties to the respective license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum product. Nor were the license agreements in the instant case executed with an intent to raise, maintain and stabilize the prices of unpatented materials such as plaster and miscellaneous gypsum products. The parties to the respective license agreements knew that the licensor's right to fix minimum prices was limited to the prices on patented board manufactured and sold by the respective licensees."

"95. The Bulletin provision that 'Any sale of patented products, though ostensibly made at or above the minimum price established by licensor, will nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduces the actual price charged by licensee below such minimum price . . . by reducing the price of other products . . .' is but part of a larger provision concerning rebates and allowances made for the purpose and with the effect of reducing the licensee's price on patented board below the minimum price therefor—a price protective provision. It was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end. Nor did it have that effect. On the contrary the provision in question was a proper price protective measure reasonably designed to secure to USG the pecuniary reward of its patent monopoly. In operation, it was not used to raise, maintain or stabilize the price of unpatented materials."

ings hold that there was no understanding or agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials. We reject all these findings as clearly erroneous. The bulletin provision and the complaints by licensees addressed to Board Survey convince us that the defendants attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial.

The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary.[18] Perhaps looked at in isolation some of the government's charges are not proven with that fullness that would justify our reversal of the finding of the District Court on the point. It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling.

V.

The foregoing discussion foreshadows our conclusion. What we have said above under III on the invalidity of the arrangements as tested by the Sherman Act in dis-

[18] Objection was made to those findings which held that the defendants had not conspired to fix resale prices of board sold to manufacturing distributors.

cussing the admissibility of the declarations and acts of separate defendants against all others is applicable here. These licenses and bulletins show plainly a conspiracy to violate the Sherman Act. Price fixing of this type offends. It is well settled that price fixing, without authorizing statutes, is illegal, *per se*. See note 21, *United States* v. *Line Material Co., ante,* p. 287. Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. *United States* v. *National Lead Co.,* 332 U. S. 319, 327; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 406; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 170–74; *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convince us that the defendants violated the Sherman Act.

The *General Electric* case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized. We apply

the "rule of reason" of *Standard Oil Co.* v. *United States,* 221 U. S. 1, to efforts to monopolize through patents as well as in non-patent fields. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert.[19] Such concerted action is an effective deterrent to competition; as we said in *Masonite,* p. 281:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition. . . . Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . ."

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.

By the record now presented, violation of the Sherman Act is clear. As the order of dismissal came at the end

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[19] *Binderup* v. *Pathé Exchange,* 263 U. S. 291; *Eastern States Lumber Dealers' Assn.* v. *United States,* 234 U. S. 600; *United States* v. *Reading Co.,* 226 U. S. 324, 357; *Swift & Co.* v. *United States,* 196 U. S. 375, 396.

of the government's presentation on appellee's motion to dismiss under Rule 41 (b) [20] of the Federal Rules of Civil Procedure, the order is reversed and the case remanded for further proceedings in conformity with this opinion.*

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

MR. JUSTICE FRANKFURTER, concurring.

In Part II of the opinion the Court confessedly deals with an issue that "need not be decided to dispose of this case." Deliberate *dicta,* I had supposed, should be deliberately avoided. Especially should we avoid passing gratuitously on an important issue of public law where due consideration of it has been crowded out by complicated and elaborate issues that have to be decided. Accordingly, I join in the Court's opinion, except Part II.

The Court is agreed that the arrangements challenged by the Government as violative of the Sherman Law cannot find shelter under the patent law, howsoever valid the patents of the defendants may be. In short, we have found that the validity of the patents in the suit is irrelevant to the invalidity of the arrangements based upon them. While fully recognizing this, the Court needlessly considers the question whether the Government may, in view of *United States* v. *American Bell Telephone Co.,* 167 U. S. 224, attack the validity of the patents in the present proceeding.

It does so because "it seems inadvisable to leave . . . . as a precedent" the decision of the trial court that "the government was estopped to attack the validity of the patents in the present proceeding." But, surely, it is easy

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[20] 4 Fed. Rules Serv. (Pike & Fischer) 931; *Gulbenkian* v. *Gulbenkian,* 147 F. 2d 173, 177. We know of no reason why the statement in the *Gulbenkian* case that it is unnecessary for the appellant to offer his evidence a second time is not here applicable.

*[For Appendix to Opinion of the Court, see p. 404.]

enough to sterilize the trial court's decision by the explicit declaration that the issue need not be decided.

I shall not follow the Court's lead and indulge in *dicta* on the question whether, in a suit like this, the issue of patentability can be contested by the Government. But, as bearing upon the undesirability of announcing *dicta* on this issue, it is pertinent to point out that the cases on which the Court relies for its pronouncement hardly dispose of the problem. They are cases in which a licensee resisted claims for royalties on what purported to be valid patents. Royalties were refused because there were no patents on which they were owed. Such was the issue involved in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402. Different considerations come into play when the Government seeks a declaration of invalidity. See *United States* v. *American Bell Telephone Co., supra.* I am not remotely intimating that the differences are decisive. I am merely suggesting that a due weighing of the differences, in the light of the *Bell Telephone* case, should await the duty of adjudication. It should not be the undesirable product of deliberate *dicta.*

The Court refers to *Hurn* v. *Oursler,* 289 U. S. 238, 240, as reason for passing on an issue that "need not be decided to dispose of this case," because "it seems inadvisable to leave the [trial court's] decision as a precedent." As to our problem, *Hurn* v. *Oursler* was exactly the opposite from this case. The issue on which this Court pronounced in *Hurn* v. *Oursler* was inescapably the issue that had to be decided to dispose of the case.

The issue in *Hurn* v. *Oursler* was this: where a suit for infringement of a copyrighted play was brought in a federal court and with it was joined a non-federal cause of action based on unfair competition in regard to that play, has the federal court jurisdiction to pass on the merits of the claim of unfair competition after the court

had rejected the federally-based suit for infringement? The trial court held not, and dismissed the non-federal claim for want of jurisdiction after dismissing the federal claim on the merits. When the case came here this Court could not possibly sustain the trial court (which had been affirmed by the Circuit Court of Appeals) without necessarily affirming the trial court's ruling on the issue of jurisdiction. This Court reversed the trial court on that issue and held that the district court had jurisdiction. It found, however, that the cause of action should have been dismissed but *on the merits*. Accordingly, this Court modified the decree so that the dismissal was on the merits and not for want of jurisdiction. This Court could not have reached the merits without first determining whether there was jurisdiction to reach them. In short, in *Hurn* v. *Oursler* the precedent of the district court had to be set aside in order to decide the case. Here, the "precedent" of the district court is upon an issue which is essentially irrelevant, and therefore we should not follow the error of the district court in pronouncing upon an issue which "need not be decided to dispose of this case."

APPENDIX TO OPINION OF THE COURT.

License Agreement.

This agreement made this 18th day of October, A. D. 1929, by and between the United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and Ebsary Gypsum Co., Inc. a New York corporation, of Newark, New Jersey, hereinafter referred to as Licensee, Witnesseth, that

. . . . . .

2. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of using the process or processes and

making and using the machines and/or inventions set forth and claimed in any and all of said patents and/or applications for letters patent set forth in Exhibit A attached hereto in the manufacture of gypsum plasterboard and/or gypsum wallboard at the plants or factories now owned and/or operated by Licensee, or at any other plant or factory hereafter owned and/or operated or controlled by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America and the territories and possessions thereof gypsum plasterboard or gypsum wallboard manufactured at any such place or places and embodying the inventions and improvements set forth and claimed in said patents and/or applications for letters patent described in said Exhibit A, for the full term of said letters patent or of any letters patent which may be granted for or upon any of said applications, including any extensions and/or reissues thereof.

It is expressly understood and agreed that the indivisible and non-exclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patents and so long as said license shall continue, the minimum price or prices at which Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances covered by any of said letters patent and which shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any of said plasterboard or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or commencing with the date when

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a patent shall have been granted or issued for or upon any of the said Roos or Bayer inventions and/or applications any of said plasterboard or gypsum wallboard manufactured by Licensee, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said Roos or Bayer inventions and/or applications, and in case Licensor shall exercise the right so reserved, it shall first serve written notice of its intention so to do upon Licensee, accompanied with a statement of the minimum price or prices at which Licensee shall sell said gypsum plasterboard or gypsum wallboard, and thereafter shall give to Licensee written or telegraphic notice of any change in such price or prices, and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect and after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any gypsum plasterboard or gypsum wallboard manufactured by it by use of any of the machines or appliances covered by any of said patents and which during the existence thereof shall embody the inventions and improvements set forth and claimed in any of said patents which are presently issued, or any gypsum plasterboard or gypsum wallboard manufactured by second parties and which during the existence thereof shall embody the inventions and improvements set forth and claimed in either patent number 1,500,452 or patent number 1,230,297, or any gypsum plasterboard or gypsum wallboard manufactured by Licensee after a patent shall have issued upon any of the said Roos or Bayer inventions and/or applications and during the existence thereof, the body or core of which is made according to the process set forth and claimed in any patent granted for or upon any of said inventions and/or applications, at a price or prices less than that

stated by Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices.

Said minimum price shall not be more than that price at which Licensor determines to sell plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents to its own like trade in the same market.

3. Licensee agrees to pay to Licensor for said disclosures, information and assistance and the agreements of Licensor herein contained, and for the right, license and privilege of using the processes and making and using the machines and/or inventions in the manufacture of plasterboard and gypsum wallboard covered by said patents and applications for letters patent described in said Exhibit A, and for the privilege of manufacturing, using and/or selling plasterboard and gypsum wallboard embodying the inventions and improvements set forth and claimed in said patents and applications for letters patent, an amount (hereinafter for convenience referred to as a license fee or royalty) equivalent to three and one-half per cent (3½%) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent, manufactured and sold by Licensee between the date hereof and February 10, 1937, the date of the expiration of patent number 1,330,413 mentioned in said Exhibit A, and thereafter an amount equivalent to two per cent (2%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufactured and sold by it between February 10, 1937, and July 8, 1941, the date of the expiration of said patent number 1,500,452, and thereafter an amount equivalent to one per cent (1%) of the selling price of Licensee of all such plasterboard and gypsum wallboard manufac-

tured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued for or upon any of the said Roos or Bayer applications; . . . .

. . . . . .

5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor.

6. Licensee agrees to keep separate full and accurate books of accounts and records showing the exact quantity of all plasterboard and gypsum wallboard manufactured and sold by it, as well as a separate record of all plasterboard and/or gypsum wallboard sold by it in bundles, ...

7. Licensor, or its duly authorized representative, shall have the right at all reasonable times during business hours to inspect the books of account and records of Licensee referred to in the next preceding paragraph

hereof, including all records of every kind showing the quantity of said plasterboard and gypsum wallboard manufactured and sold by it and the quantity thereof put up and sold by it in bundles and the price or prices at which the same was sold, and to make copies thereof and memoranda therefrom; . . . .

. . . . . .

9. Having regard for the fact that there are or may be certain manufacturers of plaster or gypsum products, jobbers or other wholesale distributors of such products, who do not or may not manufacture gypsum wallboard or plasterboard but who desire or may desire to have gypsum wallboard or plasterboard manufactured for them, it is understood and agreed that Licensee may manufacture for jobbers (being those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail) gypsum wallboard or plasterboard embodying the inventions and improvements set forth and claimed in said letters patent or in any letters patent after the same shall have been issued, granted for or upon any of the said applications and may with the written consent of first party manufacture for any such other manufacturer or other wholesale distributor, gypsum wallboard or plasterboard embodying the said inventions and improvements; Provided, However, that the said license fee or royalty to be paid to Licensor as hereinbefore provided shall be based upon all gypsum wallboard and plasterboard manufactured for and sold and invoiced to such other manufacturer, jobber or wholesale distributor and upon the regular selling price of Licensee of such plasterboard or gypsum wallboard to its regular dealer trade at the time of such sale and invoice, and shall not be based upon the price at which plasterboard or gypsum wallboard is sold and invoiced by Licensee to such other manufacturer, jobber or whole-

sale distributor. Nothing hereinbefore contained in this agreement shall be construed to give Licensee the right to manufacture gypsum plasterboard or gypsum wallboard embodying the inventions and improvements set forth and claimed in any of said letters patent or in any letters patent after the same shall have been granted for or upon any of said applications for said other manufacturers or wholesale distributors and to sell the same, without the written consent of Licensor.

. . . . . .

12. In the event that either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein to be kept by it and performed, then the other party, at its election, may serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged neglect, failure or refusal, and if within thirty (30) days from the date of delivery of said notice the party in default shall not cure the default specified in said notice, then the other party may cancel and terminate this agreement by notifying the party in default in writing of its election so to do, without the necessity of any court action; . . . .

. . . . . .

15. In case Licensor shall, subsequent to the effective date hereof, grant to any other person except Abel Davis and Eugene Holland, receivers of the Universal Gypsum & Lime Co. or their successors or to the said Universal Gypsum & Lime Co., any license under said patents or applications for letters patent set forth in said Exhibit A and paragraph 4 hereof for the manufacture, sale or use of gypsum plasterboard or gypsum wallboard or bundles thereof, embodying the claims or inventions set forth and claimed in said patents or said applications, or shall grant any right under any such license, upon terms more

favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person. This paragraph shall not apply to any license granted on or prior to the effective date hereof, nor shall the same apply to the terms of settlement of any claim of Licensor or provisions with respect to the payment thereof, contained in any such license.

MITCHELL ET AL., MEMBERS OF THE CIVIL SERVICE COMMISSION, *v.* COHEN.

NO. 130. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.*

Argued January 6, 1948.—Decided March 8, 1948.

1. Part-time service with the Volunteer Port Security Force of the Coast Guard Reserve does not entitle one to veterans' preference in federal employment under the Veterans' Preference Act of 1944. Pp. 412–423.
2. Those who served temporarily on a part-time basis with the Volunteer Port Security Force are not "ex-servicemen" within the meaning of § 2 of the Veterans' Preference Act. Pp. 417–420.
3. The term "ex-servicemen" in the Veterans' Preference Act is to be construed as embracing only those who performed military service on full-time active duty with military pay and allowances, and who thereby dislocated the fabric of their normal economic and social life. Pp. 421–422.
4. The provision of § 2 of the Veterans' Preference Act establishing preference eligibility for unmarried widows of ex-servicemen, even though these widows may have continued their normal civilian employment during the war, does not require that "ex-servicemen" be construed more broadly than above indicated. Pp. 420–421.

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*Together with No. 131, *Mitchell et al., Members of the Civil Service Commission*, v. *Hubickey*, also on certiorari to the same Court.

5. One who, on the date when the Veterans' Preference Act became law, had not disenrolled from the Volunteer Port Security Force could not have acquired vested preference rights under § 18 of the Act, by virtue of a Civil Service Commission ruling extending preference rights under prior laws to those who had served with the Volunteer Port Security Force. Pp. 422–423.

160 F. 2d 915, reversed.

Respondents brought suits against members of the Civil Service Commission to establish their status as preference eligibles in federal employment. The District Court granted summary judgments in their favor. 69 F. Supp. 54. The Court of Appeals affirmed. 160 F. 2d 915. This Court granted certiorari. 332 U. S. 754. *Reversed*, p. 423.

Herbert A. Bergson argued the cause for petitioners. With him on the brief were *Solicitor General Perlman*, *Paul A. Sweeney* and *Oscar H. Davis*.

Gerhard A. Gesell argued the cause and filed a brief for respondents.

Mr. Justice Murphy delivered the opinion of the Court.

The problem here is whether temporary members of the Volunteer Port Security Force of the Coast Guard Reserve are entitled to veterans' preference in federal employment by virtue of the Veterans' Preference Act of 1944.[1]

Pursuant to § 207 of the Coast Guard Auxiliary and Reserve Act of 1941,[2] approximately 70,000 persons were enrolled as temporary members of the Coast Guard Reserve. The Reserve was a military organization estab-

[1] 58 Stat. 387, 5 U. S. C. (Supp. V, 1946) § 851.

[2] 55 Stat. 9, 12, as amended, 14 U. S. C. (Supp. V, 1946) § 307.

lished as a component part of the Coast Guard "to enable that service to perform such extraordinary duties as may be necessitated by emergency conditions." [3] The Coast Guard, in turn, was created as a military service and constitutes "a branch of the land and naval forces of the United States." [4] On November 1, 1941, the President directed that the Coast Guard operate as part of the Navy subject to the orders of the Secretary of the Navy.[5]

Of the various classifications of temporary members of the Coast Guard Reserve,[6] the largest was known as the Volunteer Port Security Force. Service therein was purely voluntary and was devoted to such activities as the patrol and guarding of harbors, waterfronts, docks, bridges, ships and industrial shore establishments. The members of this force took the oath of allegiance required of the regular members of the Coast Guard. They were enrolled "for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority." [7] In actual practice, however, the members were usually permitted to leave the Force at any time by making a request to the commanding officer of the unit to

[3] § 201 of the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 9, 11, as amended, 14 U. S. C. (Supp. V, 1946) § 301.

[4] 55 Stat. 585, 14 U. S. C. § 1.

[5] Executive Order No. 8929, 6 Fed. Reg. 5581.

[6] The other classifications were: (1) Full-time active duty with military pay and allowances; (2) Pilots without pay and allowances other than for uniforms, but paid by their own companies; (3) Officers of Great Lakes vessels without pay and allowances other than for uniforms, but paid by their own companies; (4) Coast Guard police without pay and allowances; (5) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation for their civilian positions.

[7] From the form entitled "Temporary Member of Coast Guard Reserve—Enrollment and Active Duty Assignment."

which they were assigned. They were given a "Certificate of Disenrollment" upon severance from the Force, honorable discharges and mustering-out pay not being provided.

Members of the Volunteer Port Security Force were obligated to be on active duty "only as directed by competent authority for a minimum of 12 hours per week." [8] It does not appear that their active duty exceeded that amount to any substantial degree. Because of the small number of hours of service, most members were able to continue their regular civilian employment with little or no interference. They could not be transferred from the cities in which they lived without their consent. Efforts were made by the Coast Guard to assign the 12-hour weekly duty periods to fit the convenience of the members. And many of them were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment. They could also be excused from duty if they found it temporarily inconvenient.

These members performed their duties without pay. In most cases, however, they received an allowance for uniforms; and in some instances they received food or subsistence allowance while on active duty. Military status attached to them only during periods when they were actually engaged on active duty or en route to and from such duty. While on active duty they wore their uniforms, were subject to the usual Coast Guard discipline and were vested with the same authority as members of the regular Coast Guard of similar rank.

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[8] *Ibid.* It also appears from this form that those mentioned in classifications (2) and (5) in footnote 6, *supra,* were subject to call at all times. Apparently the other classifications, including the Volunteer Port Security Force, were not subject to such a call.

At all times the members of the Volunteer Port Security Force remained subject to the Selective Training and Service Act of 1940. They were required to register and were liable for induction into the regular armed forces. In fact, many of them did enlist or were drafted into those forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve. If illness or disease occurred while on duty, they were accorded the same hospital treatment as members of the regular Coast Guard. But if they were injured or killed in the line of duty, they were entitled only to the benefits prescribed by law for civilian employees of the United States. Moreover, they were ineligible for the benefits of National Service Life Insurance.

Respondent Cohen enrolled on April 13, 1944, as a member of the Volunteer Port Security Force and was assigned to duty with the Captain of the Port, Washington, D. C. He performed his part-time duties without compensation and without interruption to his regular employment as a civilian economist in the War Department. He was disenrolled on September 5, 1945, having served on active duty on 58 days for a total service of 398 hours. Respondent Hubickey was enrolled in the Force on October 18, 1944, and was assigned to duty with the Captain of the Port, Philadelphia, Pa. He too performed his part-time duties without compensation and without interference with his regular work as a civilian naval architect in the Navy Department. On September 30, 1945, he was disenrolled, having served on active duty on 32 days for a total service of 250 hours.

On April 4, 1944, before the passage of the Veterans' Preference Act, the Civil Service Commission had ruled that the duties performed by those enrolled in the Volunteer Port Security Force entitled them to veterans' preference in federal employment under the then existing

preference laws.[9] But on November 4, 1944, after the enactment of the statute in question and pursuant to a recommendation of the Acting Secretary of the Navy, the Commission changed this ruling and decided that such duties did not entitle one to veterans' preference under the terms of the statute.[10]

The two respondents were denied veterans' preference in their government employment in accordance with the Commission's second ruling. Due to general reductions in force, respondent Cohen was discharged from the War Department and respondent Hubickey was notified that he would be discharged from the Navy Department. They then brought these actions to compel the members of the Commission to classify them as preference eligibles; they also asked the court to adjudge and declare them entitled to the status of preference eligibles under the provisions of the Veterans' Preference Act. The District Court granted summary judgments in their favor. 69 F. Supp. 54. The Court of Appeals affirmed, one justice dissenting. 160 F. 2d 915. We brought the cases here on certiorari, the problem raised being one of importance in the administration of the Veterans' Preference Act.

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[9] Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission. This provided that active duty performed by temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions, constituted active duty as distinguished from training duty and entitled the member performing such duty to preference benefits under the then existing preference laws.

[10] Departmental Circular No. 508 to Heads of Departments and Independent Establishments. This modified the earlier ruling and provided that only those temporary Coast Guard Reservists performing full-time duty with pay and allowances at shore stations or aboard Coast Guard vessels were entitled to preference under the Veterans' Preference Act of 1944.

The pertinent portion of the Veterans' Preference Act is to be found near the end of § 2. That establishes preference in government employment for "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, . . . and have been separated therefrom under honorable conditions."

Respondents claim that their service with the Volunteer Port Security Force brings them squarely within this statutory provision, hence entitling them to veterans' preference. It is undisputed, of course, that they did serve part-time on active duty in a branch of the armed forces of the United States during World War II and that they were separated therefrom under honorable conditions. The crucial question is whether they thereby are "ex-servicemen" within the meaning of this particular statute. On that score, respondents urge that this term must be given its ordinary and literal meaning so as to refer to all those who performed military service.[11] The length or continuity of active duty and the presence or absence of compensation become immaterial from respondents' point of view; the mere performance of some type of military service is thought to be sufficient. Since respondents concededly did perform military service while on intermittent active duty with the Volunteer Port Security Force, the conclusion is reached that they are "ex-servicemen" within the contemplation of this statute. Resort to the legislative history and other secondary sources is said to be unwarranted, so clear and obvious is the meaning of that term.

In our opinion, however, the term "ex-servicemen" has no single, precise definition which permits us to read and

[11] Respondents point out that the word "serviceman" is defined as "One who has performed military service." Webster's New International Dictionary, 2d ed. (1942).

apply that term without help from the context in which it appears and the purpose for which it was inserted in the statute. Ex-servicemen are indeed those who have performed military service. And they may include those who have served on active duty only part-time and without compensation. But this designation may also be confined to a more definite and narrow class of individuals who performed military service, to those whose full time and efforts were at the disposal of military authorities and whose compensation included military pay and allowances. Such ex-servicemen are those who completely disassociated themselves from their civilian status and their civilian employment during the period of their military service, suffering in many cases financial hardship and separation from home and family. They formed the great bulk of the regular armed forces during World War II. In the popular mind, they were typified by the full-fledged soldier, sailor, marine or coast guardsman. Our problem, of course, is whether Congress used the term "ex-servicemen" in the broad or narrow sense when it enacted the Veterans' Preference Act. And the answer to that problem is to be determined by an examination of the statutory scheme rather than by reliance upon dictionary definitions.

The Veterans' Preference Act was enacted in 1944 to aid in the readjustment and rehabilitation of World War II veterans. It was felt that the problems of these returning veterans were particularly acute and merited special consideration. Their normal employment and mode of life had been seriously disrupted by their service in the armed forces and it was thought that they could not be expected to resume their regular activities without reemployment and rehabilitation aids. The Federal Government, in its capacity as an employer, determined to

take the lead in such a program.[12] The Veterans' Preference Act was accordingly adopted, creating special preference and protection for returning veterans at every stage of federal employment.

Throughout the legislative reports and debates leading to the birth of this statute is evident a consistent desire to help only those who had sacrificed their normal pursuits and surroundings to aid in the struggle to which this nation had dedicated itself.[13] It was the veterans or ex-servicemen who had been completely divorced from their civilian employment by reason of their full-time service with the armed forces who were the objects of

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[12] "I believe that the Federal Government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed services that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.

"The problems of readjustment will be difficult for all of us. They will be particularly difficult for those who have spent months and even years at the battle fronts all over the world. Surely a grateful nation will want to express its gratitude in deeds as well as in words."

Letter from the President to Rep. Ramspeck, quoted in H. R. Rep. No. 1289, 78th Cong., 2d Sess., p. 5.

[13] H. R. Rep. No. 1289, 78th Cong., 2d Sess.; S. Rep. No. 907, 78th Cong., 2d Sess.; 90 Cong. Rec. 3501–3507. The House report stated (p. 3): "Private employers and corporations, as well as State, county, and municipal governments, have been urged through the selective-service law and otherwise to afford reemployment to veterans when they leave the armed forces. Your committee feels that the Federal Government should set the pace, and that this proposal is an essential part of the reemployment and rehabilitation program." The Senate report stated (p. 1): "The committee believes that in view of the fact that members of the armed forces rapidly are being returned to civilian life, the bill should be enacted without delay."

Congressional solicitude. Reemployment and rehabilitation were considered to be necessary only as to them.

There is nothing to indicate that the legislative mind in this instance was directed toward granting special benefits or rewards to those who performed military service without interference with their normal employment and mode of life. As to them, assistance in reemployment and rehabilitation was thought unnecessary. Their civilian employment status remained unchanged by reason of their military service. And since their civilian life was substantially unaltered, there was no problem of aiding their readjustment back to such a life. Indeed, to have given them preference rights solely because of their part-time military service would have been inconsistent with the professed aims of the statutory framers. Such preference would have diluted the benefits conferred on those ex-servicemen who had made full-scale sacrifices; and it would have been inequitable to the many civilians who also had participated voluntarily in essential war and defense activities but who had not been directly connected with a branch of the armed forces.

It is true that § 2 of the Act establishes preference eligibility for the unmarried widows of deceased ex-servicemen despite the fact that these widows may have continued their normal civilian employment during the war. But the preference rights thereby granted are derivative in nature. They are conferred on the widows because of the dislocation and severance from civil life which their deceased husbands suffered while performing full-time military duties and in partial substitution for the loss in family earning power occasioned by their husbands' deaths. Congress felt that this was one way of expressing the moral obligation and the debt of gratitude which this nation was thought to owe these widows. Such a provision certainly affords no basis for widening the concept of

"ex-servicemen" beyond that which we have indicated. The widows of ex-servicemen are in a special category which cannot be compared, in terms of sacrifice or need for reemployment and rehabilitation, with any group of individuals who performed part-time military duties.[14]

In the light of the very clear purpose which Congress had in mind in adopting the Veterans' Preference Act, we are constrained to define the term "ex-servicemen," for the purposes of this particular statute, as relating only to those who performed military service on full-time active duty with military pay and allowances, thereby dislocating the fabric of their normal economic and social life.[15] It thus becomes obvious that respondents' service

[14] The same observations apply to the provision in § 2 giving veterans' preference to the wives of ex-servicemen who have a service-connected disability and who themselves have been unable to qualify for any civil-service appointment. See also 62 Stat. 3, extending veterans' preference benefits to the widowed mothers of deceased or permanently and totally disabled ex-servicemen. H. R. Rep. No. 697, 80th Cong., 1st Sess.; S. Rep. No. 480, 80th Cong., 1st Sess.

[15] The view we take of this matter coincides with that expressed by the supporters of H. R. 1389, 80th Cong., 1st Sess. That bill, as amended, proposed to change § 2 of the Veterans' Preference Act by providing that " 'active duty' in any branch of the armed forces of the United States shall mean active full-time duty with military pay and allowances in any branch of the armed forces during any campaign or expedition (for which a campaign badge has been authorized)."

Hearings were held before the House Committee on Post Office and Civil Service. The bill was unanimously reported out by the committee, H. R. Rep. No. 465, 80th Cong., 1st Sess., and was adopted by voice vote by the House of Representatives, 93 Cong. Rec. 7315–7318. A unanimous Senate Committee on Civil Service also reported the bill favorably, S. Rep. No. 396, 80th Cong., 1st Sess., but the Senate adjourned without considering the bill.

The proponents of the bill and the two committees considered it as a clarification of the original Congressional intent as to the meaning of "ex-servicemen." It was stated that the country owes a debt of gratitude to the temporary Coast Guard Reservists, "but they are

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with the Volunteer Port Security Force of the Coast Guard Reserve cannot qualify them as "ex-servicemen" entitled to veterans' preference under this enactment. They continued their normal civilian employment with the War Department and the Navy Department during the war, employment which suffered as little as possible from their military service; they served on active duty for only relatively short periods each week and could be disenrolled at their own request; they received no military pay and very few allowances; they could not be transferred away from their homes without their consent. They were therefore able to retain the essential elements of their civilian life. As to them, there was no problem of reemployment or rehabilitation caused by their military service. They are not among the "ex-servicemen" whom Congress desired to assist by means of the Veterans' Preference Act.

One other matter remains. Respondents claim, and the Court of Appeals held, that they acquired vested preference rights under § 18 of the Act. In pertinent part, § 18 provides that "this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." It is said that the Civil Service Commission's ruling of April 4, 1944, extending preference rights under the then existing laws to those who had performed service with the

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not to be classed as ex-servicemen, who were actually uprooted from their civilian occupations and subjected to the rigors of full-time military training and combat. It is to the latter group that Congress intended to provide employment preference in Government service." 93 Cong. Rec. 7315. The need for clarification of § 2 was said to be the confusion created by the lower court decisions in the instant cases.

Volunteer Port Security Force, gave respondents vested rights which were preserved by § 18 when the Veterans' Preference Act was subsequently enacted.

This contention is without substance. Veterans' preference rights by their very nature do not accrue until one has become a veteran through separation from the armed forces. On June 27, 1944, when the Veterans' Preference Act became law, neither of the respondents had as yet disenrolled from the Volunteer Port Security Force. In fact, respondent Hubickey had not even enrolled by that date. Thus they could not be classed as veterans or ex-servicemen, whatever definition be given those terms, on June 27, 1944, and they could not have earned any veterans' preference rights prior to that date. The Commission's ruling of April 4, 1944, did no more than inform respondents that they would be entitled to veterans' preference upon disenrollment, provided such ruling was lawful and still in effect. It did not purport to give them preference rights as of April 4, 1944, or to cause those rights to accrue before disenrollment. Since they did not possess and had not been granted any such rights under prior law, respondents were completely unaffected by the provisions of § 18. That section was primarily designed to perpetuate preferences granted earlier to veterans who had served in the armed forces during peacetime and who were then in government employment or on civil-service registers.[16] Respondents were obviously not veterans of that type.

Reversed.

MR. JUSTICE DOUGLAS dissents.

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[16] See S. Rep. No. 907, 78th Cong., 2d Sess., p. 2; H. R. Rep. No. 1289, 78th Cong., 2d Sess., p. 3. The Veterans' Preference Act does not grant benefits to future peacetime veterans.

MOGALL *v.* UNITED STATES.

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

No. 48. Argued October 16, 1947.—Decided March 8, 1948.

The Selective Service Regulations imposed no legal obligation upon an employer of a registrant under the Selective Training and Service Act to report to the local draft board facts which might have resulted in the registrant being placed in a different draft classification; and an employer's failure to make such reports was not a violation of § 11 of the Act. P. 425.

158 F. 2d 792, reversed.

Petitioner was convicted of a violation of § 11 of the Selective Training and Service Act. The Circuit Court of Appeals affirmed. 158 F. 2d 792. This Court granted certiorari. 331 U. S. 797. *Reversed*, p. 425.

Rudolph F. Becker, Jr. argued the cause for petitioner. With him on the brief was *Charles W. Kehl.*

W. Marvin Smith argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro.*

PER CURIAM.

Petitioner and his employee, one Perniciaro, were jointly indicted and tried on the charges contained in an eight-count indictment. The defendants were acquitted under Counts 1 to 7, the first of which charged petitioner and Perniciaro with conspiring for the purpose of enabling Perniciaro to evade military service by failing to make known to the draft board facts which might have resulted in Perniciaro being placed in a different draft classifica-

tion. The defendants were convicted under Count 8, however, which charged petitioner and Perniciaro with failing to report facts in writing to the local draft board which might have resulted in Perniciaro being placed in a different draft classification, contrary to § 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. § 311 and § 626.1 (b) of the Selective Service Regulations.

The Government now concedes that the Selective Service Regulations imposed no legal obligation upon petitioner, as an employer of a registrant under the Selective Training and Service Act, to make such reports to the local board. It is also conceded that petitioner was tried and convicted upon the assumption that he was under such a legal obligation. We agree that the plain language of the Regulation and the record of this case support these conclusions.

The Government urges that although the judgment of conviction against petitioner should be reversed, the indictment should not be dismissed since the prosecution may wish to try petitioner a second time on the charges contained in Count 8, as an aider and abettor.

There is no showing of facts sufficient for us to pass judgment on the question. Accordingly, we intimate no opinion on the propriety of this procedure or the issues which it might present. See *Sealfon* v. *United States,* 332 U. S. 575 (1948). Those questions will be open in the District Court on our remand of the cause.

Reversed.

ECCLES ET AL. *v.* PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA.

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

No. 101. Argued December 9, 1947.—Decided March 15, 1948.

In admitting a state bank to membership in the Federal Reserve System, the Board of Governors prescribed a condition that, if a particular bank holding company acquired stock in the bank, the bank would withdraw from membership within 60 days after written notice from the Board. The holding company acquired less than 11% of the bank's stock. The bank sued for a declaratory judgment that the condition was invalid and for an injunction against its enforcement. Its claims of threatened injury were supported entirely by affidavits. The Board disavowed any present intention of enforcing the condition, on the ground that it had satisfied itself that the bank's independence had not been affected and that the public interest required no action. *Held:* The bank's need for equitable relief is too remote and speculative to justify a declaratory judgment—especially against an agency of the Government and on the basis of affidavits. Pp. 426–435.

82 U. S. App. D. C. 126, 161 F. 2d 636, reversed.

The District Court denied a declaratory judgment that a condition prescribed by the Board of Governors of the Federal Reserve System in admitting a state bank to membership in the Federal Reserve System was invalid and denied an injunction against its enforcement. The United States Court of Appeals for the District of Columbia reversed. 82 U. S. App. D. C. 126, 161 F. 2d 636. This Court granted certiorari. 332 U. S. 755. *Reversed,* p. 435.

J. Leonard Townsend argued the cause for petitioners. With him on the brief were *Solicitor General Perlman, Robert L. Stern* and *George B. Vest.*

Samuel B. Stewart, Jr. argued the cause for respondent. With him on the brief was *Luther E. Birdzell.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding under the Declaratory Judgment Act, 48 Stat. 955, 28 U. S. C. § 400. Its aim is to have declared invalid a condition under which the respondent became a member of the Federal Reserve System. The California State Banking Commission authorized the establishment of the respondent provided it obtained federal deposit insurance. This requirement could be met either by direct application to the Federal Deposit Insurance Corporation or through membership in the Federal Reserve System. § 12 B (e) and (f) of the Federal Reserve Act, 48 Stat. 162, 170, 49 Stat. 684, 687, 12 U. S. C. § 264 (e) and (f). Respondent sought such membership but its application was rejected. The promoters of the Bank, having requested the Board of Governors of the Federal Reserve System to reconsider the application for membership, were advised that favorable action depended on a showing that the Transamerica Corporation, a powerful bank holding company, did not have, nor was intended to have, any interest in this Bank. Having been satisfied on this point, the Board of Governors granted membership to respondent subject to conditions of which the fourth is the bone of contention in this litigation.

This condition reads as follows:

> "4. If, without prior written approval of the Board of Governors of the Federal Reserve System, Transamerica Corporation or any unit of the Transamerica group, including Bank of America National Trust and Savings Association, or any holding company affiliate or any subsidiary thereof, acquires, directly or indirectly, through the mechanism of extension of loans for the purpose of acquiring bank stock, or in any other manner, any interest in such bank, other than such as may arise out of usual correspondent bank relationships, such bank, within 60 days after

written notice from the Board of Governors of the Federal Reserve System, shall withdraw from membership in the Federal Reserve System."

The Board of Governors gave the respondent this explanation for the condition:

"The application for membership has been approved upon representations that the bank is a bona fide local independent institution and that no holding company group has any interest in the bank at the time of its admission to membership, and that the directors and stockholders of the bank have no plans, commitments or understandings looking toward a change in the status of the bank as a local independent institution. Condition of membership numbered 4 is designed to maintain that status."

Some time later, in 1944, Transamerica, without prior knowledge of the respondent, acquired 540 of the 5,000 shares of its outstanding stock. The Bank duly advised the Board of Governors of this fact, but requested that it be relieved of Condition No. 4. This, the Board of Governors declined to do. Then followed this action, in the United States District Court for the District of Columbia, against the Board of Governors for a declaration that Condition No. 4 was invalid and for an injunction against its enforcement. A motion by the defendants to dismiss the complaint, in that it failed to set forth a justiciable controversy, was denied. 64 F. Supp. 811. The defendants answered, claiming that the Bank's acceptance of membership barred it from questioning the validity of Condition No. 4, and that in any case the condition was valid, and moved for judgment on the pleadings. The Bank, having filed a number of affidavits, moved for summary judgment. The District Court, in an unreported opinion, held that the Bank was bound by the condition on which it had accepted mem-

bership in the Federal Reserve System, and gave judgment for the defendants. The Court of Appeals for the District of Columbia, one judge dissenting, reversed. It rejected the defense of estoppel and sustained the validity of the condition "only as a statement that, if the Board of Governors should determine, after hearing, that Transamerica's ownership of the bank's shares has resulted in a change for the worse in the character of the bank's personnel, in its banking policies, in the safety of its deposits or in any other substantial way, it may require the bank to withdraw from the Federal Reserve System." 161 F. 2d 636, 643–44. Accordingly, it remanded the case to the District Court for entry of a judgment construing Condition No. 4 to such effect. Since this ruling involves a matter of importance to the administration of the Federal Reserve Act, we brought the case here. 332 U. S. 755.

Condition No. 4 provides for withdrawal from membership in the Federal Reserve System, for violation of its provisions, "within 60 days after written notice from the Board of Governors . . . ." Section 9 of the Federal Reserve Act authorizes the Board of Governors to revoke the membership status of a bank "after hearing."[1] If

[1] "If at any time it shall appear to the Board of Governors of the Federal Reserve System that a member bank has failed to comply with the provisions of this section or the regulations of the Board of Governors of the Federal Reserve System made pursuant thereto, or has ceased to exercise banking functions without a receiver or liquidating agent having been appointed therefor, it shall be within the power of the board after hearing to require such bank to surrender its stock in the Federal reserve bank and to forfeit all rights and privileges of membership. The Board of Governors of the Federal Reserve System may restore membership upon due proof of compliance with the conditions imposed by this section." 38 Stat. 251, 260, as amended, 46 Stat. 250, 251, 49 Stat. 684, 704, 12 U. S. C. § 327. See also § 5 of the Administrative Procedure Act, 60 Stat. 237, 239, 5 U. S. C. § 1004.

the case contained no more than the foregoing elements, three questions would emerge:

(1) Was this action premature, brought as it was before the Board of Governors commenced revocation proceedings?

(2) If not, could the respondent attack the validity of a condition on the basis of which it had been accepted, and had enjoyed, membership? Compare *Fahey* v. *Mallonee,* 332 U. S. 245, 255.

(3) If so, did the Board of Governors have power to impose the condition as a means of guarding against acquisition by Transamerica of an interest in respondent?

However, with due regard for the considerations that should guide us in rendering a declaratory judgment, the record as a whole requires us to dispose of the case without reaching any of these questions.

Extended correspondence between Marriner S. Eccles, the then Chairman of the Board of Governors of the Federal Reserve System, and A. P. Giannini, Chairman of the Board of Directors of Transamerica, together with the testimony of Eccles before the House Committee on Banking and Currency, set forth the reason for the Board's insistence on the fourth condition. The Board sought to block "acquisition by Transamerica of stock in independent unit banks, especially when it constitutes a means of evading the requirements of the Federal agencies who will not permit its banks to establish additional branches." Hearings before Committee on Banking and Currency, House of Representatives, on H. R. 2634, 78th Cong., 1st Sess., p. 15. The Board was concerned not that Transamerica might purchase some shares of independent banks for the ordinary purposes of investment, but that it would buy into banks in order to acquire control, and thereby turn banks, though outwardly independent, into parts of its own banking network. The Board of Governors was therefore carrying out the policy underlying Con-

dition No. 4 when it formally disavowed any intention to invoke that condition against respondent merely because of acquisition by Transamerica of an interest in the Bank, with no indication of subversion of its independence.[2] This action by the Board was taken after it had satisfied itself that Transamerica's holding did not affect the Bank's control. The Bank had vigorously insisted on its continued independence, in urging upon the Board the harmlessness of Transamerica's ownership of some of the Bank's stock, and the Board, upon independent investigation found such to be the fact. Accordingly, the Board concluded that "the public interest" called for no action.

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 297–98; H. R. Rep. No. 1264, 73rd Cong., 2d Sess., p. 2; Borchard, Declaratory Judgments (2d ed. 1941) pp. 312–14. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

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[2] The following is an extract from the minutes of a meeting of the Board on January 28, 1946:

"Upon consideration of the latest report of examination of the Peoples Bank, Lakewood Village, California, from which the Board concluded that there had been no substantial change in the control, management or policy of the bank resulting from the acquisition by Transamerica Corporation of certain shares of the bank's stock, the Board, by unanimous vote, decided that there was no present need in the public interest for any action by the Board with respect to the condition of membership of the bank relating to acquisition of its stock by Transamerica Corporation."

The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance. And so we turn to the facts of the case at bar. The Bank has always insisted that it is independent of Transamerica; the Board of Governors has sustained the claim. The Bank stands on its right to remain in the Federal Reserve System; the Board acknowledges that right. The Bank disclaims any intention to give up its independence; the Board of Governors, having imposed the condition to safeguard this independence, disavows any action to terminate the Bank's membership, so long as the Bank maintains the independence on which it insists. What the Bank really fears, and for which it now seeks relief, is that under changed conditions, at some future time, it may be required to withdraw from membership, and if this happens, so the argument runs, the Comptroller of the Currency, one of the Directors of the Federal Deposit Insurance Corporation, has agreed with the Federal Reserve Board to refuse any application by the Bank for deposit insurance as a non-member.

Thus the Bank seeks a declaration of its rights *if* it should lose its independence, or *if* the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and *if* then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing. Many of the same reasons are present which impel them to abstain from adjudicating constitutional claims against a statute before it effectively and presently impinges on such claims.

It appears that the respondent could, if it wished, protect itself from the loss of its independence through adoption of by-laws forbidding any further sale or pledge of its shares to Transamerica or its affiliates. See California Corporations Code, L. 1947, c. 1038, § 501 (g).[3] To this the Bank replies that even if its independence is maintained, the Board of Governors may change its policy, and seek enforcement of Condition No. 4, whether or not such enforcement is required by "the public interest" in having independent banks, which the condition now serves. Such an argument reveals the hypothetical character of the injury on the existence of which a jurisdiction rooted in discretion is to be exercised. In the light of all this, the difficulties deduced from the present uncertainty regarding the future enforcement of the condition, possibly leading to uninsured deposits, are too tenuous to call for adjudication of important issues of public law.[4] We are asked to contemplate as a serious danger that a body entrusted with some of the most delicate and grave responsibilities in our Government will change a deliberately formulated policy after urging it on this Court against the Bank's standing to ask for relief.

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[3] "501. The by-laws of a corporation may make provisions not in conflict with law or its articles for:

. . . . . .

"(g) Special qualifications of persons who may be shareholders, and reasonable restrictions upon the right to transfer or hypothecate shares."

Likewise, the shareholders, or such of them as chose to, could presumably bind themselves not to sell or pledge to Transamerica, and by noting this agreement on their certificates could bind their transferees. Cf. *Vannucci* v. *Pedrini,* 217 Cal. 138, 17 P. 2d 706.

[4] The bank asserted, in its affidavits, not that lack of confidence had deterred depositors, but that deposits had been so heavy that capital expansion was in order, but might be disadvantaged by fear of prospective investors to risk personal assessment if deposits were uninsured.

A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process. But, as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore equally inappropriate for a declaration of rights. This is especially true in view of the type of proof offered by the Bank. Its claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment. Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies. Equity Rule 46 forbade such practice save in exceptional cases. See *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U. S. 701; cf. Federal Rule of Civil Procedure 43 (a). Again, not the least of the evils that led to the Norris-LaGuardia Act was the frequent practice of issuing labor injunctions upon the basis of affidavits rather than after oral proof presented in open court. See Amidon, J., in *Great Northern R. Co.* v. *Brosseau,* 286 F. 414, 416; Swan, J., in *Aeolian Co.* v. *Fischer,* 29 F. 2d 679, 681–82.

Where administrative intention is expressed but has not yet come to fruition (*Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324), or where that intention is unknown (*Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 429–30), we have held that the controversy is not yet ripe for equitable intervention. Surely, when

a body such as the Federal Reserve Board has not only not asserted a challenged power but has expressly disclaimed its intention to go beyond the legitimate "public interest" confided to it, a court should stay its hand.

Judgment reversed.

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

MR. JUSTICE REED, with whom MR. JUSTICE BURTON joins, dissenting.

In order to get admission into the Federal Reserve System, the respondent was required to put into its charter a provision which was allegedly beyond the power of the Board of Governors of the System to require. It seems obvious that the requirement was a restriction on the market for the respondent's stock and therefore detrimental to the conduct of its business, a continuing threat of the Board to exclude respondent from the benefits of the System.

Respondent desired to be free of what it regarded as an illegal requirement. The Board of Governors has not agreed that it will never enforce the prohibition but holds it as a threat to force the respondent to resign from the System upon acquisition of control by those deemed undesirable by the Board.

Certainly, as I see it, there is not only the possibility of future injury but a present injury by reason of the threat to the marketability of respondent's stock. It may have a substantial bearing upon the willingness of customers to establish banking relations with it, especially major relationships looking toward long and close associations of interests. It requires no elaboration to convince me that the threat is a real and substantial interference by allegedly illegal governmental action. As that

threat has taken a definite form by the enforced agreement for withdrawal, we have not something that may happen but a concrete written notice requiring withdrawal by this respondent from the System on the happening of a fact which is contrary to the Board's idea of the public interest. Whether the Board's idea of a legitimate public interest is correct is the very point at issue.

In such circumstances there is a justiciable controversy, the claim of a right and a present threat to deprive a particular person of the right claimed. The damage from its actual or threatened enforcement is, of course, irremediable. Any bank would be seriously injured by even an effort to oust it from the System. This gives jurisdiction under the Declaratory Judgment Act. Judicial Code § 274d.

This Court has discretion to refuse to consider a petition for a declaratory judgment and an injunction to stop a threatened or existing injury. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461. That discretion is not unfettered. *Altvater* v. *Freeman,* 319 U. S. 359, 363. There is no difference between declaratory suits involving an equitable remedy and other equity suits. Where an actual controversy with federal jurisdiction exists over the legal relations of adverse parties, discretion usually cannot properly be exercised by refusing an adjudication. *Meredith* v. *Winter Haven,* 320 U. S. 228; cf. *Bell* v. *Hood,* 327 U. S. 678. Unusual circumstances, not here present, such as other pending suits, *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, or supersession of state authority, *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, sometimes justify refusal of relief.

Under the facts of this case, however, it seems improper to refuse an adjudication at this time. If governmental power is being unlawfully used to constrain respondent's operation of its business, respondent is entitled to pro-

tection, now. See *Columbia Broadcasting System* v. *United States,* 316 U. S. 407, a case where prematurity was clearer than here.

I would decide this case on the merits.

BAKERY SALES DRIVERS LOCAL UNION NO. 33 ET AL. *v.* WAGSHAL, TRADING AS WAGSHAL'S DELICATESSEN.

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

No. 225. Argued December 17–18, 1947.—Decided March 15, 1948.

In a suit by a delicatessen store to enjoin a boycott of its business by a labor union, the pleadings and supporting affidavits alleged that: Because the hours of delivery were inconvenient, the store stopped buying bread from one bakery and started buying from another; although the store had always made payments for the bread direct to the first bakery and not to the driver employed by the bakery, a representative of the bakery drivers' union demanded that payment of the balance due for bread previously bought from the first bakery be made to the driver who had delivered it and that the store discontinue the sale of a certain non-union product; there was a dispute about the amount of the bill; the store discontinued the sale of the non-union product but refused to make payment for the bread to the driver; and the union instituted a boycott which prevented the store from obtaining bread from other bakeries or retail stores. The District Court denied the union's motion to dismiss the suit and granted an injunction *pendente lite*. The Court of Appeals dismissed an appeal. *Held:*

1. The boycott did not grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act, and the order granting an injunction *pendente lite* was therefore not appealable as of right. Pp. 442–445.

(a) The controversy over the hour of delivery was not a "labor dispute," since it was between the store and the bakery and not between the store and the driver or his union. Moreover, it was a dead controversy. Pp. 442–443.

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(b) The controversy over the amount of the bill was between the store and the bakery, and it did not become a "labor dispute" merely because a representative of the union undertook to collect the bill. Pp. 443–444.

(c) Since it appears from the record before this Court that the boycott was addressed only to the question of payment of the bill and that the incidental controversy over the sale of a non-union item (which had been discontinued) was a mere pretext, the latter is not sufficient to make the case one growing out of a "labor dispute." P. 444.

2. The Labor Management Relations Act of 1947, 61 Stat. 136, § 10 (h), did not remove the limitations of the Norris-LaGuardia Act upon the power to issue an injunction against a secondary boycott where the injunction is sought by a private party. P. 442.

3. Since the record does not show that a stay was granted pending review here, it must be assumed that the union's action in lifting the boycott was merely obedience to the judgment here for review; and the case cannot be considered to have become moot by reason of the lifting of the boycott. P. 442.

4. A contention that a determination whether there is a labor dispute should not rest upon affidavits is not ruled upon, because the affidavits in this case were merely a gloss on the complaint, constituted an informal amendment, and served only as allegations and not proof. Pp. 444–445.

82 U. S. App. D. C. 138, 161 F. 2d 380, affirmed.

The United States Court of Appeals for the District of Columbia dismissed an appeal from a judgment of the District Court granting an injunction *pendente lite* against a boycott by a labor union and denying a motion to dismiss the suit. 82 U. S. App. D. C. 138, 161 F. 2d 380. This Court granted certiorari. 332 U. S. 756. *Affirmed,* p. 445.

Herbert S. Thatcher argued the cause for petitioners. With him on the brief were *J. Albert Woll* and *Jacqueline Wemple.*

William E. Leahy argued the cause for respondent. With him on the brief were *William J. Hughes, Jr.* and *Nicholas J. Chase.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an action brought in a United States District Court to enjoin interference with a business, and the question is whether the complaint subjects that court to the limitations imposed by the Norris-LaGuardia Act upon its equity jurisdiction.

This is the substance of the complaint. Respondent owns a delicatessen store which sells food and serves meals. She obtained bread for the delicatessen store from Hinkle's bakery. Deliveries were made by a driver, an employee of Hinkle and a member of Local Union No. 33, one of the petitioners. The driver delivered the bread at noon, which inconvenienced the respondent, since the checking of deliveries at that hour interfered with the serving of lunches. Respondent "required" the driver to bring the bread at another hour. Shortly thereafter, Hinkle informed the respondent that it would no longer furnish her with bakery products. And so, respondent made arrangements with another bakery, which delivered at a more convenient hour.

Three weeks later, the petitioner Andre, president of the union, visited the delicatessen store and stated that the respondent owed the driver approximately $150 and requested immediate payment. Respondent replied that she had never had dealings with the driver, but had paid Hinkle directly by check, and would pay the bill in due course. Andre replied that the payment would have to be made to the driver in full; furthermore, that if the respondent did not cease carrying a certain non-union article of food he noticed on display, delivery of bread, milk, and other products necessary to the respondent's business would be cut off. Shortly thereafter the respondent sent a check to Hinkle for the balance of her bill. It was returned by the union, with a letter signed by Andre asserting that the payment was owed to its

member, the driver, and could not be accepted. The following day, the bakery which had been serving respondent after Hinkle had stopped doing so, ceased to deal with her, explaining that the union had threatened otherwise "to pull out all its drivers." Through an effective boycott, the union kept the respondent from obtaining bread from other bakeries or retail stores. The delicatessen store was also picketed.

The complaint prayed for temporary and permanent injunctions against the boycott and other interference with respondent's business, the payment of damages, and the usual catch-all relief. Petitioners moved to dismiss the action on the ground that the controversy as set forth in the complaint involved a "labor dispute" under the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101 *et seq.* Respondent filed an "answer to motion to dismiss," attached to which were affidavits, including one of Benjamin Wagshal, manager of the delicatessen store, elaborating the incidents narrated in the complaint. Among other matters set forth, he stated that payment for bread purchased from Hinkle had always been made by check sent directly to Hinkle and was never made to a driver, and that neither the union nor any of its drivers had ever previously questioned this practice; that Andre had asserted by mail and at the delicatessen store that the check which the respondent had sent to Hinkle was $12.22 short of the amount owed; and that the non-union item on sale to which Andre had objected was not a subject of controversy but merely an excuse for Andre's attempt, on his visit to the delicatessen store, to enforce his demands concerning the bill, and that in any event its sale had been discontinued.

The District Court granted an injunction *pendente lite,* restraining the petitioners from interfering with respondent's business or preventing sale and delivery of bakery products to the respondent, by boycott and picket-

ing. At the same time, it denied the petitioners' motion to dismiss. Petitioners filed a notice of appeal to the Court of Appeals for the District of Columbia, and respondents moved to dismiss the appeal.

If this case does not involve a "labor dispute" under the Norris-LaGuardia Act, an appeal as of right could not be had in the Court of Appeals for the District of Columbia. 31 Stat. 1189, 1225, as amended, D. C. Code (1940) § 17–101. However, § 10 of the Norris-LaGuardia Act, 47 Stat. 70, 72, 29 U. S. C. § 110, provides for immediate review of an order granting or denying "any temporary injunction in a case involving or growing out of a labor dispute . . . ." [1] The Court of Ap-

[1] Section 13 of the Norris-LaGuardia Act, 47 Stat. 70, 73, 29 U. S. C. § 113, reads as follows:

"SEC. 13. When used in this Act, and for the purposes of this Act—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or

peals, one justice dissenting, held that this was not such a case, and dismissed the appeal. 161 F. 2d 380. Because of asserted conflict between this decision and prior decisions of this Court on the scope of "labor dispute" within the meaning of the Norris-LaGuardia Act, we granted certiorari. 332 U. S. 756.

A preliminary claim must be met, that the case has become moot. The short answer to the argument that the Labor Management Relations Act of 1947, 61 Stat. 136, 149, § 10 (h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party. The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review. We therefore turn to the merits.

The petitioners attach significance to three incidents for their claim that a "labor dispute" is here involved.

1. The controversy over the hour of delivery. The petitioners claim that this was a dispute "concerning terms or conditions of [the driver's] employment,"

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representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

thereby raising a labor dispute, "whether or not the disputants stand in the proximate relation of employer and employee." § 13 (c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade—to have the bread delivered by the same driver at a different hour, or by another driver, by an independent contractor, or through some other resourceful contrivance. To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, quality, delivery, payment, credit, or any other business transaction into a "labor dispute." Cf. *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not involved in the subsequent dispute with the union, or in the boycott against which the injunction was directed.

2. The controversy over the bill. The petitioners regard both the question whether payment was to be made to the driver rather than to Hinkle, and the disagreement over the disputed sum of $12.22, as a matter concerning the driver's wages, and therefore a condition of his employment. But, on the allegations now here, respondent had nothing to do with the payment of the driver's wages. The delicatessen store was Hinkle's customer. On the basis of the allegations to be considered, the driver would receive his pay whether or not respond-

ent paid her bill. It is immaterial that the driver may have been the conduit for payment—as drivers who deliver packages normally are. The same is true as to the disputed item of $12.22. The mere fact that it is a labor union representative rather than a bill collector who, with or without the creditor's consent, seeks to obtain payment of an obligation, does not transmute a business controversy into a Norris-LaGuardia "labor dispute." Cf. *Dorchy* v. *Kansas,* 272 U. S. 306, 311.

3. The non-union item on sale in the delicatessen store. Sale by a merchant of non-union commodities is, no doubt, a traditional source of labor disputes within the scope of the Norris-LaGuardia Act. While the complaint itself did not indicate the history of this matter after Andre's visit, the affidavit attached to the "answer to motion to dismiss" sets forth that it was not a bona fide bone of contention, but a mere pretext, and, further, that the respondent thereafter withdrew the item from sale. While the conclusion of the incident giving rise to a controversy may not necessarily terminate a labor dispute (cf. *Hunt* v. *Crumboch,* 325 U. S. 821), what is before us leaves no doubt that the subsequent boycott was addressed only to the question of payment of the bill. Petitioners suggest that since no injunction may issue in a case growing out of a labor dispute, except upon oral testimony, determination whether there is a labor dispute should not rest on affidavits. But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof.

This case was decided on a motion to dismiss. All that was determined was that on the basis of the respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act did not apply. Since the only issue before the court below, and therefore before us, was the appealability of the order for an injunction *pendente*

lite, which in turn depended on the applicability of the Norris-LaGuardia Act, other questions raised are not now open here.

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY dissent. MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

FRANCIS ET AL. *v.* SOUTHERN PACIFIC CO.

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

No. 400. Argued February 5, 1948.—Decided March 15, 1948.

1. Basing jurisdiction on diversity of citizenship, certain minor children sued an interstate railroad in a federal court in Utah to recover damages for the death of their father, an employee of the railroad, who was killed in Utah while riding the railroad as an interstate passenger on a free pass, not in connection with his duties as an employee. The pass provided that the user assumed all risk of injury and absolved the railroad from any liability therefor. Under instructions withholding an issue of the railroad's ordinary negligence and submitting only an issue of its wanton negligence, the jury found for the railroad. *Held:* Judgment for the railroad affirmed. Pp. 446–450.

   (a) In view of a subsequent decision of the Supreme Court of Utah to similar effect, this Court cannot say that the Circuit Court of Appeals committed plain error in holding that defenses which would have been available in a suit by the decedent were available in a suit by the heirs on a separate and distinct cause of action created by Utah law; and, therefore, this Court will not overrule that holding under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. Pp. 447–448.

   (b) Under the Hepburn Act, as amended by the Transportation Act of 1940, the right of an employee of an interstate railroad to recover damages for injuries sustained while riding on a free pass is governed by federal law. Pp. 448–450.

(c) The well-settled federal rule sustaining waivers of liability for ordinary negligence contained in free passes issued to employees by interstate railroads has become part of the warp and woof of the Hepburn Act, as amended by the Transportation Act of 1940. Pp. 448–450.

2. After a verdict has been rendered in a civil case in a federal court, it is too late to object for the first time that the jury was selected from a panel from which persons who work for daily wages were intentionally and systematically excluded. Pp. 450–451.

162 F. 2d 813, affirmed.

In a suit by minor children of a railroad employee to recover damages for his death while traveling on a free pass as an interstate passenger, the Circuit Court of Appeals affirmed a judgment for the defendant. 162 F. 2d 813. This Court granted certiorari. 332 U. S. 835. *Affirmed,* p. 451.

Parnell Black argued the cause for petitioners. With him on the brief were *Calvin W. Rawlings* and *Harold E. Wallace.*

Paul H. Ray argued the cause for respondent. With him on the brief was *S. J. Quinney.*

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are the minor children of Jack R. Francis who was killed while riding as an interstate passenger on one of respondent's trains. They brought this suit, acting through their general guardians, to recover damages on account of his death. Jurisdiction in the federal court was founded on diversity of citizenship. The trial judge submitted to the jury only the question of respondent's wanton negligence. The error alleged is his refusal to submit to the jury the issue of ordinary negligence. The jury returned a verdict for respondent. The Circuit Court of Appeals affirmed. 162 F. 2d 813.

The Circuit Court of Appeals held that Utah law creates a right of action in the heirs for the wrongful death of the decedent and that the action is distinct from any which decedent might have maintained had he survived. But the court held that the action is maintainable only where the decedent could have recovered damages for his injury if death had not ensued. In this case the decedent, an employee of respondent, was riding on a free pass not in connection with any duties he had as an employee but as a passenger only. The Circuit Court of Appeals therefore held as a matter of federal law that respondent would not have been liable to decedent for damages caused by ordinary negligence, relying on *Northern Pacific R. Co.* v. *Adams,* 192 U. S. 440. It concluded that respondent had the same defense against the heirs. We granted the petition for a writ of certiorari to reexamine the relationship between local law and federal law respecting the liability of interstate carriers under free passes.

In *Van Wagoner* v. *Union Pac. R. Co.,* — Utah —, 186 P. 2d 293, decided after the petition for certiorari in the present case was filed, the heirs sued to recover damages for the death of the decedent in a grade-crossing accident. The court held that a defense of contributory negligence which would have barred recovery by the decedent likewise bars the heirs. In view of this ruling by the Utah Supreme Court we cannot say that the Circuit Court of Appeals committed plain error in holding that respondent had the same defenses against petitioners as it would have had against the decedent.[1] Yet it requires such showing of error for us to overrule the lower courts in

[1] The Utah Supreme Court in its original opinion in the *Van Wagoner* case stated that the right granted the heirs is a "right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit." On petition for rehearing that statement was eliminated and the follow-

their applications of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. See *Palmer* v. *Hoffman,* 318 U. S. 109, 118; *MacGregor* v. *State Mutual Co.,* 315 U. S. 280; *Steele* v. *General Mills,* 329 U. S. 433, 439. Cf. *Wichita Co.* v. *City Bank,* 306 U. S. 103.

The free pass in the present case stated that "the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company . . . from any liability therefor." In *Northern Pacific R. Co.* v. *Adams, supra,* a similar provision in a free pass was sustained as a defense to an action brought under an Idaho statute by the heirs of a passenger.[2] That was in 1904. The *Adams*

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ing one substituted: "Under the facts of this case the right to proceed against the wrongdoer is subject to the defense of contributory negligence." 189 P. 2d 701.

That ruling is no deviation from the Utah law as construed by the lower federal courts. It supports the view of Utah law taken by the Circuit Court of Appeals and is in line with the weight of authority in the state courts. See *Mellon* v. *Goodyear,* 277 U. S. 335, 344–345. Hence we do not deem it appropriate to remand the case for consideration of the intervening decision in the *Van Wagoner* case. Cf. *Huddleston* v. *Dwyer,* 322 U. S. 232.

[2] The Court said, pp. 453–454:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

decision was soon followed by *Boering* v. *Chesapeake Beach R. Co.,* 193 U. S. 442. Then in 1906 came the Hepburn Act which under pain of a criminal penalty prohibited a common carrier subject to the Act from issuing a "free pass" except, *inter alia,* to "its employees and their families." 34 Stat. 584, 49 U. S. C. § 1 (7). Thereafter in 1914 the Court held that the rule of the *Adams* case was applicable under the federal statute and that the "free pass" was nonetheless a gratuity though issued to an employee of the carrier. *Charleston & W. C. R. Co.* v. *Thompson,* 234 U. S. 576. *Kansas City So. R. Co.* v. *Van Zant,* 260 U. S. 459, followed in 1923 and held that the liability of an interstate carrier to one riding on a "free pass" was determined not by state law but by the Hepburn Act. The Court said, p. 468, "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of."

For years this has been the accepted and well-settled construction of the Hepburn Act. During that long period it stood unchallenged in this Court and, so far as we can ascertain, in Congress too. Then came the Transportation Act of 1940, 54 Stat. 898, 900, with its comprehensive revision of the statutes of which the Hepburn Act was part. Amendments were made to the free-pass provision of the Act to permit free transportation of additional classes of persons.[3] No other amendments to the

[3] See H. R. Rep. 2016, 76th Cong., 3d Sess., p. 59.

free-pass provision were made. It was reenacted without further change or qualification. In view of this history we do not reach the question of what construction we would give the Hepburn Act were we writing on a clean slate. The extent to which we should rely upon such history is always a difficult question which has frequently troubled the Court in many fields of law and with varied results. See *Girouard* v. *United States,* 328 U. S. 61, 69, 70; *Helvering* v. *Hallock,* 309 U. S. 106, 119, 123. But in the setting of this case, we find the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation most persuasive indications that the rule of the *Adams, Thompson,* and *Van Zant* cases has become part of the warp and woof of the legislation. See *Missouri* v. *Ross,* 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. R. Co.,* 298 U. S. 492, 500; *United States* v. *Ryan,* 284 U. S. 167, 175; *Hecht* v. *Malley,* 265 U. S. 144, 153; *Electric Battery Co.* v. *Shimadzu,* 307 U. S. 5, 14. Any state law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause. For it was held in the *Van Zant* case that the free-pass provision of the Hepburn Act was a regulation of interstate commerce "to the completion of which the determination of the effect of the passes is necessary." Thus there is no room for the application of *Erie R. Co.* v. *Tompkins, supra,* on this phase of the case. The *Van Zant* case arose not in a lower federal court but in a state court; the holding was not a declaration of a "general commercial law" but a ruling that "the incidents and consequences" of the pass were controlled by the federal act "to the exclusion of state laws and state policies." 260 U. S. at 469.

Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217. We do not stop

to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the *Thiel* case was decided a few weeks after the verdict of the jury in the present case. If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. *Queenan* v. *Oklahoma,* 190 U. S. 548, 552.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE join, dissenting.

Utah law permits recovery against a railroad when its negligence is responsible for a passenger's death, whether that passenger rides on a free pass containing an attempted waiver of liability for negligence or pays his fare in money. Because I believe Utah law should govern this case I would reverse this judgment. But I think affirmance of the judgment is equally wrong whether the case is to be considered governed wholly by Utah law, by federal law, or in part by both.

No act of Congress has entrenched upon the long-existing power of all the states, including Utah, to provide damages for such wrongful deaths as this complaint alleged. If there is here any barrier to recovery based upon federal law, it is grounded in judge-made "general commercial law" announced by this Court in the year 1904 in *Northern Pac. R. Co.* v. *Adams,* 192 U. S. 440. The rule laid down in that case was that a railroad could by stipulation validly exempt itself from liability under a state statute for negligent injuries inflicted within that state upon passengers carried wholly gratuitously. Creation of the 1904 *Adams* rule by this Court was under authority of a power then exercised, but repudiated in 1938 in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, whereby

federal courts, in passing upon questions of state law upon which there was no controlling state legislative enactment, declared the "general commercial law" of a state on the federal court's notion of wise public policy, independently of state court decisions.

This Court followed the *Adams* "general commercial law" state rule several times between its creation in 1904 and repudiation of this Court's power to create state law in 1938—the last application of the *Adams* rule having been made by this Court in 1923 in *Kansas City So. R. Co.* v. *Van Zant,* 260 U. S. 459. That decision stated that an act of Congress had made the effect of the conditions in an employee's pass a federal question, but decided that "federal" question entirely by reliance on the old *Adams* "general commercial law" state rule. Since the *Erie-Tompkins* decision in 1938, and in fact since 1923, the *Adams* rule has never been applied by this Court until today. Now it is applied not as a federally created state rule of "general commercial law" but as a judicially created post-*Erie-Tompkins* rule of purely federal law. While this Court may look to the 1904 pre-*Erie-Tompkins* state rule of general commercial law "as a convenient source of reference for fashioning" a post-*Erie-Tompkins* federal rule, *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367, it should not, as the Court does here, automatically accept the old state rule as a federal rule, without any appraisal of its soundness in relation to present day conditions. No such appraisal has been made here. The old *Adams* rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments.

Furthermore, the 1904 *Adams* rule, even in its original narrow scope, marked a departure from the philosophy of this Court's previous decisions. One subsequent line

of the Court's decisions has tended to limit the 1904 rule's scope while another has tended to expand it. Today's opinion expands that rule beyond any point it has before reached. As indicated, I think the *Adams* "general commercial law" state rule is an obstacle to the execution of present congressional policies embodied in statutes. That obstacle I think should be removed by this Court which fashioned the old rule. In any event, I certainly would not expand the old *Adams* rule to cover the facts of this case.

I.

It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment.

The Court's uncritical reliance today on the 1904 judicially created rule, which to me is both undesirable and uncertain in scope, emphasizes one of the inherent dangers in judge-made laws pointed out by an eminent legal commentator in the field of tort law. Professor Bohlen, in his Studies in the Law of Torts, 610–611 (1926), had this to say about "dangers" of court-made tort standards: "The first is that of the undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally valid. . . . To regard a standard of conduct as fixed

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and immutable because judicially announced, is to create a standard which, however just or even necessary at the time, may become a scandal and a hissing in the future." [1]

II.

In 1944, Jack Francis, aged 30, his wife, aged 29, and their three children, aged 3, 6, and 8, lived in Carlin, Nevada. Jack was then and had been for several years a conductor and brakeman for the respondent, Southern Pacific Company. His father, Ray E. Francis, had served the respondent in the same capacity for 35 years. The elder Francis and his wife lived in Ogden, Utah, and the young Francis family visited them Christmas week. In the early morning of December 31, Jack and his wife boarded a Southern Pacific train at Ogden bound for Carlin. They took seats in the rear car. Both had passes granted by the respondent because the husband was its employee. Each pass contained a printed stipulation that the user assumed "all risk of injury to person" and absolved the railroad "from any liability therefor." A short distance out of Ogden, while the train was still

[1] Mr. Justice Cardozo said this about the quest for unvarying and eternal certainty in the law: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born." *The Nature of the Judicial Process,* Benjamin N. Cardozo, 166–67 (1921). "Somewhere between worship of the past and exaltation of the present, the path of safety will be found." *Id.* at 160.

in Utah, an engine and train of cars crashed into the rear car. Husband and wife were killed.

This is one of two suits brought against the railroad by the grandparents as guardians of the three children to recover damages on account of their parents' deaths. The actions were brought under a Utah law since Congress has never passed any act which provides remedies against railroads for negligently injuring or killing railroad passengers, even interstate passengers on interstate railroads. Whether passengers or their dependents shall have a right of action under such circumstances has been a question left by Congress for regulation by the state in which the injury or death occurred. See, *e. g., Chicago, R. I. & P. R. Co.* v. *Maucher,* 248 U. S. 359, 363. See also cases collected in 76 A. L. R. 428–435.

For many years the states did not generally authorize suits for wrongful death. Their omission of such remedies was due to traditional "common law" hostility to recoveries for death. This hostility provoked much lay criticism, echoes of which may be found in the cases cited below.[2] About the middle of the last century, because of "dissatisfaction with the archaisms of the law," state legislatures began to abolish the common law rule by specifically authorizing suits for wrongful death and now all states have such statutes. *Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 346, 350–351. So strong is Utah's antipathy to the common law attitude that Art. XVI, § 5, of the Utah Constitution forbids the state legislature to abrogate the right to recover damages for wrongful death. This suit for damages was brought under the

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[2] *Van Amburg* v. *Vicksburg, S. & P. R. Co.,* 37 La. Ann. 650, 651, 65, 55 Am. Rep. 517, 518; *Rowe* v. *Richards,* 35 S. D. 201, 206–207, 151 N. W. 1001, 1003; *Salsedo* v. *Palmer,* 278 F. 92, 94; *Maney* v. *Chicago, B. & Q. R. Co.,* 49 Ill. App. 105, 112–113. For a discussion of the state wrongful death statutes, see annotations: L. R. A. 1915E, 1075, 1095, 1163; 23 A. L. R. 1262; 27 L. R. A. (N. S.) 176.

Utah statute enacted in accordance with that state constitutional policy. Utah Code Ann. § 104–3–11 (1943). And in a case involving a federal wrongful death statute this Court has said "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied" by such statutes. *Van Beeck* v. *Sabine Towing Co., supra* at 350–351.

One count of the complaint here alleged ordinary negligence; the other alleged gross negligence. Either type of negligence would justify a recovery under the Utah statute. And since the complaint claimed recovery under the Utah statute, liability, if any, springs from that statute. See *Spokane & I. E. R. Co.* v. *Whitley,* 237 U. S. 487, 494–495. Under Utah law the railroad here could not have defeated liability in this case on the ground that the passes stipulated that the users would assume the risk of injury. The trial judge charged the jury, however, that because of opinions of this Court the pass exemption stipulation was valid and barred recovery "for just ordinary negligence." The Circuit Court of Appeals affirmed on the basis of this Court's *Adams* and *Van Zant* cases. 162 F. 2d 813, 816. The action of the two lower courts was in accordance with their interpretation of this Court's opinions notwithstanding the fact that long ago the Utah Supreme Court, in declaring state law, rejected such a contention in the following language: "It is argued that even if the ticket was a free pass gratuitously possessed with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is correct in this contention." *Williams* v. *Oregon Short Line R. Co.,* 18 Utah 210, 221, 54 P. 991, 994 (1898). See also *Houtz* v. *Union Pacific R. Co.,* 33 Utah 175, 179, 93 P. 439, 441; *Hansen* v. *Oregon Short Line R. Co.,* 55 Utah 577, 581–582, 188 P. 852, 854. This

Court has itself recognized and acted on the fact that it is the law of Utah that "when a common carrier accepts a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence, and skill, which, as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous passage permitted, by him, in violation of law." *Southern Pac. Co.* v. *Schuyler,* 227 U. S. 601, 609–610.[3]

In the *Schuyler* case this Court sustained a Utah judgment under the Utah wrongful death statute, which judgment permitted recovery for death of a "gratuitous" passenger killed while riding free, although assuming he was

[3] The recent *Van Wagoner* Utah Supreme Court decision cited by the Court is not out of harmony with the above cases but, as amended on rehearing, is expressly limited to a holding that contributory negligence of a decedent may bar recovery under the Utah statute on the part of his heirs. That holding simply means that the death was not "wrongful" under the statute. It does not mean that where there is company negligence Utah would hold that a railroad could barter away the beneficiary's rights.

And as I read the opinion of the Circuit Court of Appeals in the case now before us, it did not hold that under Utah law an action is maintainable only where "the decedent could have maintained an action to recover damages for his injury if death had not ensued." For that statement in its opinion, the Circuit Court of Appeals relied only on the *Adams* case and several other opinions of this Court. It did not purport to be construing Utah law. On this point, therefore, there is no question presented as to whether the Circuit Court of Appeals made a "plain error" in the construction of state law. The state law on that subject has been very clearly stated by the State Supreme Court to the effect that it "is beyond the power of the Legislature to take from the dependents of an employee their claim against the employer, where such employee dies as the result of a wrongful injury by the employer." *Halling* v. *Industrial Comm'n of Utah,* 71 Utah 112, 120–121, 263 P. 78, 80–81.

not a member of a group to whom the carrier might lawfully issue passes under the Hepburn Act. The *Schuyler* case held that the Hepburn Act did not deprive Schuyler, who violated it, "of the benefit and protection of the law of the State," because "such a violator" was "a human being, of whose safety the plaintiff in error [railroad] had undertaken the charge." Jack Francis and his wife were not violators of the Hepburn Act or any other act, federal or state. Each of them "was a human being of whose safety the railroad had taken charge." But by today's decision their children are denied the benefit of Utah's law. A federal rule of law is said to compel this Court to bar recovery under Utah's statute.

III.

What is this federal rule of law? Where did a rule emanate which today constrains this Court, without appraisal of the rule's scope or merits, to deny these children a right to recover damages from a railroad that negligently killed their parents? I say "negligently killed" because that must be assumed since the Court affirms a judgment against the children in a case where the jury was denied a right to award damages for a killing caused by the "ordinary negligence" of the railroad.

The Court points to no records and I can find not a single shred of evidence that Congress has ever directly or indirectly, explicitly or impliedly, through the Hepburn Act, or through any other act, authorized railroads to contract against liability for their negligence which results in the injury or death of a railroad employee or any other person legally riding on a railroad pass. The original rule followed in an expanded form by the Court today is actually a judicial product of the old days of *Swift* v. *Tyson,* 16 Pet. 1 (1842), days in which federal courts invoked "a transcendental body of law outside of

any particular State . . . using their independent judgment as to what it was." Holmes, J., dissenting, *Black & White Taxi. Co.* v. *Brown & Yellow Taxi. Co.,* 276 U. S. 518, 533.

As already pointed out, our decision in *Erie R. Co.* v. *Tompkins, supra,* repudiated *in toto* the old *Swift* v. *Tyson,* "transcendental" or "general commercial law" power of federal courts. But as I see this case, the Court now perpetuates and strengthens the old rule based on the repudiated *Swift* v. *Tyson* doctrine, and the rule applied today rests on no other foundation than a completely uncritical adoption of this Court's 1904 "independent judgment." That judgment held it to be bad public policy, indeed, offensive to the Court's "moral sense," for a state to provide that an injured passenger who rode on a wholly gratuitous and guest basis could recover damages if a railroad had cautiously stipulated in advance that such a free passenger must assume the risks of railroad negligence. An investigation of the evolution of the "rule" from its 1904 beginning and application to its much broader application today will demonstrate, I believe, that it is rooted now, as in 1904, in nothing but the original "transcendental general law" source.

IV.

The background of the 1904 rule throws light on its judicial "general law" origin. In 1852 this Court was unable to find any difference between the kind of duty owed by a railroad to its paying and non-paying passengers; "public policy and safety" were held to require that a railroad exercise "the greatest possible care and diligence" for the safety of all passengers, and any less measure of care entitled an injured passenger to recover. *Philadelphia & Reading R. Co.* v. *Derby,* 14 How. 468,

485–486.[4] This principle was reaffirmed the next year in a water carriage case "as resting, not only on public policy, but on sound principles of law." *The Steamboat New World* v. *King,* 16 How. 469, 474; and see to the same effect *Railroad Company* v. *Lockwood,* 17 Wall. 357, 382–383. In 1873, this Court in an elaborate and well-reasoned opinion held that it was against the public interest and public policy to permit common carriers to stipulate against the results of the negligence of themselves or their agents, and that while the rule applied both to carriage of goods and passengers, it applied with "special force to the latter." *Railroad Company* v. *Lockwood, supra* at 384. The passenger in the *Lockwood* case was a drover traveling on a free pass to look after cattle; the Court reserved decision as to whether the rule would apply to a strictly free passenger. Four years later the Court applied the same reasoning to a railroad-designated "free pass" passenger, finding that in fact there was consideration for the carriage and that it was not a "matter of charity" or a "mere gratuity." *Railway Company* v. *Stevens,* 95 U. S. 655, 658, 660. The *Lockwood* and *Stevens* cases plainly stand for the principle that where there is any benefit derived by the railroad a pass is not "free," and that a passenger riding on such a pass may

[4] The Court said: ". . . It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference, (if it be capable of definition,) as the verdict has found this to be a case of gross negligence.

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.' "

recover for injuries due to the railroad's negligence, regardless of stipulations in his pass.

In the *Lockwood* case this Court refused to follow decisions of the Supreme Court of New York, the State where the carriage contract was made and where the accident occurred, but instead, since there was no controlling New York statute, expressly decided the point as one of "general commercial law." 17 Wall. at 368. And see *Chicago, Milwaukee & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 136–137. Out of this "general commercial law" background emerged the "rule" relied on by the Court in the *Adams* case.

V.

The beginning of the doctrine that a railroad could by stipulation exempt itself from liability for negligent injury to strictly free passengers was in *Northern Pac. R. Co.* v. *Adams, supra,* and *Boering* v. *Chesapeake Beach R. Co.,* 193 U. S. 442, both decided in 1904. The decisions in these cases bear internal proof that they rested on the "general commercial law" ground. The *Adams* opinion treated the newly announced doctrine as no more than a special exception to the rule of "general commercial law" of the *Lockwood* case, which rule denied railroads power to exempt themselves from the effects of their negligence through the device of "free" passes.

As bearing on the narrow scope of the *Adams* rule and its "transcendental law" origin, it is of importance that the *Adams* and *Boering* cases were decided in 1904, two years before Congress outlawed political passes in the Hepburn Act. There existed at that time a widespread hostility to the use of "strictly free" railroad passes. The pass in the *Boering* case as well as in the *Adams* case was "strictly free." Adams, the deceased, was a lawyer but not employed by the railroad that gave him the pass. Many believed, as shown by the legislative history of the

Hepburn Act, that railroads were using passes to influence public men to favor railroads at the expense of the public good. Consequently, pass givers and pass users of "strictly free" passes, as distinguished from givers and users of employees' passes, were in bad repute. The *Adams* and *Boering* decisions plainly reflect this sentiment. Both decisions spotlighted the importance of having "those who accept gratuities and acts of hospitality" stand by their contracts to assume the risks of injury incident to riding. In the *Lockwood* and *Stevens* cases, where no money was paid for passage, but neither carriage was strictly free, interests of the public in a carefully operated railroad system were expressly held to outweigh sanctity of contracts and all other considerations; in the *Adams* and *Boering* cases, sanctity of contracts, particularly contracts made to obtain strictly free transportation, was given greater weight than the public's interest in safe transportation.[5] But all the cases alike turned out judge-made rules of "general commercial law." Now let us follow the *Adams* rule to its appearance in other cases relied on by the Court today for the statement that this rule of "general commercial law" has become part of the "warp and woof" of the Hepburn Act.

Charleston & W. C. R. Co. v. *Thompson,* 234 U. S. 576, is the next case relied on here. It was decided in 1914, eight years after passage of the Hepburn Act, which had, with certain exceptions, prohibited issuance of passes by railroads. 34 Stat. 584, 49 U. S. C. § 1 (7). The suit was brought by the wife of a railroad employee to recover for injuries sustained by her while an interstate railroad

[5] A note appended to the *Lockwood* case as reported in 21 L. Ed. 627 cites cases in support of the position there taken that the *Adams* rule was contrary to the weight of judicial authority. And see 22 L. R. A. 794; 37 L. R. A. (N. S.) 235; 37 Ann. Cas. 623.

passenger riding on a pass. The Court of Appeals of Georgia considered it to be the general rule that strictly free pass passengers could not recover for injuries if their passes contained a stipulation requiring the passenger to assume the risk of railroad negligence. But that court went on to hold that the Hepburn Act, by specifically authorizing issuance of passes to railroad employees and their families, had put them in a different category from "purely gratuitous" passengers. The court regarded passes issued to members of an employee's family as partial compensation for the employee's services, and for that reason distinguished persons riding on such passes from strictly free pass passengers, to whom the harsh *Adams* rule applied. 13 Ga. App. 528, 80 S. E. 1097. This Court reversed, saying that "The main question is whether when the statute permits the issue of a 'free pass' to its employés and their families it means what it says." It did not find that the pass on which the injured wife of the employee had ridden was free in fact, but held that the "pass was free under the statute," thereby treating employees' passes as though they were strictly free, without stating any reason except that the Hepburn Act had referred to passes as "free." *Cf. Norfolk Southern R. Co.* v. *Chatman,* 244 U. S. 276, 280–281. The Court then went further and upheld the pass stipulations for railroad exemption from liability for negligence. But the Court did not at all rely on the Hepburn Act for this latter holding. Instead it was said that "As the pass was free under the statute . . . the validity of its stipulations" was "established by the decisions of this court," relying completely upon the *Adams* and *Boering* cases. Thus the *Charleston & W. C. R. Co.* case did not discover the *Adams* rule in an act of Congress; the rule it relied on had been judicially created in 1904 by an exercise of the Court's "transcendental" law power.

Kansas City So. R. Co. v. *Van Zant,* 260 U. S. 459, decided in 1923, is the next and the last case relied on by the Court today. That case decided that the "incidents and consequences" of an employee's pass raise a federal question. *Cf. Southern Pac. Co.* v. *Schuyler,* 227 U. S. 601, 610; *Chicago, R. I. & P. R. Co.* v. *Maucher,* 248 U. S. 359, 363. It then repeated the statement made in *Charleston & W. C. R. Co.* v. *Thompson, supra,* that an employee's pass transportation is "free," again without any explanation of why. To this extent it may be said that the Court was then construing the Hepburn Act, though I think its construction was wrong. But the Court did not, even in this last case (1923), hold or intimate that the Hepburn Act of itself put employee-pass passengers in a separate class, to be negligently killed or injured with impunity. To degrade railroad employee passengers to this unfortunate level this Court in the *Van Zant* case again relied on the rule it had fashioned in the *Adams* and *Boering* decisions. So long as one agreed with the soundness of the *Adams* case rule and with this Court's exercise of a power to declare "general commercial law" under the *Swift* v. *Tyson,* doctrine, the result of the *Van Zant* case could not be questioned in 1923. But that was fifteen years prior to *Erie R. Co.* v. *Tompkins, supra,* in which we abandoned the "transcendental" law doctrine, as typified by the *Adams* rule, and today's decision is ten years after we took that salutary step.

In applying this pre-*Erie-Tompkins* court-made transcendental law rule at this time, the Court not only in part neutralizes our *Erie-Tompkins* decision. It actually leaves a rule standing which might have already fallen under the repudiated *Swift* v. *Tyson* doctrine so far as it governed. For though a purely transcendental law rule judicially created by this Court under the pre-*Erie-Tompkins* doctrine was "none the less the law of the

State," it need only have remained the "law of the State" until "changed by its legislature." *Chicago, Milwaukee, & St. P. R. Co.* v. *Solan,* 169 U. S. 133, 136–137. Hence, had the *Swift-Tyson* doctrine not been repudiated, the *Adams* rule as applied to persons injured in Utah should have fallen of its own weight had the Utah legislature passed a law authorizing a man's children to recover from a railroad that negligently killed their parents while they were "free pass" passengers. Utah has a statute broad enough to authorize such recoveries. The only barrier to recovery under that state statute is grounded on a court-announced "commercial law" rule, a poor excuse indeed for depriving a state of exercising its traditional power to control actions for local wrongful deaths. Of course this is an interstate carrier and we should not constrict congressional powers over it by narrow statutory interpretations. *Cf. Federal Trade Comm'n* v. *Bunte Bros.,* 312 U. S. 349. But the very absence of a federal statute to take the place of local wrongful death statutes should be the equivalent of a loud congressional warning to courts to refrain from encroaching on state powers here.

VI.

It is said however that Congress, although aware of the *Adams* transcendental law rule, has never changed it. Indulging for the moment the convenient fiction that Congress knows all about that rule and what it means, why should it think that old rules laid down by this Court and based on the *Swift* v. *Tyson* doctrine could survive our decision in *Erie* v. *Tompkins?* And why should Congress think that a rule which had never been applied by this Court to bar the children of a deceased employee would be extended to bar recovery by those children? I venture the suggestion that it would be shocking to members of Congress, even those who are in closest touch with

interstate commerce legislation, to be told that their "silence" is responsible for application today of a rule which is out of step with the trend of all congressional legislation for more than the past quarter of a century. There are some fields in which congressional committees have such close liaison with agencies in regard to some matters, that it is reasonable to assume an awareness of Congress with relevant judicial and administrative decisions. But I can find no ground for an assumption that Congress has known about the *Adams* rule and deliberately left it alone because it favored such an archaic doctrine.[6] I reject the idea that Congress ever has approved such a rule, and none of its legislation for the past quarter of a century indicates that it ever would have approved it.

VII.

The legislative history of the Hepburn Act's free pass provision shows that application of the *Adams* doctrine to employees' passes is not in accordance with but directly hostile to the congressional purpose in permitting employee passes. That Congress never would have passed an Act which so penalized employees, may be seen by reading even the few portions of the Congressional Rec-

[6] The Transportation Act of 1940, 54 Stat. 899, 900, 49 U. S. C. 1 (7), expanded the groups eligible to ride on "free passes." But no language used in that Act and no legislative history that I have found indicates any congressional knowledge of the existence of the penalizing *Adams* rule, much less approval of it. Far from indicating a purpose to acquiesce in any kind of reduced employee protection, Congress in § 7 (2) (f) of that Act, 49 U. S. C. § 5 (2) (f), provided a new and extraordinary protection for employees whose jobs might be affected by railroad mergers and consolidations. See Sen. Rep. No. 433, 76th Cong., 1st Sess., 4, 21; H. R. Rep. No. 2832, 76th Cong., 3d Sess., 68–69; *Interstate Commerce Comm'n* v. *Railway Labor Assn.*, 315 U. S. 373, 379–380.

ord and committee reports cited below.[7] In very brief summary that history shows:

Prior to 1906, there grew up a demand by the people that railroads cease discriminating against some shippers in favor of others and cease using free passes as a means to obtain special favors from public officials and administrative agencies. Public complaint was not against employees using passes. In fact, some unions had bargaining agreements for passes, and Congressmen who spoke on the Hepburn bill considered employees' passes to be a part of the inducement to work for railroads. Passes were spoken of by those who discussed legislation on the House and Senate floors as part of the compensation of employees. The subject was an important one and was so treated. At one time a conference report recommended to both houses that all passes be prohibited. 40 Cong. Rec. 7741. This report was defeated and the debates in-

[7] 40 Cong. Rec. 7741, 7851–7852, 7920–7940, 7978–7998. The following statement is typical of the sentiment that brought into the Hepburn Act the exception that permitted issuance of passes to and use of them by employees: "While I am on my feet I will take the opportunity to say in regard to the pass amendment or provision that I have received, as other Senators have, a great many telegrams from railway employees and from organizations of railway employees protesting against any provision being incorporated here that will prevent them from being supplied with or from accepting free transportation. I shall not take time to discuss that, as it has been fully discussed. I simply wish to say that I fully agree with them, and I believe that we ought not to enact any such legislation, and should we do so it would, in my judgment, be perpetrating a very great injustice upon those people. The matter of free transportation, as the Senator from Wisconsin [Mr. Spooner] said yesterday, enters partly into the consideration for their employment, and we have no moral right to deprive them of that privilege." 40 Cong. Rec. 7981. See also *id.* at 7984–7985. See Sen. Rep. No. 1242, 59th Cong., 1st Sess., Views of Mr. Tillman and Mr. Newlands, pp. 10, 16; 1 Sharfman, The Interstate Commerce Commission 44 (1931); *Sassaman* v. *Pennsylvania R. Co.*, 144 F. 2d 950, 956, nn. 7 and 8.

dicate that it would have been difficult to pass a bill which failed to permit issuance of passes to railroad employees—not in the spirit of giving alms to beggars or favors to politicians, but to requite men for faithful work.

If any senator or congressman discussing the Hepburn Act had ever heard of the *Adams* rule, he failed to mention it. But it must be conceded there was no reason for him to mention it, since the purposes of the Act bore no relation, directly or remotely, to liability of a railroad for injury to passengers whether riding on passes or paying their fares. Even if some member of Congress had been acquainted with the *Adams* rule and had thought that the Hepburn Act bore some remote relation to the liability of railroads for injury to passengers, still he would have had no reason to believe this Court would subsequently expand that rule, then applicable only to "strictly free pass" passengers, to penalize employees and others authorized by Congress to ride on passes. As I see it, today's decision undermines the purpose Congress had in mind in approving the long-standing practice of employees' passes. It perverts an advantage expressly saved to employees into a penalty for making use of it. It makes traps of these passes.

VIII.

Moreover, the subjection of railroad employees while passengers to the hazards of uncompensated injuries is at war with the basic philosophy which has found expression in other industrial and social legislation for many years. Employers' liability acts, compensation acts, social insurance legislation of the federal government and various states, and a host of other legislative policies have been grounded upon the basic premise that care of the accidentally injured should be accepted as a matter of great public concern. Congress has also erased every vestige of the old judicially created fellow-servant and

assumption-of-risk doctrines in connection with suits by railroad employees on account of injuries suffered in the course of their employment. *Tiller* v. *Atlantic C. L. R. Co.,* 318 U. S. 54. The analogy between these now repudiated judicially created tort-law doctrines and the present rule was pressed on the Court in briefs for the railroad in the *Adams* case. Congress has also emphatically outlawed all kinds of stipulations and contracts to exempt railroads from liability for their negligence in Employers' Liability Act cases. *Duncan* v. *Thompson,* 315 U. S. 1. All of this body of legislation, and much more to which reference could be made, has departed from the premise of the *Adams* and *Boering* decisions that it is more important to society that men abide by ticket and contract stipulations [8] than it is to have a system which provides compensation for the industrially injured and the dependents of those who are killed. For our society attempts to take care of its aged, unemployed, crippled and disabled, as well as the dependents of those killed by our industrial machine. See *Georgetown College* v. *Hughes,* 76 U. S. App. D. C. 123, 130 F. 2d 810, 822–825; *Interstate Commerce Comm'n* v. *Railway Labor Assn.,* 315 U. S. 373, 376–378. And the present railroad regulatory system is such that payment by railroads for injuries inflicted by them upon passengers is just as certainly borne by the public as though those injured and their dependents were directly supported by governmental institutions.

Whether allowance of damages for negligent death is the best way to meet the problems incident to transpor-

[8] The *Boering* case was supported by the following statement: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." 193 U. S. at 451.

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tation dangers is beside the point. Many courts generally, including this one and Utah's, may have been wrong in thinking that the possibility of having to pay damages for deaths of passengers due to railroad negligence would make railroads more cautious.[9] Perhaps society could take care of injured passengers and their dependents in a less wasteful manner. But so long as Congress leaves the states free to adopt this method of meeting the problem, I think this Court should not handicap the states. Congress could provide a substitute for the state laws; we cannot.

IX.

Today's decision leaves states free to provide that railroads must pay for injury or death of passengers who can and do pay a full money fare for passage. This group is far more likely to include some people who are better able financially to take care of themselves in case of injury than are the members of some of the other groups permitted by the Hepburn Act to ride on free passes, all of whom are penalized by today's decision. These groups are in addition to railroad employees and their families, employees of other railroads; ministers of religion; Young Men's Christian Association workers; inmates of eleemosynary institutions; indigent, destitute, and homeless persons; disabled soldiers; and others in analogous categories. In following a course today that

[9] *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368. See *Jacobus* v. *St. Paul & C. R. Co.*, 20 Minn. 125, 130: "Whether the case be one of a passenger for hire,—a merely gratuitous passenger,—or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger."

takes all of the above groups out from under the protection of state laws, the Court ignores the signs erected by Congress, all of which point in the opposite direction. Assuming the Court is right in saying that a rule with such consequences has become a part of the warp and woof of the Hepburn Act, it is a defective part which this Court alone has woven into the Act and which clashes with the congressionally fashioned fabric and design. The result is a motley pattern. I would restore the original congressional design.

No sound argument has been or can be advanced for application of the 1904 *Adams* rule in today's entirely different judicial and legislative environment, even as the rule was first narrowly applied to a purely gratuitous carriage, except that it was unquestioningly accepted 34 and 25 years ago in cases where the rule's soundness was not challenged. When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.

The *Van Zant* case did hold that since the Hepburn Act the "incidents and consequences" of an employee's pass raised a federal question. It then held that the user of an employee's pass must stand by his contract to assume the risks of negligent injury by the railroad. Neither it, nor any other case since the Hepburn Act, until the case today, has held that the penalizing consequences of the father's contract must be visited upon his children. I would not so extend the more than dubious *Van Zant* doctrine.

WOODS, HOUSING EXPEDITER, *v.* STONE.

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

No. 392. Argued February 4, 1948.—Decided March 15, 1948.

1. The one-year period of limitations prescribed by § 205 (e) of the Emergency Price Control Act of 1942 as amended, on an action against a landlord on account of an overcharge in rent of property which the landlord had failed to register as required by rent regulations, begins to run not from the date of payment of the rent but from the date of the landlord's failure to comply with a refund order. Pp. 473–478.
2. Failure of the landlord to make refund in accordance with the refund order is a violation of an "order . . . prescribing a maximum" rent under § 205 (e) and gives rise to the cause of action created by that section. P. 477.
3. The landlord's own failure to register the property having rendered the payments of rent subject to revision and to refund, under legislation and regulations in force when the payments were made, the objection to the refund order as retroactive can not be sustained. Pp. 477–478.

163 F. 2d 393, reversed.

The Price Administrator, predecessor of the Housing Expediter, brought an action against the respondent under § 205 (e) of the Emergency Price Control Act of 1942 as amended, on account of an overcharge in the rental of property. The District Court held that the period of limitations under the Act began to run from the time of the overcharge, and not from the time of the respondent's failure to make refund pursuant to a refund order. The Circuit Court of Appeals affirmed. 163 F. 2d 393. This Court granted certiorari, limited to the question of the statute of limitations. 332 U. S. 835. *Reversed,* p. 478.

Stanley M. Silverberg argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Irving M. Gruber* and *Ed Dupree.*

James F. Brennan argued the cause for respondent. With him on the brief was *Carl M. Weideman.*

Norma L. Comstock filed a brief, as *amicus curiae,* urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Respondent Stone owned a house in Mooresville, Indiana which he rented to one Locke for $75 per month beginning on or about August 1, 1944. As this was the first rental of the premises, the applicable law [1] and regulations [2] imposed on the owner a duty to file a registration statement within thirty days.

The respondent failed to register the property. He sold it in April 1945 and registration by the new owner brought notice to the Area Rent Director of respondent's prior renting of the property without complying with the registration requirement. On June 28, 1945, the Director, pursuant to the regulations, reduced the rental from $75 to $45 per month, effective from the first rental, and

[1] Emergency Price Control Act of 1942, 56 Stat. 23, as amended by Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App. (Supp. V, 1946) § 901 *et seq.*

[2] Section 7, Rent Regulations for Housing, 8 Fed. Reg. 14663, 10 Fed. Reg. 3436, providing in part as follows: "*Registration*—(a) *Registration statement.* On or before the date specified in Schedule A of this regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord. . . ."

ordered the excess refunded within thirty days thereafter. Respondent failed to refund, the tenant did not sue and this action was instituted by the Price Administrator. The District Court and the Court of Appeals, among other things, held that the one-year statute of limitations ran from the dates of payment of the rentals. 163 F. 2d 393. This conflicted with the holding of the Court of Appeals for the Fourth Circuit which, under similar circumstances, held that the limitation period started upon default in refunding the excess within thirty days after the refund order. *Creedon* v. *Babcock,* 163 F. 2d 480. We granted certiorari limited to this question. 332 U. S. 835.

No question is raised, and none could have been raised in this proceeding, as to the validity of the relevant regulations and the refund order, either on the ground of retroactivity or otherwise, because any challenge to the validity of either would have to go to the Emergency Court of Appeals. 50 U. S. C. App. (Supp. V, 1946) § 924; *Bowles* v. *Willingham,* 321 U. S. 503. See also *Woods* v. *Cloyd W. Miller Co.,* 333 U. S. 138. Taking the legislation, the regulations and the order to be valid exercises of governmental power, as we are thus required to do, the only question before us is when do excessive collections by the landlord begin to enjoy the shelter of the statute of limitations?

Under the system of rent control as established, a landlord is required to register rented accommodations within thirty days after they are first devoted to that use. This brings notice to the control authority that the premises are within its official responsibility and provides data for quick, if tentative, determination as to whether the rental exacted exceeds the level permitted by the policy of Congress set out in the statute.

But when, as in this case, the landlord does not comply with this requirement, there is likelihood that, as hap-

pened here, his transaction will be overlooked for some time or perhaps escape scrutiny entirely. But the landlord is not allowed thus to profit from his own disobedience of the law. If he could keep the excess collections by thus retarding or preventing scrutiny of his contract, he would gain an advantage over all landlords who complied with the Act as well as over tenants whose necessity for shelter is too pressing to admit of bargaining over price. The plan therefore provides that, despite his failure to register, the landlord may continue to collect his unapproved price, but only on condition that it is subject to revision by the public authority and to a refund of anything then found to have been excessive.[3]

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[3] Section 4, Rent Regulations for Housing, 8 Fed. Reg. 14663, 10 Fed. Reg. 3436, providing in part as follows: "*Maximum rents.* . . . (e) *First rent after effective date.* For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in section 7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

"If the landlord fails to file a proper registration statement within the time specified (except where a registration statement was filed prior to October 1, 1943), the rent received for any rental period commencing on or after the date of the first renting or October 1, 1943, whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under section 5 (c) (1). Such amount shall be refunded to the tenant within 30 days after the date of issuance of the order. . . ."

The plan of the statute and the regulations issued pursuant to it was applied in this case. The landlord failed to register the property. His rental operations escaped notice of the authorities until fortuitously disclosed. He collected as he had a right to do, but subject to readjustment, a rental fixed by himself that was found on inquiry to exceed by 66-2/3% what was fair rental value of the property. He was ordered to refund the excess. He now contends that he can keep all of it that he collected upwards of a year before the action was commenced, upon the ground that the one-year statute of limitations runs,[4] not from the date of his default in obeying the refund order, but from the date of each collection of rental.

We cannot sustain his contention. The statute and regulations made his rentals tentative but not unlawful. Until the contingency of readjustment occurred, the tenant could have had no cause of action for recovery of any part of the rental exacted by the landlord. The cause

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[4] Section 205 (e) of the Act as amended, 50 U. S. C. App. (Supp. V, 1946) § 925 (e) provides: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. . . . For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be . . . . If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. . . ."

The functions of the Administrator were subsequently transferred to the Housing Expediter who appears as petitioner here.

of action now does not rest upon, and hence cannot date from, mere collection. The duty to refund was created and measured by the refund order and was not breached until that order was disobeyed. It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred. *United States* v. *Wurts,* 303 U. S. 414. We think no such result was expressed or intended. It was from the violation which occurred when the order was not obeyed within the required time that the statute of limitations commenced to run. *Cf. Rawlings* v. *Ray,* 312 U. S. 96; *Fisher* v. *Whiton,* 317 U. S. 217; *Cope* v. *Anderson,* 331 U. S. 461.

It is now suggested that no cause of action can be based on a refund order, irrespective of its validity. As we have pointed out, the validity of the regulation and order are conclusive upon us here. This cause of action is based upon violation of an "order . . . prescribing a maximum [rent] . . . ." The command to refund cannot be treated as a thing apart, but must be taken in its setting as an integral and necessary part of the order fixing the maximum rent. It was this order that was disobeyed. It would be a strange situation if there were authority to order the landlord to make a refund but no legal obligation on his part to pay it. We think it clear that default in obedience to the requirement of refund gives rise to the cause of action sued upon herein.

It is also suggested that the refund order applies the law to the landlord retroactively. Quite apart from the fact that this is an objection to the order itself rather than to the question of limitation of time, we think the suggestion to be without merit. This is not the case of a new law reaching backwards to make payments illegal that were free of infirmity when made. By legislation

and regulation in force before the collections were made, the landlord's own default in registering had rendered these payments conditional, subject to revision and to refund. Readjustment under these conditions cannot be said to be retroactive law making.

We hold that the one-year statute of limitations began to run on the date that a duty to refund was breached, and on this point only we reverse the judgment of the court below.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

I had supposed that no rule of judicial administration was better settled than that the Court should restrict itself to the questions presented in a petition for certiorari. This is especially true where, as here, the petition was granted but "limited to the question as to the statute of limitations presented by the petition for the writ," 332 U. S. 835, and the case was transferred to the summary docket. The exceptions to this rule are rare, as where the jurisdiction of this Court or of the lower courts is plainly wanting, or where a patent error *in favorem vitae* is to be noted. In any event, it is clear that this case could not be one of them. The exclusive jurisdiction provisions of the Emergency Price Control Act may well preclude our consideration of the validity of the "retroactive order." But since an issue other than that pertaining to the statute of limitations has been dealt with, I would like to add a few words to MR. JUSTICE JACKSON'S opinion, inasmuch as his immoderate restraint does not lay bare the "merits" of the controversy.

The crux of the matter is that where a landlord rents new housing accommodations but, as here, disobeys the regulatory scheme and fails to file a registration statement, if he chooses to collect the rent that he himself has

fixed, he can do so only contingently. The Administrator may catch up with him and fix what was the proper amount from the beginning. The excess is illegal and must therefore be refunded.

There is nothing novel about a regulatory scheme whereby landlords who violate the law are denied the right to profit thereby. It has consistently been upheld by the Emergency Court of Appeals. *150 East 47th Street Corp.* v. *Creedon,* 162 F. 2d 206; see *Senderowitz* v. *Clark,* 162 F. 2d 912, 917; cf. *Easley* v. *Fleming,* 159 F. 2d 422. When Congress provided in § 2 (g) of the Act that regulations "may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof," 56 Stat. 23, 27, 50 U. S. C. (Supp. V, 1946) § 902 (g), it plainly authorized effective administrative remedies for dealing with evasion.

If such an order is to be termed "retroactive," it comes within the Court's recent ruling that "such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194, 203.

MR. JUSTICE DOUGLAS, dissenting.

I think it is plain that a "refund order" is not a maximum rent order since it does more than fix a rent ceiling. I would not stretch a point to call it such, in view of the aversion our law has to the creation of retroactive liabilities. The Court finds fairness in the result because of the special circumstances of the case. Yet it recognizes a cause of action created not by Congress but by those who administer the law. That cause of action is

written into the statute through the addition of retroactive liabilities.

The rent collected by this landlord was the maximum rent which he could at the time lawfully collect. At no time did he collect rent in excess of the ceiling then prevailing.[1] Almost a year later the ceiling was reduced—from $75 a month to $45 a month—and the reduction was made retroactive by a "refund order." The landlord is now sued by the government for treble the amount of the so-called overcharge.

The statute gives a right of action against anyone who collects more than the prescribed maximum price or rent. § 205 (e).[2] No right of action to sue for overcharges prescribed by a "refund order" is contained in § 205 (e) which defines the cause of action and the statute of limitations with which we are presently concerned.[3] The cause of action there described is based on a violation of a maxi-

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[1] The maximum rent for the type of housing involved here was the first rent after the effective date of the regulations, *viz.*, $75 a month. See Rent Regulation for Housing, § 4 (e) (3), 8 F. R. 14663, 10 F. R. 3436.

[2] Section 205 (e) provides, so far as here material, as follows:

"If any person selling a commodity violates a regulation, order, or price schedule *prescribing a maximum price* . . . the person who buys such commodity . . . may, within one year from the date of the occurrence of the violation, . . . bring an action against the seller on account of the overcharge. . . . For the purposes of this section the payment or receipt of rent . . . shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration *exceeds the applicable maximum price*." (Italics added.)

[3] It may be that the Administrator could sue to compel compliance with the refund order under § 205 (a). See *Porter* v. *Warner Co.*, 328 U. S. 395. There may be other remedies arising from respondent's failure to file a registration statement. Thus § 4 (e) of the Rent Regulations for Housing states: "The foregoing provisions and any refund thereunder do not affect any civil or criminal lia-

mum rent order. The statute of limitations runs "from the date of the occurrence of the violation." It will not do to say that the date of the violation in this situation must relate to the "refund order" because prior thereto there was no violation. Such an interpretation rewrites § 205 (e) and creates a cause of action not only for violating a rent ceiling but also for violating a "refund order." That changes the scheme of the section. The right to obtain a return of money paid normally turns on conditions existing when it was paid. The statute of limitations usually starts to run then and not at some later time. Certainly it is novel law which makes the legality of rent payments turn on the unpredictable future action of an official who in the exercise of his discretion determines that a lower rental should have been paid. Yet the Court has to enter that field of retroactive law in order to make a "refund order" a maximum rent order for the purposes of § 205 (e).

Congress here said in effect that all payments for housing and commodities in excess of the prevailing ceiling were unlawful; and all payments at the ceiling were lawful. The Court in its construction of § 205 (e) does violence to that policy. For it expands the statutory cause of action so as to penalize those who in yesterday's transactions exacted no more than the law and regulations permitted. Any such use of retroactive law to construe § 205 (e) makes it most doubtful that Congress ever adopted the meaning now given the section. I would conclude that Congress had taken that course only if it had said so in unambiguous terms. But one who reads

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bility provided by the Act for failure to file the registration statement required by section 7." There is no need to canvass those possibilities here as § 205 (e) supplies the only basis for petitioner's judgment in this case.

§ 205 (e) to find any reference to liabilities based on "refund orders" reads in vain. And it is only violations of the orders described in that section which give rise to the cause of action under it.

It is said, however, that no question concerning the validity of the "refund order" can be considered here because any challenge to its validity would have to go to the Emergency Court of Appeals. I do not dispute that view. See *Bowles* v. *Willingham,* 321 U. S. 503; *Yakus* v. *United States,* 321 U. S. 414. For Congress in § 203 and § 204 of the Act provided a special administrative procedure for testing the validity of any provision of a "regulation, order, or price schedule," a procedure the constitutionality of which we have sustained. See *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States, supra.* But we are not here concerned with the power of the Administrator to issue a "refund order." Our question is different and involves only a question of law turning on the meaning of § 205 (e). What we have to decide is whether a "refund order" is a "regulation, order, or price schedule prescribing a maximum price" within the meaning of § 205 (e). That is the first step in determining the time from which the statutory period of limitations is measured.

In short, the cause of action here at issue can be created only by the statute, not by regulations. The question is not one of validity of the regulations but of statutory interpretation; not an interpretation to determine whether the statute authorizes the regulations, but whether it authorizes the suit.

UNITED STATES *v.* EVANS.

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

No. 15. Argued February 3, 1948.—Decided March 15, 1948.

1. Section 8 of the Immigration Act of 1917 does not make it a punishable offense to conceal or harbor aliens not entitled to enter or reside in the United States, in view of the ambiguity in the statute as to the scope of the offense and as to the penalty which Congress intended to prescribe. Pp. 483–495.
2. Although Congress intended by § 8 to make criminal and to punish concealing or harboring of aliens, the uncertainty as to the nature of the offense or offenses and as to the applicable penalty poses a problem which is outside the bounds of judicial interpretation and can be solved only by Congressional action. P. 495.

Affirmed.

Respondent was indicted for concealing and harboring aliens, in alleged violation of § 8 of the Immigration Act of 1917. The District Court granted a motion to dismiss the indictment. The United States appealed directly to this Court under the Criminal Appeals Act. *Affirmed,* p. 495.

David Reich argued the cause for the United States. With him on the brief were *George T. Washington,* then Acting Solicitor General, *Assistant Attorney General Caudle, Robert S. Erdahl* and *Philip R. Monahan.*

David Ginsburg argued the cause and filed a brief for appellee.

Mr. Justice Rutledge delivered the opinion of the Court.

Section 8 of the Immigration Act of 1917 provides:

> "That any person . . . who shall bring into or land in the United States . . . [or shall attempt to do so]

> or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place . . . any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*" (Emphasis added.) 39 Stat. 880, 8 U. S. C. § 144.

Appellee and another were indicted for concealing and harboring five named aliens in alleged violation of § 8. Before trial appellee moved that the indictment be dismissed on the ground that it did not charge a punishable offense. He argued that although the statute provided for two different crimes, one landing or bringing in unauthorized aliens, and the other concealing or harboring such aliens, punishment was prescribed in terms only for the former crime. The District Court accepted this argument and granted the motion to dismiss. The Government appealed directly to this Court pursuant to the Criminal Appeals Act, 28 U. S. C. § 345, and we noted probable jurisdiction.

The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses including attempts. The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting at least three, and perhaps four, possible yet

inconsistent answers on the statute's wording. Furthermore, as will appear, the legislative history is neither clear nor greatly helpful in ascertaining which of the possibilities calling for punishment was the one Congress contemplated.

Before discussing specifically the alternatives, we note that the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty.[1] Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty. Rather we are asked to make it effective by applying that one of the possibilities which seems most nearly to accord with the criminal proscription and the terms of the penalizing provision.

On the other hand, appellee does not really dispute that Congress meant, by inserting the amendment prohibiting concealing or harboring,[2] to make those acts criminal. But he denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion indicated by the premise, namely, that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense

[1] Since the issues arise on dismissal of the indictment which charges both concealing and harboring, as well as attempt to conceal and harbor, we are not asked to determine whether "conceal or harbor" as used in § 8 specifies only one offense or two distinct ones or, if the latter, the difference between the two. Cf. notes 7 and 8 *infra* and text.

[2] Section 8 as enacted originally in 1907, 34 Stat. 900, covered only bringing in or landing and attempts to bring in or land. The prohibition of concealing or harboring and of attempting to conceal or harbor was added by amendment in 1917. 39 Stat. 880.

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of judicially construing statutes [3] and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all.

Even in criminal matters a strong case would be required to bring about the result appellee seeks. For, where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose. This is as true of penalty provisions as it is of others. *United States* v. *Brown,* 333 U. S. 18.

But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.[4] But given some legislative edict, the margin between the necessary and proper judicial function of construing stat-

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[3] Indeed appellee asserts that the words of § 8 are unambiguously to the effect that fine and imprisonment are to be imposed "for each and every alien so landed or brought in . . . ," not "for each and every alien so concealed or harbored." This view regards the concluding "for each and every alien" clause as an integral and inseparable part of the penalty provision for all offenses punishable under the section.

[4] *United States* v. *Hudson and Goodwin,* 7 Cranch 32; *United States* v. *Britton,* 108 U. S. 199; *United States* v. *Eaton,* 144 U. S. 677; *Viereck* v. *United States,* 318 U. S. 236, 241, 243–244.

utes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree.

We turn then to consider whether the Government is asking that we do too much when it puts forward a preferred reading of the penal provision, perhaps suggests another as a permissible alternative, and is prepared to accept a third, though disavowing its complete consistency with Congress' intent, if neither of the others is adopted.

The Government's preferred reading would impose the same penalty for concealing or harboring as for bringing in or landing, notwithstanding the "for each and every alien" clause is limited expressly to aliens "so landed or brought in or attempted to be landed or brought in." Under this interpretation the effect of that clause would be to provide additional punishment, as stated in the brief, "where the crime of landing or bringing in aliens *or the crime of concealing or harboring aliens* involves more than one alien brought into the country illegally." (Emphasis added.)

This construction is admittedly ungrammatical and the failure to integrate the wording of the "each and every alien" clause with the language of the 1917 amendment adding the concealing and harboring offenses is conceded to have been possibly due to oversight.

If only imperfect grammar stood in the way, the construction might be accepted. But we agree with appellee that more is involved. The Government in effect concedes that in terms the section prescribes no penalty for concealing or harboring. But it argues that inclusion of them as offenses becomes meaningless unless the penalty provision, in spite of its wording, is construed to apply to them as well as to bringing in or landing. In other words, because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute.

To do this would be to go very far indeed, upon the sheer wording of the section. For it would mean in effect that we would add to the concluding clause the words which the Government's reading inserts, "and for each and every alien so concealed or harbored." It is possible that Congress may have intended this. But for more than one reason we cannot be sure of that fact.

In the first place, the section as originally enacted was limited to acts of smuggling. And there is some evidence in the legislative history that the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process.[5]

But that evidence is not conclusive.[6] And the section's wording is susceptible of much broader constructions. On the language it is possible not only to treat concealing or harboring as offenses distinct and disconnected from smuggling operations; it is also possible to regard them as separate and distinct from each other. And on the broadest possible interpretation, giving independent effect to the words "or not lawfully entitled . . . to reside within the United States," [7] the section could be taken

[5] The Senate Report accompanying the 1917 amendment stated that "such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States and related offenses . . . ." Sen. Rep. No. 352, 64th Cong., 1st Sess. 9.

[6] There is no indication of the degree or character of the relation suggested by the words "and related offenses," see the preceding note, with reference to the proximity of the acts proscribed, in time and place, to smuggling operations.

[7] This possibility apparently is not comprehended by the indictment in this case, which substitutes "and" for the "or" given by the statutory wording in describing the aliens charged to have been concealed and harbored, *viz.*, "which said alien persons then and there were aliens not duly admitted to the United States by an

to apply to concealing or harboring of aliens lawfully admitted but unlawfully remaining within the country.

In that event an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining. And, with him, one harboring an alien known to have entered illegally at some earlier, even remote, time would incur the penalties provided for smuggling, if the Government's position giving implied extension of the penalty provision were accepted.

We do not mention these possibilities to intimate opinion concerning the reach of the statute with reference to covering them, for no such question is squarely before us. But we point them out because they are relevant to the problem of assurance or reasonable certainty in asserting that Congress by necessary implication intended to extend the penalties originally and still clearly provided for smuggling to all offenses covered by the language defining the crimes.

The very real doubt and ambiguity concerning the scope of the acts forbidden, if any, beyond those clearly and proximately connected with smuggling raise equal or greater doubt that Congress meant to encompass all those acts within the penal provisions for smuggling. If acts disconnected from that process are forbidden, the separate offenses of concealing and more particularly of har-

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immigrant inspector *and* not lawfully entitled to enter or reside in the United States . . . ." (Emphasis added.)

Even if this use of the conjunctive in place of the statutory disjunctive, see text of § 8 quoted at the beginning of this opinion, would prevent applying this indictment to a case involving no illegal entry, but only illegal remaining, that fact would not prevent the drafting of other indictments to cover such cases or perhaps amending this one to give it the disjunctive effect. These possibilities are as pertinent to whether the suggested penal extension should be made as if actually presented on the indictment in its present form.

boring, if the two are distinct, might require, in any sound legislative judgment, very different penalties from those designed to prevent or discourage smuggling in its various phases. That is essentially the sort of judgment legislatures rather than courts should make.

The position the Government asks us to take involves therefore a major task in two respects, not merely one. The first is to expand the penal language beyond the explicit limitation "for each and every alien so landed or brought in," so as to apply the penalties designed for smuggling to all offenses covered by the section. The second is to do this blindly in reference to the scope and quality of the forbidden acts to which the extension is to be made, that is, without resolving beforehand the questions we have noted as arising on the face of the section in relation to its reach in defining the offenses of concealing or harboring. The Government does not ask us to undertake now to say how far the section may or may not go in these numerous aspects of defining coverage.[8] We are not willing to undertake extension of the penalty provision blindfold, without knowing in advance to what acts the penalties may be applied. Nor are we any more willing to decide wholesale among the various possibilities of coverage. That problem, squarely presented in concrete instances, might be resolved step by step, were there no difficulty over the penalty. But to resolve it broadside now for all cases the section may cover, on this indirect presentation, would be to proceed in an essentially legis-

[8] The indictment not only conjoins illegal remaining with illegal entry, cf. note 7, but charges that petitioner concealed and harbored aliens "not duly admitted . . . and not lawfully entitled to enter or reside . . . ." Thus, the specific charge in this case cannot be said to be limited to smuggling, for no wording of the statute relating to bringing in or landing is included. Such a limitation could be read into the indictment only by now declaring the statute to be limited as a whole to acts constituting part of the smuggling process.

lative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty.

Beyond the difficulties arising on the section's wording, the legislative history is sufficent in one respect, when added to the other obstacles, to make them insuperable for accepting the Government's preferred reading. It discloses that both before [9] and after [10] the 1917 amendment the immigration authorities and particularly the Commissioner General repeatedly sought from Congress the specific penal wording the Government now asks us

[9] The bills proposed by the Commissioner General would have clearly prescribed the same penalty for concealing or harboring as for landing or bringing in. The penalty provision of one draft stated that the penalty should apply "for each and every alien so landed or brought in or attempted to be landed or brought in, or so concealed or harbored, or with respect to whom there has been such an attempt to conceal or harbor, or assisting or abetting another to conceal or harbor." See Annual Report for 1909 of the Commissioner General of Immigration, 168. The simple clause "for each and every alien to whom this section is applicable" was substituted in the bill proposed in the annual report for 1910. (P. 170.) In 1911 a bill incorporating many of the Commissioner General's suggested amendments to the Act was introduced, but the penalty provisions of § 8 were not made applicable to concealing or harboring. S. 3175, 62d Cong., 2d Sess. This omission was not corrected in the subsequent drafts that eventually resulted in the 1917 statute. See H. R. 6060, 63d Cong., 2d Sess.; H. R. 10384, 64th Cong., 1st Sess.

[10] In his 1931 and 1932 annual reports the Commissioner General specifically pointed out that an amendment to § 8 was necessary because it had been interpreted to provide no penalty for the offense of concealing and harboring. A bill introduced in the House of Representatives in 1934, but not enacted, included an amendment to § 8 to make the penalty apply "for each and every alien in respect to whom any of the foregoing offenses have occurred." H. R. 9366, 73d Cong., 2d Sess. At the hearings on this bill, the Deputy Commissioner expressly pointed out that the amendment was designed "to make sure that there will be no question that we can inflict this penalty for concealing a smuggled alien." Hearings before the

to insert. These efforts were made as conflicting judicial decisions demonstrated that the courts were very much at sea [11] and their floundering was brought to congressional attention.[12] In each instance nevertheless the effort was unsuccessful.

It may well be, as the Government infers, that this only increases the mystery of Congress' failure to include explicit penalties when it added the new offenses. It is possible that Congress may have thought none were needed. But that view hardly explains satisfactorily the subsequent repeated failures to clarify the matter, after experience had shown that need. We cannot take them as importing clear direction to the courts to do what Congress itself either refused or failed on notice to do upon so many occasions and importunities.

We are not entirely sure that the Government intends to put forward as an alternative suggestion the reading,

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House Committee on Immigration and Naturalization on H. R. 9366, 73d Cong., 2d Sess. 22.

In 1940 the general problem was again before Congress when it was made unlawful to stow away in order to facilitate entry into the United States or to aid or abet a stowaway, 54 Stat. 306, and again when the Act was amended to authorize the deportation of any alien who, knowingly and for gain, encouraged, induced or assisted another alien to effect an unlawful entry. 54 Stat. 671.

[11] The Circuit Court of Appeals for the First Circuit construes the section to prescribe a penalty for concealing or harboring, but not to authorize increased penalties where more than one alien is concerned, as is the case for the offense of landing or bringing in. *Medeiros* v. *Keville,* 63 F. 2d 187, see note 14 *infra.* In the Southern District of California it has been held both that no penalty is prescribed for concealing or harboring, *United States* v. *Niroku Komai,* 286 F. 450; *United States* v. *Kinzo Ichiki,* 43 F. 2d 1007, and that the same penalty is prescribed for concealing or harboring as for landing or bringing in, *United States* v. *Roberts,* unreported decision by Yankwich, J., on April 29, 1946; *United States* v. *Piamonte,* unreported decision by Weinberger, J., on May 21, 1946.

[12] See hearings before the House Committee on Immigration and Naturalization on H. R. 9366, 73d Cong., 2d Sess. 22.

already discussed, which would extend the smuggling penalties to the section's broadest possible construction in relation to definition and coverage of criminal acts, *i. e.*, to concealing or harboring of aliens lawfully admitted but unlawfully remaining. But appellee regards this as a tendered possibility and specified statements in the Government's brief appear to sustain his view.[13] Whether appellee is correct in taking the statements as suggesting an independent alternative or, on the other hand, they were made, though not accurately phrased for the purpose, in support of the Government's preferred position, is not greatly material. For, in any event, what has been said about extending the penalty to include the narrower range of forbidden acts applies to the broader one with even greater force as calling for the extension's rejection.

There is, finally, the third possible interpretation which the Government concedes not wholly consistent with the statutory purpose, but says nevertheless is clearly authorized "if a strictly grammatical construction of Section 8 is employed." This would read the "for each and every alien" clause out of the section insofar as offenses of concealing or harboring are concerned, while leaving it effective for bringing in or landing. In other words, the reading would differentiate the two classes of offenses for applying the penalty provision. The prescribed maximum penalties would be made effective for concealing or harboring, but without augmenting them according to the number of aliens concealed or harbored, even though previously landed or brought in, at the same time. That

[13] Illustrative is the statement, "We submit, therefore, that a proper reading of Section 8 in the light of its legislative history can leave no doubt of Congress' intention that the penal provisions should apply to the offense of concealing or harboring an alien *not duly admitted or not lawfully entitled to enter or reside within* the United States." (Emphasis added.)

increase however would continue in force for bringing in or landing.[14]

The wording of § 8 can be made to support this interpretation only by treating the "for each and every alien" clause as ambivalently separable in relation to the two classes of offenses. Nothing on the face of the section suggests such a reading. The comma preceding the final clause is not equal to the burden of supporting the construction. The clause was part of the section before the concealing and harboring offenses were added. Previously there could have been no possible intent or purpose to apply the clause to some of the offenses but not to others. The clause's function was solely to augment the penalty when more than one alien was involved. That function was not changed when the new offenses were added.[15] Neither the amendment's wording nor its history evinces any purpose to increase punishment, propor-

[14] This was the view taken in *Medeiros* v. *Keville*, 63 F. 2d 187, by the Circuit Court of Appeals for the First Circuit, which appears to be the only appellate decision on the matter. The Government successfully opposed the granting of certiorari in that case, although consistently with its present preferred position it now asserts that, contrary to the ruling, the congressional intent to punish concealing and harboring proportionately to the number of aliens involved is "equally as clear as the intent to make those offenses punishable at all."

In response to appellee's suggestion of inconsistency between that position and the one now taken, the Government points out that its brief in opposition also urged that the *Medeiros* decision was, in any event, correct on other grounds.

[15] Indeed it was in effect reinforced by the 1917 amendment. For that amendment not only added the new offenses but substantially increased the maxima of the authorized fine and imprisonment. Congress thus gave specific attention to the penal provision in addition to expanding the criminal acts, and in this respect followed the Commissioner General's recommendation. Yet it declined at the same time to alter the "for each and every alien" clause, which he also asked to have changed.

tionately to the number of aliens involved, for one class of offenders but not for the other. The construction, like the preferred one, is a construction of necessity, to be justified if at all only by the fact that without it the statute becomes unenforceable for the offenses of concealing or harboring.

If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply. The uncertainty extends not only to the inconsistent penalties said to satisfy the section, either grammatically or substantively if not grammatically. It also includes within varying ranges at least possible, and we think substantial, doubt over the section's reach to bring in very different acts which conceivably might be held to be concealing or harboring. The latter ambiguity affects the former and their sum makes a task for us which at best could be only guesswork.

This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.

The judgment is

Affirmed.

COMMISSIONER OF INTERNAL REVENUE *v.* SOUTH TEXAS LUMBER CO.

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

No. 384. Argued January 14, 1948.—Decided March 29, 1948.

1. A corporate taxpayer which filed its federal income and excess profits tax return on the accrual basis, but elected to report income from certain installment sales on the installment basis as authorized by § 44 of the Internal Revenue Code, may not, in computing its excess profits tax credit under § 714, include in "invested capital" (as "accumulated earnings and profits") the unrealized and unreported profits from such installment sales. Pp. 497–506.
2. The provision of § 29.115–3 of Treasury Regulations 111, applicable to excess profits tax as well as to income tax, that "a corporation computing income on the installment basis as provided in § 44 shall, with respect to the installment transaction, compute earnings and profits on such basis," is valid. Pp. 500–503.
3. Treasury Regulations constitute contemporaneous constructions of the revenue statutes by those charged with the administration of these statutes, and should not be invalidated except for weighty reasons. P. 501.
4. The provision of § 29.115–3 of Treasury Regulations 111 here in question is not in conflict with §§ 115 (*l*), 111, 112, and 113 of the Internal Revenue Code. Pp. 504–506.

162 F. 2d 866, reversed.

The Commissioner's redetermination of respondent's income and excess profits tax was sustained by the Tax Court. 7 T. C. 669. The Circuit Court of Appeals reversed. 162 F. 2d 866. This Court granted certiorari. 332 U. S. 829. *Reversed*, p. 506.

Lee A. Jackson argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Arnold Raum* and *Carlton Fox.*

Charles C. MacLean, Jr. argued the cause for respondent. With him on the brief were *Arthur A. Ballantine* and *J. Arthur Platt.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises a question as to respondent's liability for the taxable year 1943 under the Excess Profits Tax Act of 1940 as amended. 54 Stat. 975, 26 U. S. C. § 710, *et seq.* The law was passed to tax abnormally high profits due to large governmental expenditures about to be made from appropriations for national defense.[1] The excess profits tax was a graduated surtax upon a portion of corporate income, and was imposed in addition to the regular income tax. It applied to all corporate profits and gains over and above what Congress deemed to be a fair and normal return for the corporate business taxed.

Under the controlling 1943 law the amount of income subject to this excess profits tax is computed by subtracting from the net income subject to regular income tax the amount of earnings Congress deemed to be a taxpayer's normal and fair return.[2] This deductible amount, called the excess profits credit, was to be computed in one of two ways, whichever resulted in the lesser tax. § 712. The first, not used here, permits a deduction of an amount equal to the company's average net income for the taxable years 1936 to 1939 inclusive. § 713. The second, used here, permits a deduction of an amount equal to 8 per centum of the taxpayer's invested capital for the taxable year.[3] § 714. An includable element of the "invested capital" is the "accumulated earnings and profits as of the beginning of such taxable year." It thus appears that by this method Congress intended, with minor exceptions not here relevant, to impose the excess profits tax on all annual net income in excess of 8% of a

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[1] H. R. Rep. No. 2894, 76th Cong., 3d Sess., 1–2.

[2] Other adjustments not here material are provided, but the chief deduction or "adjustment" is the one noted above.

[3] The straight 8% figure of 1940 was modified in several respects not here material in 1941 and subsequent years. 55 Stat. 699; 56 Stat. 911; 58 Stat. 55.

corporation's working capital, including its accumulated profits. The controversy here is over the taxpayer's claim that in computing its 1943 tax the statute allows it to include in this 8% deduction its "accumulated profits" from certain installment sales, which profits the taxpayer, in accordance with an option conferred upon him, had elected not to report as a part of its taxable income in prior years.

Beginning in 1937 and extending over a four-year period, respondent sold parcels of real estate, gave deeds, and took installment notes, which were secured by mortgages and vendors' liens. It kept its books generally on a calendar year accrual basis of accounting, a basis under which all obligations of a company applicable to a year are listed as expenditures, whether paid that year or not, and all obligations to it incurred by others applicable to the year are set up as income on the same basis. Under 26 U. S. C. § 41 an income taxpayer may report income and expenditures either on an accrual basis or on a cash basis—under which latter method annual net income is measured by the difference between actual cash received and paid out within the taxable year. In any event, the basis used must, in the language of § 41, "clearly reflect the income."

Respondent did not report the value of its land installment notes as income on the accrual basis as it could have done under § 41. Instead, from 1937 up to and including 1943, it has consistently reported its annual income from the installment sales on a third or "installment" basis, expressly authorized for certain types of installment sales by 26 U. S. C. § 44. That section permits a taxpayer to return as taxable income for a given year only "that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price." Thus respondent's install-

ment income has actually been reported for taxes all along substantially on a modified cash receipts basis, and the taxpayer's net income, which is subjected both to the normal income tax and to the excess profits tax, has not in any of these years reflected the unpaid balances on the installment notes, or any part of them. On the contrary, these balances were listed on respondent's tax returns during these years as "Unrealized Profit Installment Sales."

On its 1943 excess profits tax return respondent nevertheless reported as "accumulated earnings and profits" the amount of "Unrealized Profit Installment Sales" shown on its books at the end of 1942,[4] and included this amount in "invested capital." It thus sought to deduct 8% of its theretofore designated "unrealized profit" in computing its excess profits tax. The Commissioner redetermined the tax for 1943 after eliminating this item from "invested capital." The Tax Court sustained the Commissioner's redetermination, 7 T. C. 669, relying on its opinion in *Kimbrell's Home Furnishings, Inc.* v. *Commissioner,* 7 T. C. 339.[5] The Circuit Court of Appeals, with one justice dissenting, reversed on the authority of its decision in *Commissioner* v. *Shenandoah Co.,* 138 F. 2d 792. The Government's petition for certiorari alleged that the result reached by the Circuit Court of Appeals was counter to the Commissioner's regulations and to long-standing tax practices recognized by statutes and judicial opinions, under which practices a taxpayer normally cannot report taxable income on one accounting basis and adjustments of that income on another. The

[4] In its 1943 return respondent also reported the amount of such unrealized profits shown on its books as of the end of the two preceding years for purposes of calculating the excess profits credit carryover authorized by § 710 (c).

[5] The *Kimbrell* case was subsequently reversed but not on the contention here urged. 159 F. 2d 608.

questions thereby raised are of importance in tax administration and we granted certiorari to consider them.

A Treasury regulation, set out in part below,[6] applicable to both the normal income tax and the excess profits tax,[7] specifically provides that "a corporation computing income on the installment basis as provided in section 44 shall, with respect to the installment transactions, compute earnings and profits on such basis."[8] Since respondent computed its taxable income from installment sales on the installment or modified cash receipts basis, but computed its earnings and profits from these same sales on another basis, the accrual, it contends that the regulation is invalid because inconsistent with the governing code provisions. Validity of the regulation is therefore the crucial question.

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[6] Section 29.115–3 of Regulations 111: "EARNINGS OR PROFITS.—In determining the amount of earnings or profits (whether of the taxable year, or accumulated since February 28, 1913, or accumulated prior to March 1, 1913) due consideration must be given to the facts, and, while mere bookkeeping entries increasing or decreasing surplus will not be conclusive, the amount of the earnings or profits in any case will be dependent upon the method of accounting properly employed in computing net income. For instance, a corporation keeping its books and filing its income tax returns under sections 41, 42, and 43 on the cash receipts and disbursements basis may not use the accrual basis in determining earnings and profits; a corporation computing income on the installment basis as provided in section 44 shall, with respect to the installment transactions, compute earnings and profits on such basis; . . . ."

[7] The meaning of all terms used in the subchapter dealing with the income tax was expressly made applicable to terms used in the excess profits subchapter. § 728. Treasury Regulations 112 provided: ". . . In general, the concept of 'accumulated earnings and profits' for the purpose of the excess profits tax is the same as for the purpose of the income tax." § 35.718–2. See also H. R. Rep. No. 2894, 76th Cong., 3d Sess., 41.

[8] This part of the regulation was added as an amendment to Reg. 103, § 19.115–3, now § 29.115–3 of Reg. 111, after adoption of the 1940 Excess Profits Tax Law. T. D. 5059, July 8, 1941.

This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. See, *e. g., Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378.

This regulation is in harmony with the long-established congressional policy that a taxpayer generally cannot compute income taxes by reporting annual income on a cash basis and deductions on an accrual basis. Such a practice has been uniformly held inadmissible because it results in a distorted picture which makes a tax return fail truly to reflect net income. This has been the construction given income, estate, and previous excess profits tax laws by administrative officials, the Board of Tax Appeals, and the courts.[9]

The regulation's reasonableness and consistency with the statutes which impose the excess profits tax on incomes is also supported by prior legislative and administrative history. The present "invested capital" deduction is patterned after a similar provision in § 326 (a) of the Revenue Act of 1918, 40 Stat. 1057, 1088, 1092. That section imposed a "War-Profits and Excess-Profits Tax." Invested capital there included "paid-in or earned surplus and undivided profits." Under that law the administration, the Board of Tax Appeals, and the courts have uniformly held that a taxpayer, having elected to

[9] G. C. M. 2951, VII–I Cum. Bull. 160 (1928); I. T. 3253, 1939–1 Cum. Bull. 178; *Consolidated Asphalt Co.,* 1 B. T. A. 79, 82; *Henry Reubel Executor,* 1 B. T. A. 676, 678–680; *B. B. Todd, Inc.,* 1 B. T. A. 762, 766; *Bank of Hartsville,* 1 B. T. A. 920, 921; *Atlantic Coast Line R. Co.,* 2 B. T. A. 892, 894–895; *United States* v. *Anderson,* 269 U. S. 422, 440; *Jacob Bros.* v. *Comm'r,* 50 F. 2d 394, 396; *Jenkins* v. *Bitgood,* 22 F. Supp. 16, 17–18, aff'd, 101 F. 2d 17.

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adopt the installment basis of accounting, could not thereafter distort his true excess profits tax income by including uncollected installment obligations in his "invested capital" deduction base.[10] A taxpayer, having chosen to report his taxable income from installment sales on the installment cash receipts plan, thereby spreading its gross earnings and profits from such sales over a number of years and avoiding high tax rates, was not permitted to obtain a further reduction by shifting to an accrual plan and treating uncollected balances on these installment sales as though they had actually been received in the year of the sale.

The history of the congressional adoption of the optional installment basis also supports the power of the Commissioner to adopt the regulation here involved. Prior to 1926 the right of a taxpayer to report on the installment plan rested only on Treasury regulations.[11] In 1925, the Board of Tax Appeals held these regulations were without statutory support.[12] Congress promptly, in § 212 (d) of the 1926 Revenue Act, adopted the present statutory authority for an elective installment basis for reporting income, the Senate committee report on the measure designating it as a "third basis, the installment

[10] *Schmoller & Mueller Piano Co.* v. *United States,* 67 Ct. Cl. 428; *John M. Brant Co.* v. *United States,* 40 F. 2d 126; *Standard Computing Scale Co.* v. *United States,* 52 F. 2d 1018; *Jacob Bros.* v. *Comm'r,* 50 F. 2d 394; *Tull & Gibbs* v. *United States,* 48 F. 2d 148; *Appeal of Blum's, Inc.,* 7 B. T. A. 737, 771; *New England Furniture & Carpet Co.* v. *Comm'r,* 9 B. T. A. 334; *Green Furniture Co.* v. *Comm'r,* 14 B. T. A. 508; *S. Davidson & Bros.* v. *Comm'r,* 21 B. T. A. 638, 644; *Federal St. & Pleasant Valley Passenger R. Co.* v. *Comm'r,* 24 B. T. A. 262, 266.

[11] Article 117 of Regulations 33 (Revised), promulgated Jan. 2, 1918, and Article 42 of Regulations 45, promulgated April 17, 1919.

[12] *B. B. Todd, Inc.,* 1 B. T. A. 762; *H. B. Graves Co.,* 1 B. T. A. 859; *Hoover-Bond Co.,* 1 B. T. A. 929; *Six Hundred and Fifty West End Avenue Co.,* 2 B. T. A. 958.

basis." [13] This new statutory provision was strikingly similar to the Treasury regulations previously held unauthorized by the Board of Tax Appeals. That the Commissioner was particularly intended by Congress to have broad rule-making power under the regulation was manifested by the first words in the new installment basis section which only permitted taxpayers to take advantage of it "Under regulations prescribed by the Commissioner with the approval of the Secretary . . . ." The clause is still contained in § 44 of the Internal Revenue Code. This gives added reasons why interpretations of the Act and regulations under it should not be overruled by the courts unless clearly contrary to the will of Congress. See *Burnet* v. *S. & L. Bldg. Corp.*, 288 U. S. 406, 415.

The installment basis of reporting was enacted, as shown by its history, to relieve taxpayers who adopted it from having to pay an income tax in the year of sale based on the full amount of anticipated profits when in fact they had received in cash only a small portion of the sales price. Another reason was the difficult and time-consuming effort of appraising the uncertain market value of installment obligations.[14] There is no indication in any of the congressional history, however, that by passage of this law Congress contemplated that those taxpayers who elected to adopt this accounting method for their own advantage could by this means obtain a further tax advantage denied all other taxpayers, whereby they could, as to the same taxable transaction, report in part on a cash receipts basis and in part on an accrual basis.

We find nothing unreasonable in the regulations here. See *Commissioner* v. *Wheeler*, 324 U. S. 542.

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[13] S. Rep. No. 52, 69th Cong., 1st Sess., 19, the Senate Finance Committee's report on Revenue Act of 1926, 44 Stat. 9, 23.

[14] S. Rep. No. 52, 69th Cong., 1st Sess. 19; *Willcuts* v. *Gradwohl*, 58 F. 2d 587, 589–590.

It is argued that notwithstanding what has been said, Congress by enacting § 501 of the 1940 Second Revenue Act, 54 Stat. 974, 1004, 26 U. S. C. § 115 (*l*), had provided a definition of "earnings and profits" which includes these unpaid installment obligations and that the regulation here conflicts with § 115 (*l*),[15] which is applicable alike to both the income and the excess profits taxes. There are at least two reasons why we cannot accept this argument. In the first place, neither § 115 (*l*) nor any other purports to alter the Commissioner's power to promulgate reasonable regulations which require taxpayers who adopt the installment basis of accounting to use an accounting method that reflects true income. The hybrid method here urged would not accomplish that result.

In the second place, we cannot agree with the respondent's interpretation of § 115 (*l*). He argues that "earnings and profits" derived from a sale of property are defined in § 115 (*l*) considered in the light of §§ 111, 112, and 113; that these sections together define such earnings and profits as all gain "realized" in the year of sale and "recognized" under the law applicable to the year of sale; that all the anticipated profits from these installment sales were "realized" when the sales were made because the installment obligations of the purchasers were received by respondent in the year of sale and they must be assumed to have been worth their face value; that they

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[15] Section 115 (*l*) provides: "The gain or loss realized from the sale or other disposition . . . of property by a corporation— . . .

"(2) for the purpose of the computation of earnings and profits of the corporation for any period beginning after February 28, 1913, shall be determined by using as the adjusted basis the adjusted basis (under the law applicable to the year in which the sale or other disposition was made) for determining gain.

"Gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent to which such a realized gain or loss was recognized in computing net income under the law applicable to the year in which such sale or disposition was made."

were "recognized" as taxable by § 111 (c), the law applicable to the year of sale; and that consequently the Commissioner was compelled to accept these lawfully "realized" and "recognized" accumulated profits as "invested capital" for excess profits tax purposes, even though not previously reported as taxable income for either income tax or excess profits tax purposes. Finally respondent contends that § 44 merely conferred upon it a privilege to defer payment of income tax on its tax-"recognized" profits realized from installment sales until the unpaid installment obligations were collected.

The congressional reports on § 115 (*l*) do not provide support for the idea that gains not included in taxable income under the taxpayer's method of accounting may nevertheless be considered "realized" and "recognized" for computing tax adjustments or deductions so long as they might have entered into such computations under a different method of accounting.[16] Furthermore, neither § 111, § 112, nor § 113 requires a "recognition" of the full face value of installment paper. It is true that § 111 (b) does provide that gain or loss "realized" from the sale of property shall be measured by the "sum of any money received plus the fair market value of the property (other than money) received" and § 111 (c) provides that the extent of gain or loss shall be "recognized" as determined "under the provisions of section 112." But § 111 (d)

[16] The Conference Committee report on the Second Revenue Act of 1940, 54 Stat. 974, said with reference to § 115 (*l*): "The provisions in the House and Senate bills, that gain or loss so realized shall increase or decrease the earnings and profits to, but not beyond, the extent *recognized* in computing net income under the law applicable to the year in which such sale or disposition was made, are retained. As used in this subsection the term 'recognized' relates to a realized gain or loss which is recognized pursuant to the provisions of law, for example, see section 112 of the Internal Revenue Code. It does not relate to losses disallowed or not taken into account." Conf. Rep. No. 3002, 76th Cong., 3d Sess., 60.

provides that nothing in § 111 "shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received." This means that where a taxpayer has validly reported its income from installment sales on the installment basis provided by § 44, that section, not §§ 111, 112, and 113, prescribes the extent to which receipts from such sales are "recognized" as taxable and the year in which such receipts are "recognized" in computing taxable income. Section 44 provides for the return as income "in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price." Unlike § 111, § 44 does not recognize as subject to income tax liability the "market value" of deferred installment obligations. They may never be recognized by a taxpayer on the installment basis for tax purposes under § 44 or any other section, for they may never be paid, or may be paid only in part. The anticipated profits from these deferred obligations are recognized and taxable under § 44 only if the obligations are paid and when they are paid, unless they are sold or transferred before payment. Thus, whatever meaning is given to the words "realized" and "recognized," the regulation here considered is not in conflict with §§ 115 (*l*), 111, 112, and 113.

The regulation is valid. The respondent can include in its equity invested capital only that portion of its profits from installment payments which it has actually received and on which it has already paid income taxes in the years of receipt.

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON dissent.

WINTERS *v.* NEW YORK.

APPEAL FROM THE COURT OF SPECIAL SESSIONS OF NEW YORK CITY.

No. 3. Argued March 27, 1946.—Reargued November 19, 1946.—Reargued November 10, 1947.—Decided March 29, 1948.

Subsection 2 of § 1141 of the New York Penal Law, as construed by the State Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become vehicles for inciting violent and depraved crimes against the person, *held* so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press. Pp. 508–520.

294 N. Y. 545, 63 N. E. 2d 98, reversed.

Appellant was convicted for having certain magazines in his possession with intent to sell them, in violation of subsection 2 of § 1141 of the New York Penal Law. The Appellate Division of the Supreme Court of New York affirmed. 268 App. Div. 30, 48 N. Y. Supp. 230. The Court of Appeals of New York affirmed, 294 N. Y. 545, 63 N. E. 2d 98, and amended its remittitur to the trial court so as to show that it had held that the conviction did not violate the Fourteenth Amendment. 294 N. Y. 979, 63 N. E. 2d 713. *Reversed,* p. 520.

Arthur N. Seiff argued the cause and filed the briefs for appellant. With him on the original argument and the first reargument was *Emanuel Redfield.*

Whitman Knapp argued the cause for appellee. With him on the briefs was *Frank S. Hogan.*

Briefs of *amici curiae* urging reversal were filed by *Sidney R. Fleisher* for the Authors' League of America, Inc.; and *Emanuel Redfield, Osmond K. Fraenkel* and *Morris L. Ernst* for the American Civil Liberties Union.

MR. JUSTICE REED delivered the opinion of the Court.

Appellant is a New York City bookdealer, convicted, on information,[1] of a misdemeanor for having in his possession with intent to sell certain magazines charged to violate subsection 2 of § 1141 of the New York Penal Law. It reads as follows:

> "§ 1141. Obscene prints and articles
>
> 1. A person . . . who,
>
> 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .
>
> . . . . .
>
> Is guilty of a misdemeanor, . . ."

[1] The counts of the information upon which appellant was convicted charged, as the state court opinions show, violation of subsection 2 of § 1141. An example follows:

"Fourth Count

"And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the Crime of Unlawfully Possessing Obscene Prints, committed as follows:

"The said defendant, on the day and in the year aforesaid, at the city and in the county aforesaid, with intent to sell, lend, give away and show, unlawfully did offer for sale and distribution, and have in his possession with intent to sell, lend, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled 'Headquarters Detective, True Cases from the Police Blotter, June 1940', the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime."

Upon appeal from the Court of Special Sessions, the trial court, the conviction was upheld by the Appellate Division of the New York Supreme Court, 268 App. Div. 30, 48 N. Y. S. 2d 230, whose judgment was later upheld by the New York Court of Appeals. 294 N. Y. 545, 63 N. E. 2d 98.

The validity of the statute was drawn in question in the state courts as repugnant to the Fourteenth Amendment to the Constitution of the United States in that it denied the accused the right of freedom of speech and press, protected against state interference by the Fourteenth Amendment. *Gitlow* v. *New York,* 268 U. S. 652, 666; *Pennekamp* v. *Florida,* 328 U. S. 331, 335. The principle of a free press covers distribution as well as publication. *Lovell* v. *City of Griffin,* 303 U. S. 444, 452. As the validity of the section was upheld in a final judgment by the highest court of the state against this constitutional challenge, this Court has jurisdiction under Judicial Code § 237 (a). This appeal was argued at the October 1945 Term of this Court and set down for reargument before a full bench at the October 1946 Term. It was then reargued and again set down for further reargument at the present term.

The appellant contends that the subsection violates the right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. *Stromberg* v. *California,* 283 U. S. 359, 369; *Herndon* v. *Lowry,* 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions,

protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press. Where the alleged vagueness of a state statute had been cured by an opinion of the state court, confining a statute punishing the circulation of publications "having a tendency to encourage or incite the commission of any crime" to "encouraging an actual breach of law," this Court affirmed a conviction under the stated limitation of meaning. The accused publication was read as advocating the commission of the crime of indecent exposure. *Fox* v. *Washington,* 236 U. S. 273, 277.

We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency. Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution. We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire,* 327 U. S. 146, 153, 158. They are equally subject to control if they are lewd, indecent, obscene or profane. *Ex parte Jackson,* 96 U. S. 727, 736; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

The section of the Penal Law, § 1141 (2), under which the information was filed is a part of the "indecency" article of that law. It comes under the caption "Obscene prints and articles." Other sections make punishable various acts of indecency. For example, § 1141 (1), a section not here in issue but under the same caption, punishes the distribution of obscene, lewd, lascivious, filthy, indecent or disgusting magazines.[2] Section 1141 (2) originally was aimed at the protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime.[3] It was later broadened to include all the population and other phases of production and possession.

Although many other states have similar statutes, they, like the early statutes restricting paupers from changing residence, have lain dormant for decades. *Edwards* v. *California,* 314 U. S. 160, 176. Only two other state courts, whose reports are printed, appear to have construed language in their laws similar to that here involved. In *Strohm* v. *Illinois,* 160 Ill. 582, 43 N. E. 622, a statute to suppress exhibiting to any minor child publications of this character was considered. The conviction was upheld. The case, however, apparently did not involve any problem of free speech or press or denial of due

[2] "§ 1141. . . . 1. A person who sells, lends, gives away, distributes or shows, or offers to sell, lend, give away, distribute, or show, or has in his possession with intent to sell, lend, distribute or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; . . .

. . . . . .

"Is guilty of a misdemeanor, ..."

[3] Ch. 380, New York Laws, 1884; ch. 692, New York Laws, 1887; ch. 925, New York Laws, 1941.

process for uncertainty under the Fourteenth Amendment.

In *State* v. *McKee,* 73 Conn. 18, 46 A. 409, the court considered a conviction under a statute which made criminal the sale of magazines "devoted to the publication, or principally made up of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime." The gist of the offense was thought to be a "selection of immoralities so treated as to excite attention and interest sufficient to command circulation for a paper devoted mainly to the collection of such matters." Page 27. It was said, apropos of the state's constitutional provision as to free speech, that the act did not violate any constitutional provision relating to the freedom of the press. It was held, p. 31, that the principal evil at which the statute was directed was "the circulation of this massed immorality." As the charge stated that the offense might be committed "whenever the objectionable matter is a leading feature of the paper or when special attention is devoted to the publication of the prohibited items," the court felt that it failed to state the full meaning of the statute and reversed. As in the *Strohm* case, denial of due process for uncertainty was not raised.

On its face, the subsection here involved violates the rule of the *Stromberg* and *Herndon* cases, *supra,* that statutes which include prohibitions of acts fairly within the protection of a free press are void. It covers detective stories, treatises on crime, reports of battle carnage, *et cetera.* In recognition of this obvious defect, the New York Court of Appeals limited the scope by construction. Its only interpretation of the meaning of the pertinent subsection is that given in this case. After pointing out that New York statutes against indecent or obscene publications have generally been construed to refer to sexual impurity, it interpreted the section here in question to forbid these publications as "indecent or obscene" in a

different manner. The Court held that collections of criminal deeds of bloodshed or lust "can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, . . ." 294 N. Y. at 550. "This idea," its opinion goes on to say, "was the principal reason for the enactment of the statute." The Court left open the question of whether "the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" because the magazines in question "are nothing but stories and pictures of criminal deeds of bloodshed and lust." As the statute in terms extended to other crimes, it may be supposed that the reservation was on account of doubts as to the validity of so wide a prohibition. The court declared: "In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake." Further, the Court of Appeals, 294 N. Y. at 549, limited the statute so as not to "outlaw all commentaries on crime from detective tales to scientific treatises" on the ground that the legislature did not intend such literalness of construction. It thought that the magazines the possession of which caused the filing of the information were indecent in the sense just explained. The Court had no occasion to and did not weigh the character of the magazine exhibits by the more frequently used scales of § 1141 (1), printed in note 2. It did not interpret § 1141 (2) to punish distribution of indecent or obscene publications, in the usual sense, but that the present magazines were indecent and obscene because they "massed" stories of bloodshed and lust to incite crimes. Thus interpreting § 1141 (2) to include the expanded concept of indecency and obscenity stated in its opinion, the Court of Appeals met appellant's contention

of invalidity from indefiniteness and uncertainty of the subsection by saying, 294 N. Y. at 551,

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality."

The opinion went on to explain that publication of any crime magazine would be no more hazardous under this interpretation than any question of degree and concluded, p. 552,

> "So when reasonable men may fairly classify a publication as necessarily or naturally indecent or obscene, a mistaken view by the publisher as to its character or tendency is immaterial."

The Court of Appeals by this authoritative interpretation made the subsection applicable to publications that, besides meeting the other particulars of the statute, so massed their collection of pictures and stories of bloodshed and of lust "as to become vehicles for inciting violent and depraved crimes against the person." Thus, the statute forbids the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. This construction fixes the meaning of the statute for this case. The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature. *Hebert* v. *Louisiana,* 272 U. S. 312, 317; *Skiriotes* v. *Florida,* 313 U. S. 69, 79. We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent

interpretation. Compare *Lanzetta* v. *New Jersey,* 306 U. S. 451. As lewdness in publications is punishable under § 1141 (1) and the usual run of stories of bloodshed, such as detective stories, are excluded, it is the massing as an incitation to crime that becomes the important element.

Acts of gross and open indecency or obscenity, injurious to public morals, are indictable at common law, as violative of the public policy that requires from the offender retribution for acts that flaunt accepted standards of conduct. 1 Bishop, Criminal Law (9th ed.), § 500; Wharton, Criminal Law (12th ed.), § 16. When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." *Cantwell* v. *Connecticut,* 310 U. S. 296; *Pierce* v. *United States,* 314 U. S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment.[4] The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta* v.

[4] *Connally* v. *General Construction Co.,* 269 U. S. 385, 391–92: "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, . . . or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

New Jersey, 306 U. S. 451, or in regard to the applicable tests to ascertain guilt.[5]

Other states than New York have been confronted with similar problems involving statutory vagueness in connection with free speech. In *State* v. *Diamond,* 27 New Mexico 477, 202 P. 988, a statute punishing "any act of any kind whatsoever which has for its purpose or aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such organized government, or incite or attempt to incite revolution or opposition to such organized government" was construed. The court said, p. 479: "Under its terms no distinction is made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force and violence." Later in the opinion the statute was held void for uncertainty, p. 485:

> "Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty."

Again in *State* v. *Klapprott,* 127 N. J. L. 395, 22 A. 2d 877, a statute was held invalid on an attack against its constitutionality under state and federal constitutional provisions that protect an individual's freedom of expression. The statute read as follows, p. 396:

> "Any person who shall, in the presence of two or more persons, in any language, make or utter any

[5] *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89–93; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, 242; *Smith* v. *Cahoon,* 283 U. S. 553, 564.

> speech, statement or declaration, which in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group or groups of persons residing or being in this state by reason of race, color, religion or manner of worship, shall be guilty of a misdeameanor."

The court said, pp. 401–2:

> "It is our view that the statute, *supra,* by punitive sanction, tends to restrict what one may say lest by one's utterances there be incited or advocated hatred, hostility or violence against a group 'by reason of race, color, religion or manner of worship.' But additionally and looking now to strict statutory construction, is the statute definite, clear and precise so as to be free from the constitutional infirmity of the vague and indefinite? That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The criminal code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

This Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression.[6] We have the same attitude toward federal statutes.[7] Only a definite conviction by a majority of this Court that the conviction violates the Fourteenth Amendment justifies

[6] *Omaechevarria* v. *Idaho,* 246 U. S. 343; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86.

[7] *United States* v. *Petrillo,* 332 U. S. 1; *Gorin* v. *United States,* 312 U. S. 19.

reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.

The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character "that men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391. The entire text of the statute or the subjects dealt with may furnish an adequate standard.[8] The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

The subsection of the New York Penal Law, as now interpreted by the Court of Appeals, prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories "so massed as to become vehicles for inciting violent and depraved

[8] *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 501; *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230, 245–46; *Screws* v. *United States*, 325 U. S. 91, 94–100.

crimes against the person . . . not necessarily . . . sexual passion," we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. "So massed as to incite to crime" can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required. See *Musser* v. *Utah,* 333 U. S. 95. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. As said in the *Cohen Grocery Company* case, *supra,* p. 89:

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does

not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be "massed" so as to become "vehicles for inciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon* v. *Lowry,* 301 U. S. 242, 259.

To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications. Section 1141, subsection 1, quoted in note 2, is an example. Neither the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise.

Reversed.

MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE JACKSON and MR. JUSTICE BURTON, dissenting.

By today's decision the Court strikes down an enactment that has been part of the laws of New York for more than sixty years,[1] and New York is but one of twenty States having such legislation. Four more States

[1] The original statute, N. Y. L. 1884, c. 380, has twice since been amended in minor details. N. Y. L. 1887, c. 692; N. Y. L. 1941, c. 925. In its present form, it reads as follows:

"§ 1141. Obscene prints and articles

"1. A person . . . who,

. . . . . .

"2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribu-

have statutes of like tenor which are brought into question by this decision, but variations of nicety preclude one from saying that these four enactments necessarily fall within the condemnation of this decision. Most of this legislation is also more than sixty years old. The latest of the statutes which cannot be differentiated from New York's law, that of the State of Washington, dates from 1909. It deserves also to be noted that the legislation was judicially applied and sustained nearly fifty years ago. See *State* v. *McKee,* 73 Conn. 18, 46 A. 409. Nor is this an instance where the pressure of proximity or propaganda led to the enactment of the same measure in a concentrated region of States. The impressiveness of the number of States which have this law on their statute

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tion, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . .

. . . . . .

"Is guilty of a misdemeanor . . . ."

That this legislation was neither a casual enactment nor a passing whim is shown by the whole course of its history. The original statute was passed as the result of a campaign by the New York Society for the Suppression of Vice and the New York Society for the Prevention of Cruelty to Children. See 8th Ann. Rep., N. Y. Soc. for the Suppression of Vice (1882) p. 7; 9th *id.* (1883) p. 9; 10th *id.* (1884) p. 8; 11th *id.* (1885) pp. 7–8. The former organization, at least, had sought legislation covering many more types of literature and conduct. See 8th *id.* (1882) pp. 6–9; 9th *id.* (1883) pp. 9–12. On the other hand, in 1887, the limitation of the statute to sales, etc., to children was removed. N. Y. L. 1887, c. 692. More recently, it has been found desirable to add to the remedies available to the State to combat this type of literature. A 1941 statute conferred jurisdiction upon the Supreme Court, at the instance of the chief executive of the community, to enjoin the sale or distribution of such literature. N. Y. L. 1941, c. 925, § 2, N. Y. Code Crim. Proc. § 22–a. (The additional constitutional problems that might be raised by such injunctions, cf. *Near* v. *Minnesota,* 283 U. S. 697, are of course not before us.)

books is reinforced by their distribution throughout the country and the time range of the adoption of the measure.[2] Cf. Hughes, C. J., in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399.

These are the statutes that fall by this decision: [3]

1. Gen. Stat. Conn. (1930) c. 329, § 6245, derived from L. 1885, c. 47, § 2.*

2. Ill. Ann. Stat. (Smith-Hurd) c. 38, § 106, derived from Act of June 3, 1889, p. 114, § 1 (minors).

3. Iowa Code (1946) § 725.8, derived from 21 Acts, Gen. Assembly, c. 177, § 4 (1886) (minors).

4. Gen. Stats. Kans. (1935) § 21–1102, derived from L. 1886, c. 101, § 1.

5. Ky. Rev. Stat. (1946) § 436.110, derived from L. 1891–93, c. 182, § 217 (1893) (similar).

6. Rev. Stat. Maine (1944) c. 121, § 27, derived from Acts and Resolves 1885, c. 348, § 1 (minors).

7. Ann. Code Md. (1939) Art. 27, § 496, derived from L. 1894, c. 271, § 2.

8. Ann. Laws Mass. (1933) c. 272, § 30, derived from Acts and Resolves 1885, c. 305 (minors).

9. Mich. Stat. Ann. (1938) § 28.576, derived from L. 1885, No. 138.

10. Minn. Stat. (1945) § 617.72, derived from L. 1885, c. 268, § 1 (minors).

11. Mo. Rev. Stat. (1939) § 4656, derived from Act of April 2, 1885, p. 146, § 1 (minors).

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[2] We have no statistics or other reliable knowledge as to the incidence of violations of these laws, nor as to the extent of their enforcement. Suffice it to say that the highest courts of three of the most industrialized States—Connecticut, Illinois, and New York—have had this legislation before them.

[3] This assumes a similar construction for essentially the same laws.

*Since this opinion was filed, Conn. L. 1935, c. 216, repealing this provision, has been called to my attention.

12. Rev. Code Mont. (1935) § 11134, derived from Act of March 4, 1891, p. 255, § 1 (minors).

13. Rev. Stat. Neb. (1943) § 28–924, derived from L. 1887, c. 113, § 4 (minors).

14. N. Y. Consol. L. (1938) Penal Law, Art. 106, § 1141 (2), derived from L. 1884, c. 380.

15. N. D. Rev. Code (1943) § 12–2109, derived from L. 1895, c. 84, § 1 (similar).

16. Ohio Code Ann. (Throckmorton, 1940) § 13035, derived from 82 Sess. L. 184 (1885) (similar).

17. Ore. Comp. L. Ann. (1940) § 23–924, derived from Act of Feb. 25, 1885, p. 126 (similar).

18. Pa. Stat. Ann. (1945) Tit. 18, § 4524, derived from L. 1887, P. L. 38, § 2.

19. Rev. Stat. Wash. (Remington, 1932) § 2459 (2), derived from L. 1909, c. 249, § 207 (2).

20. Wis. Stat. (1945) § 351.38 (4), derived from L. 1901, c. 256.

The following statutes are somewhat similar, but may not necessarily be rendered unconstitutional by the Court's decision in the instant case:

1. Colo. Stat. Ann. (1935) c. 48, § 217, derived from Act of April 9, 1885, p. 172, § 1.

2. Ind. Stat. Ann. (1934) § 2607, derived from L. 1895, c. 109.

3. S. D. Code (1939) § 13.1722 (4), derived from L. 1913, c. 241, § 4.

4. Tex. Stat. (Vernon, 1936), Penal Code, Art. 527, derived from L. 1897, c. 116.

This body of laws represents but one of the many attempts by legislatures to solve what is perhaps the most persistent, intractable, elusive, and demanding of all problems of society—the problem of crime, and, more particularly, of its prevention. By this decision

the Court invalidates such legislation of almost half the States of the Union. The destructiveness of the decision is even more far-reaching. This is not one of those situations where power is denied to the States because it belongs to the Nation. These enactments are invalidated on the ground that they fall within the prohibitions of the "vague contours" of the Due Process Clause. The decision thus operates equally as a limitation upon Congressional authority to deal with crime, and, more especially, with juvenile delinquency. These far-reaching consequences result from the Court's belief that what New York, among a score of States, has prohibited, is so empty of meaning that no one desirous of obeying the law could fairly be aware that he was doing that which was prohibited.

Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of "due process of law." The legal jargon for such failure to give forewarning is to say that the statute is void for "indefiniteness."

But "indefiniteness" is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as "indefiniteness" in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. The requirement is fair notice that conduct may entail punishment. But whether notice is or is not "fair" depends upon the subject matter to which it relates. Unlike the abstract stuff of mathematics, or

the quantitatively ascertainable elements of much of natural science, legislation is greatly concerned with the multiform psychological complexities of individual and social conduct. Accordingly, the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied. The statute books of every State are full of instances of what may look like unspecific definitions of crime, of the drawing of wide circles of prohibited conduct.

In these matters legislatures are confronted with a dilemma. If a law is framed with narrow particularity, too easy opportunities are afforded to nullify the purposes of the legislation. If the legislation is drafted in terms so vague that no ascertainable line is drawn in advance between innocent and condemned conduct, the purpose of the legislation cannot be enforced because no purpose is defined. It is not merely in the enactment of tax measures that the task of reconciling these extremes—of avoiding throttling particularity or unfair generality—is one of the most delicate and difficult confronting legislators. The reconciliation of these two contradictories is necessarily an empiric enterprise largely depending on the nature of the particular legislative problem.

What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be caught unaware? How easy is it to be explicitly particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative

draftsmen. Answers to these questions are not to be found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about "indefiniteness."

The action of this Court today in invalidating legislation having the support of almost half the States of the Union rests essentially on abstract notions about "indefiniteness." The Court's opinion could have been written by one who had never read the issues of "Headquarters Detective" which are the basis of the prosecution before us, who had never deemed their contents as relevant to the form in which the New York legislation was cast, had never considered the bearing of such "literature" on juvenile delinquency, in the allowable judgment of the legislature. Such abstractions disregard the considerations that may well have moved and justified the State in not being more explicit than these State enactments are. Only such abstract notions would reject the judgment of the States that they have outlawed what they have a right to outlaw, in the effort to curb crimes of lust and violence, and that they have not done it so recklessly as to occasion real hazard that other publications will thereby be inhibited, or also be subjected to prosecution.

This brings our immediate problem into focus. No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate. But he must be a bold man indeed who is confident that he knows what causes crime. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the

various alleged "causes" of crime. Bibliographies of criminology reveal a depressing volume of writings on theories of causation. See, *e. g.*, Kuhlman, A Guide to Material on Crime and Criminal Justice (1929) Item Nos. 292 to 1211; Culver, Bibliography of Crime and Criminal Justice (1927–1931) Item Nos. 877–1475, and (1932–1937) Item Nos. 799–1560. Is it to be seriously questioned, however, that the State of New York, or the Congress of the United States, may make incitement to crime itself an offense? He too would indeed be a bold man who denied that incitement may be caused by the written word no less than by the spoken. If "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," (Holmes, J., dissenting in *Lochner* v. *New York,* 198 U. S. 45, 75), neither does it enact the psychological dogmas of the Spencerian era. The painful experience which resulted from confusing economic dogmas with constitutional edicts ought not to be repeated by finding constitutional barriers to a State's policy regarding crime, because it may run counter to our inexpert psychological assumptions or offend our presuppositions regarding incitements to crime in relation to the curtailment of utterance. This Court is not ready, I assume, to pronounce on causative factors of mental disturbance and their relation to crime. Without formally professing to do so, it may actually do so by invalidating legislation dealing with these problems as too "indefinite."

Not to make the magazines with which this case is concerned part of the Court's opinion is to play "Hamlet" without Hamlet. But the Court sufficiently summarizes one aspect of what the State of New York here condemned when it says "we can see nothing of any possible value to society in these magazines." From which it jumps to the conclusion that, nevertheless, "they are as much entitled to the protection of free speech as

the best of literature." Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to say that these magazines have "nothing of any possible value to society" is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting "violent and depraved crimes against the person," and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have "nothing of any possible value to society" constitutional protection but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise. The legislatures of New York and the other States were concerned with these evils and not with neutral abstractions of harmlessness. Nor was the New York Court of Appeals merely resting, as it might have done, on a deep-seated conviction as to the existence of an evil and as to the appropriate means for checking it. That court drew on its experience, as revealed by "many recent records" of criminal convictions before it, for its understanding of the practical concrete reasons that led the legislatures of a score of States to pass the enactments now here struck down.

The New York Court of Appeals thus spoke out of extensive knowledge regarding incitements to crimes of violence. In such matters, local experience, as this Court has said again and again, should carry the greatest weight against our denying a State authority to adjust its legislation to local needs. But New York is not peculiar in concluding that "collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and

depraved crimes against the person." 294 N. Y. at 550. A recent murder case before the High Court of Australia sheds light on the considerations which may well have induced legislation such as that now before us, and on the basis of which the New York Court of Appeals sustained its validity. The murder was committed by a lad who had just turned seventeen years of age, and the victim was the driver of a taxicab. I quote the following from the opinion of Mr. Justice Dixon: "In his evidence on the *voir dire* Graham [a friend of the defendant and apparently a very reliable witness] said that he knew Boyd Sinclair [the murderer] and his moods very well and that he just left him; that Boyd had on a number of occasions outlined plans for embarking on a life of crime, plans based mainly on magazine thrillers which he was reading at the time. They included the obtaining of a motor car and an automatic gun." *Sinclair* v. *The King,* 73 Comm. L. R. 316, 330.

"Magazine thrillers" hardly characterizes what New York has outlawed. New York does not lay hold of publications merely because they are "devoted to and principally made up of criminal news or police reports or accounts of criminal deeds, regardless of the manner of treatment." So the Court of Appeals has authoritatively informed us. 294 N. Y. at 549. The aim of the publication must be incitation to "violent and depraved crimes against the person" by so massing "pictures and stories of criminal deeds of bloodshed or lust" as to encourage like deeds in others. It would be sheer dogmatism in a field not within the professional competence of judges to deny to the New York legislature the right to believe that the intent of the type of publications which it has proscribed is to cater to morbid and immature minds—whether chronologically or permanently immature. It would be sheer dogmatism to deny that in some instances,

as in the case of young Boyd Sinclair, deeply embedded, unconscious impulses may be discharged into destructive and often fatal action.

If legislation like that of New York "has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." *Tanner* v. *Little,* 240 U. S. 369, 385. The Court fails to give enough force to the influence of the evils with which the New York legislature was concerned "upon conduct and habit, not enough to their insidious potentialities." *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 364. The other day we indicated that, in order to support its constitutionality, legislation need not employ the old practice of preambles, nor be accompanied by a memorandum of explanation setting forth the reasons for the enactment. See *Woods* v. *Cloyd W. Miller Co.,* 333 U. S. 138, 144. Accordingly, the New York statute, when challenged for want of due process on the score of "indefiniteness," must be considered by us as though the legislature had thus spelled out its convictions and beliefs for its enactment:

> Whereas, we believe that the destructive and adventurous potentialities of boys and adolescents, and of adults of weak character or those leading a drab existence are often stimulated by collections of pictures and stories of criminal deeds of bloodshed or lust so massed as to incite to violent and depraved crimes against the person; and
>
> Whereas, we believe that such juveniles and other susceptible characters do in fact commit such crimes at least partly because incited to do so by such publications, the purpose of which is to exploit such susceptible characters; and
>
> Whereas, such belief, even though not capable of statistical demonstration, is supported by our experience as well as by the opinions of some specialists

> qualified to express opinions regarding criminal psychology and not disproved by others; and
>
> Whereas, in any event there is nothing of possible value to society in such publications, so that there is no gain to the State, whether in edification or enlightenment or amusement or good of any kind; and
>
> Whereas, the possibility of harm by restricting free utterance through harmless publications is too remote and too negligible a consequence of dealing with the evil publications with which we are here concerned;
>
> Be it therefore enacted that—

Unless we can say that such beliefs are intrinsically not reasonably entertainable by a legislature, or that the record disproves them, or that facts of which we must take judicial notice preclude the legislature from entertaining such views, we must assume that the legislature was dealing with a real problem touching the commission of crime and not with fanciful evils, and that the measure was adapted to the serious evils to which it was addressed. The validity of such legislative beliefs or their importance ought not to be rejected out of hand.

Surely this Court is not prepared to say that New York cannot prohibit traffic in publications exploiting "criminal deeds of bloodshed or lust" so "as to become vehicles for inciting violent and depraved crimes against the person." Laws have here been sustained outlawing utterance far less confined. A Washington statute, directed against printed matter tending to encourage and advocate disrespect for law, was judged and found not wanting on these broad lines:

> "We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail.

> It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.
>
> "If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness." *Fox* v. *Washington,* 236 U. S. 273, 277.

In short, this Court respected the policy of a State by recognizing the practical application which the State court gave to the statute in the case before it. This Court rejected constitutional invalidity based on a remote possibility that the language of the statute, abstractly considered, might be applied with unbridled looseness.

Since Congress and the States may take measures against "violent and depraved crimes," can it be claimed that "due process of law" bars measures against incitement to such crimes? But if they have power to deal with incitement, Congress and the States must be allowed the effective means for translating their policy into law. No doubt such a law presents difficulties in draftsmanship where publications are the instruments of incitement. The problem is to avoid condemnation so unbounded that neither the text of the statute nor its subject matter affords "a standard of some sort" (*United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 92). Legislation must put people on notice as to the kind of conduct

from which to refrain. Legislation must also avoid so tight a phrasing as to leave the area for evasion ampler than that which is condemned. How to escape, on the one hand, having a law rendered futile because no standard is afforded by which conduct is to be judged, and, on the other, a law so particularized as to defeat itself through the opportunities it affords for evasion, involves an exercise of judgment which is at the heart of the legislative process. It calls for the accommodation of delicate factors. But this accommodation is for the legislature to make and for us to respect, when it concerns a subject so clearly within the scope of the police power as the control of crime. Here we are asked to declare void the law which expresses the balance so struck by the legislature, on the ground that the legislature has not expressed its policy clearly enough. That is what it gets down to.

What were the alternatives open to the New York legislature? It could of course conclude that publications such as those before us could not "become vehicles for inciting violent and depraved crimes." But surely New York was entitled to believe otherwise. It is not for this Court to impose its belief, even if entertained, that no "massing of print and pictures" could be found to be effective means for inciting crime in minds open to such stimulation. What gives judges competence to say that while print and pictures may be constitutionally outlawed because judges deem them "obscene," print and pictures which in the judgment of half the States of the Union operate as incitements to crime enjoy a constitutional prerogative? When on occasion this Court has presumed to act as an authoritative faculty of chemistry, the result has not been fortunate. See *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, where this Court ventured a view of its own as to what is reasonable "tolerance" in breadmaking. Considering the extent to which the whole domain of psychological inquiry has only recently

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been transformed and how largely the transformation is still in a pioneer stage, I should suppose that the Court would feel even less confidence in its views on psychological issues. At all events, it ought not to prefer its psychological views—for, at bottom, judgment on psychological matters underlies the legal issue in this case—to those implicit in an impressive body of enactments and explicitly given by the New York Court of Appeals, out of the abundance of its experience, as the reason for sustaining the legislation which the Court is nullifying.

But we are told that New York has not expressed a policy, that what looks like a law is not a law because it is so vague as to be meaningless. Suppose then that the New York legislature now wishes to meet the objection of the Court. What standard of definiteness does the Court furnish the New York legislature in finding indefiniteness in the present law? Should the New York legislature enumerate by name the publications which in its judgment are "inciting violent and depraved crimes"? Should the New York legislature spell out in detail the ingredients of stories or pictures which accomplish such "inciting"? What is there in the condemned law that leaves men in the dark as to what is meant by publications that exploit "criminal deeds of bloodshed or lust" thereby "inciting violent and depraved crimes"? What real risk do the Conan Doyles, the Edgar Allen Poes, the William Rougheads, the ordinary tribe of detective story writers, their publishers, or their booksellers run?

Insofar as there is uncertainty, the uncertainty derives not from the terms of condemnation, but from the application of a standard of conduct to the varying circumstances of different cases. The Due Process Clause does not preclude such fallibilities of judgment in the administration of justice by men. Our penal codes are loaded with prohibitions of conduct depending on ascertainment through fallible judges and juries of a man's intent or

motive—on ascertainment, that is, from without of a man's inner thoughts, feelings and purposes. Of course a man runs the risk of having a jury of his peers misjudge him. Mr. Justice Holmes has given the conclusive answer to the suggestion that the Due Process Clause protects against such a hazard: "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States,* 229 U. S. 373, 377. To which it is countered that such uncertainty not in the standard but in its application is not objectionable in legislation having a long history, but is inadmissible as to more recent laws. Is this not another way of saying that when new circumstances or new insights lead to new legislation the Due Process Clause denies to legislatures the power to frame legislation with such regard for the subject matter as legislatures had in the past? When neither the Constitution nor legislation has formulated legal principles for courts, and they must pronounce them, they find it impossible to impose upon themselves such a duty of definiteness as this decision exacts from legislatures.

The Court has been led into error, if I may respectfully suggest, by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. But diversity in result for similar conduct in different trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility, they do not deprive persons of due process of law.

In considering whether New York has struck an allowable balance between its right to legislate in a field that is so closely related to the basic function of government,

and the duty to protect the innocent from being punished for crossing the line of wrongdoing without awareness, it is relevant to note that this legislation has been upheld as putting law-abiding people on sufficient notice, by a court that has been astutely alert to the hazards of vaguely phrased penal laws and zealously protective of individual rights against "indefiniteness." See, *e. g.*, *People* v. *Phyfe,* 136 N. Y. 554, 32 N. E. 978; *People* v. *Briggs,* 193 N. Y. 457, 86 N. E. 522; *People* v. *Shakun,* 251 N. Y. 107, 167 N. E. 187; *People* v. *Grogan,* 260 N. Y. 138, 183 N. E. 273. The circumstances of this case make it particularly relevant to remind, even against a confident judgment of the invalidity of legislation on the vague ground of "indefiniteness," that certitude is not the test of certainty. If men may reasonably differ whether the State has given sufficient notice that it is outlawing the exploitation of criminal potentialities, that in itself ought to be sufficient, according to the repeated pronouncements of this Court, to lead us to abstain from denying power to the States. And it deserves to be repeated that the Court is not denying power to the States in order to leave it to the Nation. It is denying power to both. By this decision Congress is denied power, as part of its effort to grapple with the problems of juvenile delinquency in Washington, to prohibit what twenty States have seen fit to outlaw. Moreover, a decision like this has a destructive momentum much beyond the statutes of New York and of the other States immediately involved. Such judicial nullification checks related legislation which the States might deem highly desirable as a matter of policy, and this Court might not find unconstitutional.

Almost by his very last word on this Court, as by his first, Mr. Justice Holmes admonished against employing "due process of law" to strike down enactments which, though supported on grounds that may not

commend themselves to judges, can hardly be deemed offensive to reason itself. It is not merely in the domain of economics that the legislative judgment should not be subtly supplanted by the judicial judgment. "I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." So wrote Mr. Justice Holmes in summing up his protest for nearly thirty years against using the Fourteenth Amendment to cut down the constitutional rights of the States. *Baldwin* v. *Missouri,* 281 U. S. 586, 595 (dissenting).

Indeed, Mr. Justice Holmes is a good guide in deciding this case. In three opinions in which, speaking for the Court, he dealt with the problem of "indefiniteness" in relation to the requirement of due process, he indicated the directions to be followed and the criteria to be applied. Pursuit of those directions and due regard for the criteria require that we hold that the New York legislature has not offended the limitations which the Due Process Clause has placed upon the power of States to counteract avoidable incitements to violent and depraved crimes.

Reference has already been made to the first of the trilogy, *Nash* v. *United States, supra.* There the Court repelled the objection that the Sherman Law "was so vague as to be inoperative on its criminal side." The opinion rested largely on a critical analysis of the requirement of "definiteness" in criminal statutes to be drawn from the Due Process Clause. I have already quoted the admonishing generalization that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." 229 U. S. at 377. Inasmuch as "the common law as to restraint of trade" was "taken up" by the Sherman Law, the opinion in the *Nash* case also drew support from the suggestion that language in a criminal statute which might otherwise appear indefi-

nite may derive definiteness from past usage. How much definiteness "the common law of restraint of trade" has imparted to "the rule of reason," which is the guiding consideration in applying the Sherman Law, may be gathered from the fact that since the *Nash* case this Court has been substantially divided in at least a dozen cases in determining whether a particular situation fell within the undefined limits of the Sherman Law.[4] The Court's opinion in this case invokes this doctrine of "permissible uncertainty" in criminal statutes as to words that have had long use in the criminal law, and assumes that "long use" gives assurance of clear meaning. I do not believe that the law reports permit one to say that statutes condemning "restraint of trade" or "obscenity" are much more unequivocal guides to conduct than this statute furnishes, nor do they cast less risk of "estimating rightly" what judges and juries will decide than does this legislation.

The second of this series of cases, *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, likewise concerned anti-trust legislation. But that case brought before the Court a statute quite different from the Sherman Law. However indefinite the terms of the latter, whereby "it throws upon men the risk of rightly estimating a matter of degree," it is possible by due care to keep to the line of safety. But the Kentucky statute was such that no

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[4] See, *e. g., United States* v. *United Shoe Machinery Co.,* 247 U. S. 32; *United States* v. *United States Steel Corp.,* 251 U. S. 417; *United States* v. *Reading Co.,* 253 U. S. 26; *American Column & Lumber Co.* v. *United States,* 257 U. S. 377; *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392; *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150; *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533; *Associated Press* v. *United States,* 326 U. S. 1; *United States* v. *Line Material Co.,* 333 U. S. 287.

amount of care would give safety. To compel men, wrote Mr. Justice Holmes "to guess on peril of indictment what the community would have given for them [commodities] if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." 234 U. S. at 223–224. The vast difference between this Kentucky statute and the New York law, so far as forewarning goes, needs no laboring.

The teaching of the *Nash* and the *Harvester* cases is that it is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes near the proscribed area. In his last opinion on this subject, Mr. Justice Holmes applied this teaching on behalf of a unanimous Court, *United States* v. *Wurzbach,* 280 U. S. 396, 399. The case sustained the validity of the Federal Corrupt Practices Act. What he wrote is too relevant to the matter in hand not to be fully quoted:

> "It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. The other objection is to the meaning of 'political purposes.' This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there

> will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U. S. 373."

Only a word needs to be said regarding *Lanzetta* v. *New Jersey,* 306 U. S 451. The case involved a New Jersey statute of the type that seek to control "vagrancy." These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L. Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these "vagrancy statutes" and laws against "gangs" are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided.

And so I conclude that New York, in the legislation before us, has not exceeded its constitutional power to control crime. The Court strikes down laws that forbid publications inciting to crime, and as such not within the constitutional immunity of free speech, because in effect it does not trust State tribunals, nor ultimately this Court, to safeguard inoffensive publications from condemnation under this legislation. Every legislative limitation upon utterance, however valid, may in a particular case serve as an inroad upon the freedom of speech which the Constitution protects. See, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296, and Mr. Justice Holmes' dissent in *Abrams* v. *United States,* 250 U. S. 616, 624. The decision of the Court is concerned solely with the validity of the statute, and this opinion is restricted to that issue.

Syllabus.

CONNECTICUT MUTUAL LIFE INSURANCE CO. ET AL. *v.* MOORE, COMPTROLLER OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 337. Argued December 19, 1947.—Decided March 29, 1948.

1. As applied to policies of insurance issued by foreign corporations for delivery in New York on the lives of residents of New York, where the insured persons continue to be residents of New York and the beneficiaries are residents at the maturities of the policies, Article VII of the Abandoned Property Law of New York, requiring payment to the State of monies held or owing by life insurance corporations and remaining unclaimed for seven years by the persons entitled thereto, does not impair the obligation of contracts within the meaning of Art. I, § 10 of the Constitution. Pp. 545–548.
2. Nor does it deprive foreign insurance companies of their property without due process of law contrary to the Fourteenth Amendment, since the relationship between New York and its residents who abandon claims against foreign insurance companies and the relationship between New York and foreign insurance companies qualifying to do business in New York are sufficiently close to give New York jurisdiction. Pp. 548–551.
3. The problem of what another state may do as to custody of abandoned insurance monies of companies incorporated therein is not presented in this case and is not passed upon. P. 548.
4. Decision is reserved as to instances where insured persons, after delivery of the policies, cease to be residents of New York or where the beneficiaries are not residents of New York at the maturities of the policies. P. 549.
5. A decision of the highest court of a state sustaining generally the validity of a state abandoned property law and having the effect of requiring appellants to comply with the state law, is reviewable in this Court on an appeal under § 237 (a) of the Judicial Code when precise questions arising under the Federal Constitution are presented, even though the decision arises out of a suit for a declaratory judgment presenting the questions abstractly and not out of a concrete case involving particular funds and facts. Pp. 550–551.

297 N. Y. 1, 74 N. E. 2d 24, affirmed.

In a suit for a declaratory judgment, the Supreme Court of New York sustained (with certain exceptions) the validity of Article VII of the Abandoned Property Law of New York, as applied to foreign insurance companies. 187 Misc. 1004, 65 N. Y. S. 2d 143. The Appellate Division affirmed. 271 App. Div. 1002, 69 N. Y. S. 2d 323. The Court of Appeals affirmed with modification. 297 N. Y. 1, 47 N. E. 2d 24. On appeal to this Court, *affirmed* except as to issues specifically reserved, p. 551.

Ganson J. Baldwin and *Buist Murfee Anderson* argued the cause and filed a brief for appellants.

Abe Wagman, Assistant Attorney General of New York, argued the cause for appellee. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

Mr. Justice Reed delivered the opinion of the Court.

We are asked in this suit to consider the validity of the New York Abandoned Property Law as applied to policies of insurance issued for delivery in New York on the lives of residents of New York by companies incorporated in states other than New York.

Article VII of the Abandoned Property Law, headed "Unclaimed Life Insurance Funds," was enacted in 1943. In 1944 the law was amended so as to cover insurance companies incorporated out of the state.[1] Section 700 states

[1] The first statute which included insurance policies as abandoned property was enacted in 1939, ch. 923 of the Laws of 1939. That statute applied only to companies incorporated in New York, but covered all policies issued by such companies. Chapter 602 of the Laws of 1940 amended the statute so as to apply only to policies issued on the lives of residents of New York. Chapter 697 of the Laws of 1943 reenacted the principal features of the earlier statutes as Art. VII, and cc. 497 and 498 (§ 2) of the Laws of 1944 made the statute applicable to foreign insurance companies. Chapter 452 of

that "any moneys held or owing" by life insurance companies in the following three classes of policies issued on the lives of residents of New York shall be deemed abandoned property: (1) matured endowment policies which have been unclaimed for seven years; (2) policies payable on death where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based (an age varying from 96 to 100), as to which no transaction has occurred for seven years; and (3) policies payable on death in which the insured has died and no claim by the person entitled thereto has been made for seven years.[2] Other sections

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the Laws of 1946 amended Art. VII so as to provide that a life insurance company which had paid the proceeds of a policy to the state could subsequently pay a second time to a claimant and acquire the rights of the claimant against the comptroller.

[2] "§ 700. Unclaimed life insurance corporation moneys.

"1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

"(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

"(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

"(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

"(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

"(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of

of Art. VII provide that insurance corporations doing business in New York shall make an annual report of abandoned property falling within the definitions of § 700, the lists shall be advertised, and if the abandoned property advertised remains unclaimed, the amounts due and owing shall be paid to the state comptroller so as to be in the care and custody of the state. Art. VII, § 703, Art. XIV, § 1402; State Finance Law § 95. Upon payment to the state, the companies are discharged of any obligation, and any person subsequently setting up a claim must file a claim with the comptroller. A penalty of $100 a day is provided for failure to file the required report. Art. XIV, § 1412.

The present suit was brought by nine insurance companies, incorporated in states other than New York, in the Supreme Court of New York for a declaration of the invalidity of the Abandoned Property Law of New York, as applied to the plaintiffs, and to enjoin the state comptroller and all other persons acting under state authority from taking any steps under the statute. The Supreme Court ruled that the Abandoned Property Law was void in so far as it applied to policies of life insurance issued for delivery outside of New York by foreign life insurance companies. As no appeal from this ruling was taken by the state, it is not before us. The Supreme Court reserved to the appellant insurance companies the right to assert the invalidity of the Abandoned Property Law or any application thereof in so far as such law or state action thereunder sought to deprive them of any defense against any claim under any life insurance policy.

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this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

"2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned."

With the above exceptions, the Supreme Court upheld the life insurance sections of the Abandoned Property Law against appellants' attack. The Appellate Division affirmed and the Court of Appeals reversed the judgment of the Supreme Court in so far as it reserved to the companies further right to assert defense against claims under the policies. The Court of Appeals by its interpretation of the New York statute left open to the insurance companies all defenses except the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency and failure to surrender a policy on making a claim. 297 N. Y. 1, 74 N. E. 2d 24. With this modification, it affirmed the trial court's judgment.[3] Appeal to this Court was perfected under § 237 (a) of the Judicial Code and probable jurisdiction noted on October 20, 1947.

In addition to objections under New York law, appellants raised in their complaint and have consistently maintained that the statute impairs the obligation of contract within the meaning of Art. I, § 10, of the Constitution and deprives them of their property without due process of law under the Fourteenth Amendment. Their argument under the Contract Clause is that the statute transforms into a liquidated obligation an obligation which was previously only conditional. Their argument under the Due Process Clause is that New York has no power to sequester funds of these life insurance companies to meet the companies' obligations on insurance policies issued on New York residents for delivery in New York.

I. In support of their first contention appellants note that the policy terms provide that the insurer shall be under no obligation until proof of death or other con-

[3] 187 Misc. 1004, 65 N. Y. S. 2d 143; 271 App. Div. 1002, 69 N. Y. S. 2d 323; 297 N. Y. 1, 74 N. E. 2d 24.

tingency is submitted and the policy surrendered. They contend that in dispensing with these conditions the statute transforms an obligation which is merely conditional into one that is liquidated. They further claim that unless proof of death or other contingency is submitted, they will have difficulty in establishing other complete or partial defenses, such as the fact that the insured understated his age in his application for insurance, that the insured died as a result of suicide, military service, or aviation, and that the insured was not living and in good health when the policy was delivered. We assume that appellants may find it more difficult to establish other defenses, but we do not regard the statute as unconstitutional because of these enforced variations from the policy provisions.

Unless the state is allowed to take possession of sums in the hands of the companies classified by § 700 as abandoned, the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay. We think that the classification of abandoned property established by the statute describes property that may fairly be said to be abandoned property and subject to the care and custody of the state and ultimately to escheat. The fact that claimants against the companies would under the policies be required to comply with certain policy conditions does not affect our conclusion. The state may more properly be custodian and beneficiary of abandoned property than any person.

We think that the state has the same power to seize abandoned life insurance moneys as abandoned bank deposits, *Anderson National Bank* v. *Luckett,* 321 U. S. 233; *Security Bank* v. *California,* 263 U. S. 282, and abandoned deposits in a court registry, *United States* v. *Klein,* 303 U. S. 276. There are, of course, differences between the steps a depositor must take to withdraw a

bank deposit and those that a beneficiary of a policy must take to collect his insurance. Each, however, must make appropriate representations according to the requirements of his contract with bank or insurance company. When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite proper as between the contracting parties. The state is acting as a conservator, not as a party to a contract. Abandoned Property Law, Art. XIV, § 1404; State Finance Law, § 95; *Anderson National Bank* v. *Luckett, supra,* at 241.

We see no constitutional reason why a state may not proceed administratively, as here, to take over the care of abandoned property rather than adopt a plan through judicial process as in *Security Bank* v. *California, supra.* There is ample provision for notice to beneficiaries and for administrative and judicial hearing of their claims and payment of same.[4] There is no possible injury to any beneficiary. The right of appropriation by the state of abandoned property has existed for centuries in the common law. See *Anderson National Bank* v. *Luckett,*

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[4] Abandoned Property Law, Art. XIV, § 1404:

"1. The care and custody, subject only to the duty of conversion prescribed in section fourteen hundred two of this chapter, of all abandoned property heretofore paid to the state, except

"(i) abandoned property in individual amounts of less than one dollar so paid pursuant to chapter one hundred seven of the laws of nineteen hundred forty-two; and of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund."

. . . . .

See also §§ 702, 1402, 1406 (1) (a) and (b), and *Anderson National Bank* v. *Luckett, supra,* at 242.

supra, at 240 and 251. We find no reason for invalidating the statutory plan under the Contract Clause.

II. Nor do we agree with appellants' argument that New York lacks constitutional power to take over unclaimed moneys due to its residents on policies issued for delivery in the state by life insurance corporations chartered outside the state. The appellants claim that only the state of incorporation could take these abandoned moneys. They say that only one state may take custody of a debt.[5] The statutory reference to "any moneys held or owing" does not refer to any specific assets of an insurance company, but simply to the obligation of the life insurance company to pay. The problem of what another state than New York may do is not before us. That question is not passed upon. To prevail appellee need only show, as he does as to policies on residents issued for delivery in New York, that there may be abandoned moneys, over which New York has power, in the hands of appellants. The question is whether the State of New York has sufficient contacts with the transactions here in question to justify the exertion of the power to seize abandoned moneys due to its residents. Appellants urge that the following considerations should be determinative in choosing the state of incorporation as the state for conservation of abandoned indebtedness, if such moneys are to be taken from the possession of the corporations. It is pointed out that the present residence of missing policyholders is unknown; that with our shifting population residence is a changeable factor; that as the insured chose a foreign corporation as his insurer, his choice should be respected; that moneys should escheat to the sovereignty that guards them at the time of abandonment. As a practical matter, it is urged that restricting escheat or conservancy to the state of

[5] Compare *State Tax Commission* v. *Aldrich,* 316 U. S. 174; *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 293, 294.

incorporation avoids conflicts of jurisdiction between states as to the location of abandoned property and simplifies the corporations' reports by limiting them to one state with one law. Attention is called to presently enacted statutes in Pennsylvania,[6] New Jersey,[7] and Massachusetts.[8] None of these statutes apply to corporations chartered outside of the respective states. Furthermore, it is argued that the analogous bank deposit cases have upheld escheat or conservancy by the state of the bank's incorporation.[9] Finally reliance is placed on the undisputed fact that the policies are payable at the out-of-state main offices of the corporations, the evidences of their intangible assets are there located and there claims must be made and other transactions carried on.

These are reasons which have no doubt been weighed in legislative consideration. We are here dealing with a matter of constitutional power. Power to demand the care and custody of the moneys due these beneficiaries is claimed by New York, under Art. VII of the Abandoned Property Law as construed by its courts, only where the policies were issued for delivery in New York upon the lives of persons then resident in New York. We sustain the constitutional validity of the provisions as thus interpreted with these exceptions. We do not pass upon the validity in instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy. As interests of other possible parties not represented here may be affected by our conclusions and

[6] Purdon's Pa. Stat., Title 27, §§ 434–437.

[7] N. J. Rev. Stat. §§ 17:34–49—34–58 (Cum. Supp., Laws of 1945–1947).

[8] Ch. 455, Mass. Acts and Resolves (1946).

[9] See *Anderson National Bank* v. *Luckett, supra; Security Bank* v. *California, supra; In re Rapoport's Estate,* 317 Mich. 291, 26 N. W. 2d 777.

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as no specific instances of those types appear in the record, we reserve any conclusion as to New York's power in such situations. The appellants sought a declaration pursuant to New York procedure of the invalidity of Art. VII of the New York Abandoned Property Law, directed at unclaimed life insurance funds. The Court of Appeals refused to accept appellants' arguments for invalidation of the law on federal constitutional or any other grounds. This decision compelled the appellants to comply with Art. VII, except as their defenses were saved by the opinion of the Court of Appeals, unless this Court reviewed the federal constitutional issues and decided them in appellants' favor. Consequently a case or controversy arising from a statute interpreted by the state court is here with precise federal constitutional questions as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at the maturity of the policy. A judgment on that class of policies should be reviewed by this Court. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 259; *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405. See *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 459–63. We pass only upon New York's power to take over the care of abandoned moneys under those circumstances.

There have been, over the years, a close supervision and regulation by states of the business of insuring the lives of their citizens. There has been complete recognition of this relationship. See *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408.[10] New York has practiced such regulation.[11] Foreign corporations must obtain state authority to do business, segregate securities, submit to

[10] An old provision makes New York law applicable to policies issued for delivery in New York. Insurance Law § 143 (2).

[11] New York Insurance Law, §§ 42, 59, 103, 143, 208 (5), 216 (6).

examination and state process. The business activities connected with the purchase of insurance by New York residents normally take place in New York. It is the beneficiary of the policy, not the insurer, who has abandoned the moneys. Undoubtedly the relationship is very close.[12] Certainly the relationship between New York and foreign insurance companies as to policies here under discussion is as close as that between the company and its state of incorporation.[13] The Court of Appeals on this point said:

> "For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws, and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature."

We agree with this statement and hold that New York had power to take over these abandoned moneys in the hands of appellants.

The judgment of the Court of Appeals of New York is affirmed except as to issues specifically reserved.

MR. JUSTICE FRANKFURTER, dissenting.

My brother JACKSON'S opinion, with which I substantially agree, persuades me that we should decline to exercise jurisdiction in this case. The wise practice govern-

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[12] See *Greenough* v. *Tax Assessors*, 331 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357. Compare *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320: "It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."

[13] See *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138; *Ex parte Schollenberger*, 96 U. S. 369, 377; *Morgan* v. *Mutual Benefit Life Insurance Co.*, 189 N. Y. 447, 82 N. E. 438.

ing constitutional adjudication requires it. For this proceeding poses merely hypothetical questions, all of which are intertwined and concern interests not represented before us. Circumstances not more compelling, surely, than this record discloses led us in a series of recent cases to avoid borrowing trouble by declining to adjudicate premature constitutional issues. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *United Public Workers of America* v. *Mitchell,* 330 U. S. 75; *Rescue Army* v. *Municipal Court,* 331 U. S. 549.

In appearance this is a suit between a few insurance companies and the State of New York. But at the heart of the controversy are the conflicting claims of several States in a hotchpot of undifferentiated obligations. The proceeds of "abandoned" life insurance policies cannot, I assume, be seized as for escheat more than once. Since the rights and liabilities growing out of such policies are, to a vast extent, the result of a process that concerns two or more States, their interests may come into conflict when, in exigent search for revenue, they invoke the opportunities of escheat against unclaimed proceeds from insurance policies. I assume merely conflicting State interests and lay aside considerations that may be drawn from the decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533.

In the vigilant search for new sources of revenue, several States have already sought to tap for their own exchequers the matured obligations of unclaimed policies. It would be impractical not to assume that other States will do likewise. Only New York's claim is before us. It is vital to define the precise nature of this claim. New York does not lay claim to a particular fund constituting the proceeds of abandoned matured obligations. This litigation, it is conceded, seeks to test abstractly the constitutionality of the New York statute providing for turning over to her the avails of abandoned matured

insurance policies. New York asks that her right to the hotchpot of undifferentiated obligations be acknowledged. Of course New York may enable its courts to pass on the validity of a comprehensive statute unrelated to the enforcement of specific claims to specific funds that came into existence under circumstances differing in their constitutional significance. It does not follow, however, that what the New York Court of Appeals has adjudicated we must review.

The New York Court of Appeals sustained the power of New York to claim escheat on abandoned insurance maturities from foreign insurance companies doing business in New York on the basis of the insured's residence in New York at the time of the delivery of the policy in New York. According to this view, as MR. JUSTICE JACKSON points out, change of residence of the insured or of the beneficiary long before maturity of the policy, or nonresidence in New York of a beneficiary, other than the insured, at any time, become utterly immaterial. These are only some of the familiar situations that are encompassed by the Court of Appeals validation of the New York statute.

This Court does not purport to affirm all that is included in the New York judgment. It is fair, however, to say that the Court's opinion does not enumerate what possible situations included in the judgment below it has not passed upon. It is explicit in putting to one side the validity of the New York statute in "instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy. As interests of other possible parties not represented here may be affected by our conclusions and as no specific instances of those types appear in the record, we reserve any conclusion as to New York's power in such situations." But "no specific instances" of any type appear

in the record. Indeed, it may be said that the only instances of types of transactions as to which escheat is claimed that are in the record are the types on which the opinion of the Court declines to pass. The complaint specifically refers to the frequency with which policies are issued upon the lives of New York residents for non-New York beneficiaries, as well as the extent with which holders of policies change their residence. On the state of the pleadings, these allegations must be accepted as true. To be sure, New York lays claim to all funds reflecting these situations, and its highest court has sustained this generalized claim. But, as already indicated, this is not a suit for any specific fund. For all we know there are no funds in New York to which that State could lay claim even within the circumscribed affirmance by this Court of the New York judgment.

Whatever the scope of the Court's decision, it is a hypothetical decision. New York has been sustained below in an abstract assertion of authority against funds not claimed nor defined, except compendiously defined as the right to go against insurance companies doing business in New York for the proceeds of policies delivered in New York upon the lives of insured then resident in New York. This generalized decision the Court rejects. Instead, it carves out different and limited claims for which New York may go without any indication that there is anything on which such claims could feed. In any event, such a mutilated affirmance of the decision of the New York Court of Appeals, with everything else left open, is bound to hatch a brood of future litigation. Claims of the States of domicile of the insuring companies, claims of the States of residence of the insured at the time of maturity, claims of the States of residence of beneficiaries other than the insured at the time of maturity, are all put to one side here as not presented by the record though they are as much presented as what is decided. To

revenue-eager States these are practical situations full of potentialities. This Court is all too familiar with the special position of control claimed by a chartering State and the special powers the domiciliary State of a deceased asserts over his "intangibles."

How the conflicting interests of the States should be adjusted calls for proper presentation by the various States of their different claims. Words may seek to restrict a decision purporting to pass on a small fragment of what is in truth an organic complexity to that isolated part. But such an effort to circumscribe what has been decided is self-defeating. A decision has a momentum of its own, and it is nothing new that legal doctrines have the faculty of self-generating extension. We ought not to decide any of these interrelated issues until they are duly pressed here by the affected States, so that a mature judgment upon this interrelation may be reached. All the considerations of preventive adjudication—the avoidance of a truncated decision of indeterminate scope, with the inevitable duty of reconsidering it or unconsciously being influenced by implicit overtones of such a decision—require that decision await the ripening process of a defined contest over particular funds as to which different States make concrete claims.

The way is open to secure a determination by this Court of the rights of the different States in the variant situations presented by abandoned obligations on matured insurance policies. It is precisely for the settlement of such controversies among the several States that the Constitution conferred original jurisdiction upon this Court. If Florida, Massachusetts, New York and Texas could bring here for determination their right to levy a death tax in respect to a particular succession, *Texas* v. *Florida,* 306 U. S. 398, even more fitting is it that the claims of various States to seize the matured obligations of abandoned insurance policies should be presented by

those States at the bar of this Court and be adjudicated here after full reflection on all these claims. Of course the insurance companies have interests to protect and to present. But the essential problem is the legal adjustment of the conflicting interests of different States, because each may have some relation to transactions which give rise to funds that undoubtedly are subject to escheat. Until that is duly before us we should not peck at the problem in an abstract, hypothetical way.

The appeal should be dismissed.

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

I find myself unable to join the Court in this case. I cannot agree that we may affirm the judgment below without facing, or by reserving our opinion upon, the constitutional question inherent in this statute by which New York would escheat unclaimed insurance proceeds not located either actually or constructively in New York and which are the property of a beneficiary who may never have been a resident or citizen of New York.

This action is one for a declaratory judgment as to the validity of the Act and we are therefore passing on the Act as an entirety and in the abstract. The cases of nonresident beneficiaries are before us as much as any other concrete case. The Act purports to escheat in every case in which the policy was issued for delivery in New York and the insured was then a resident of that state. The unchallenged complaint alleges the Comptroller's instructions to be that removal of the insured from the state after issuance of the policy does not take a case out of the Act. The statute, as written and as affirmed, obviously intends to reach nonresident claimants and insured persons, for it provides for binding them by publication (§ 702 (2)), and by publication within New York at that. Moreover, and most importantly, in reach-

ing the judgments which we affirm, the opinion of the Special Term of the Supreme Court, while holding some features of the Act invalid, expressly considered and upheld these provisions of the Act and the Court of Appeals indicated no disagreement. Our affirmance necessarily sustains the whole judgment below and that sustains the Act in these particulars. It is perhaps unfortunate to adjudicate constitutionality in such a manner. If we had before us a concrete case, contested by adversary state claimants to the right of escheat and based on a record that would show some facts as to residence of parties to the transactions, we would know better what we are talking about. But since in a declaratory judgment action we can have only hypothetical cases before us, I cannot ignore one which certainly occurs frequently and one embraced within both the Act and the decision below.

Neither the Act nor the decision below contemplates that the right to escheat is based on residence of the owner of the proceeds at the time of escheat, or at any other time, but rather on these two facts: (1) that the policy was issued for delivery in New York, and (2) that the *insured* was then a resident of New York. Thus, the State claims power to escheat what is due a *beneficiary* solely because it was the residence of the *insured* when the policy was issued and irrespective of the nonresidence at that time and at all times of the beneficiary whose property it takes. Thus, the escheat of one man's property is based on another man's one-time residence in the state. Further, the seizure of today is based not even on the assured's residence at the time the policy matured, but on his residence at some prior date, which, in view of the long-term nature of insurance contracts, may have been many years ago.

The effect of the Court's affirmance of the judgment upholding this statute is that a residence by the insured in New York at the time a policy was "issued for deliv-

ery" there shows "sufficient contacts with the transaction," so that the State may escheat proceeds owned by a beneficiary who may never have lived in that State. Even in the abstract, I find the concept of "sufficient contacts with the transaction" too vague to be helpful in defining practical bounds of a state's jurisdiction or power to escheat. We are given no enlightenment as to why any one or more events is regarded as "sufficient," nor as to what jurisprudential context is to be given to the term "contact," which seems taken over from some vernacular other than that of the law. I cannot even tell here what the Court thinks the controlling "transaction" is. If it is issuance of the policy that is the "contacted" transaction, it would seem that the State where it was issued, where premiums were paid, or where it was actually delivered, would be more controlling than the place where it was "issued for delivery." If it is the maturing of the claim, I see less "contact" from a sometime and remote residence than from a later one, or one at the time of events which matured the policy.

The weakness of the Court's test of sufficient contacts with the "transaction" is more fully revealed when we consider that by its application today other states are cut off from escheating the proceeds (unless the company is subject to multiple escheats), although by the same tests they have many more and much closer "contacts" with some part of the transaction. If we say New York may step into the beneficiary's shoes and collect his unclaimed insurance proceeds solely because the insured lived in New York when the policy issued for delivery there, how can we deny the claim of another state to escheat the same fund when its claim is asserted under any one or more of the following circumstances: (1) It is the state in which the insured has died or where some other contingency occurred which brought the claim to maturity. (2) It is

the state in which the beneficiary always has resided and was last known to reside. (3) It is the state of a proved later and longer residence of the insured. (4) It is the state to which both the insured and the beneficiary removed and resided after the policy was taken out in New York. (5) It is the state of actual permanent domicile, as opposed to mere residence in New York, of the insured and the beneficiary. (6) It is the state of actual delivery of the policy, though it was "issued for delivery" in New York. (7) It is the state where the claim is payable and where funds for its discharge are and at all times have been located. Certainly the foregoing are "contacts" as I would understand the term, and some of them or some combination of them seem more persuasive of a right to escheat than the grounds on which we are affirming New York's right to do so.

I am not unmindful of the Court's pronouncement that it does not decide what a state other than New York may do and that it excepts from its approval "instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy." As to those cases, the Court says it reserves any conclusion. But how can it reserve a conclusion as to whether "contacts" here determined to be sufficient in the case of New York will be sufficient in the case of another state? The issue of "sufficiency of contacts" is settled by this decision. The premises that are being applied today lead inescapably to the conclusion that other states have equally good grounds (*i. e.,* "sufficient contacts") to escheat the same claims. Are we going to repudiate our reasoning in this case the first time another state invokes it in conflict with New York, or will we hold the reasoning impeccable and, hence, the company subject to a double or multiple liability to escheat? The effort to remain

uncommitted to any conclusion is self-delusive when it is accompanied, as it is here, by a commitment as to all of the factors which shape the conclusion "reserved."

It seems to me that the constitutional doctrine we are applying here, if we are consistent in its application, leaves us in this dilemma: In sustaining the broad claims of New York, we either cut off similar and perhaps better rights of escheat by other states or we render insurance companies liable to two or more payments of their single liability. If we impale ourselves, and the state and insurance companies along with us, on either horn of this dilemma, I think the fault is in ourselves, not in our Constitution.

For the juridical basis on which escheat has from time to time rested, we need go no farther than the law of New York itself as expounded by Judge Cardozo. Escheat survives only as an "incident of sovereignty," whether the subject of escheat is personal or real estate. *Matter of People* (*Melrose Ave.*), 234 N. Y. 48, 136 N. E. 235. But sovereignty by itself means nothing; sovereignty exists in respect of something or over someone. The two usual examples of escheat properly incidents of sovereignty are:

First, sovereignty in the sense of actual dominion over the property escheated. The State on this basis may, of course, take unto itself lands which fail of private owners through want of heirs, and tangible personal property lost or abandoned in the state. The right to appropriate intangible property constructively within the state also has been upheld by this Court on grounds that "the deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion." *Anderson National Bank* v. *Luckett,* 321 U. S. 233; *Security Bank* v. *California,* 263 U. S. 282. See also *United States* v. *Klein,* 303 U. S. 276. But New York can show neither actual nor

constructive dominion over the property sought now to be escheated. The proceeds to be escheated are held by out-of-the-state insurance companies and by no stretch of imagination are they within New York's dominion. And certainly residence of the insured at the time the policy issued cannot generate constructive possession of either the beneficiary's claim or the actual proceeds at maturity or at the time of abandonment.

Second, sovereignty over the person, as a resident or citizen, will justify the state in stepping into his shoes as claimant of abandoned property. Our federal form of government presupposes a dual allegiance. In addition to a general allegiance to the United States, each person has a particular allegiance to the state of which he is a resident, and hence, under the Fourteenth Amendment, is a citizen. This status, while it lasts, subjects him and what is his to state power. But New York, under this statute, does not rely on this relationship to sustain this escheat. It would step into the shoes of beneficiaries last known to be citizens of other states and even if they were so unfortunate as never to have been in New York State. The State bases its right to seize such a non-resident's assets solely on the fact that the insured was there when the policy issued. But even if the allegiance of the insured would in some circumstances justify escheat of the beneficiaries' payments, how can it do so after the allegiance has long since ceased? The right of a citizen to migrate from one state of the Union to another, *cf. Edwards* v. *California,* 314 U. S. 160, carries with it, of necessity, the right of expatriation, a right for which this Nation has always contended. A state cannot fasten its power and will upon a resident so that it adheres to him for life. I have never before heard it denied that one, if he makes his intent sufficiently clear, may by migration bring to an end his allegiance to a state and with it the state's sovereignty over him. But New York's plan re-

quires us to say not only that sovereignty over an insured reaches the property of a third-party beneficiary but that such a consequence follows both parties for life, although the insured may have deliberately acquired a new allegiance and become a citizen of another state, and the beneficiary may never have been in New York.

Consideration of these conventional and established grounds of escheat shows not only that they fail to support the New York statute in this class of cases, but also that they establish a superior right of escheat in other states as an incident of their sovereignty. Of course, the two grounds I have mentioned may bring two states into conflict. Indeed, such a conflict now exists. Pennsylvania, apparently relying on the theory of the bank deposit cases, undertakes to escheat all unclaimed funds in the hands of companies it has chartered, even though the insured may have been a resident of New York when the policy issued, so that New York would claim the same fund. Can we now say New York may take, without saying Pennsylvania must give? Do we say the company must pay twice? This makes pertinent the question whether we should not decline to decide such issues as are here involved when they are presented only in the abstract by a declaratory judgment action. See *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461.

But if we are to entertain the case, I think we should decide it, not by extemporized generalities like "sufficient contacts with the transaction," but by recognized standards having definite connotations in the law. New York is not the only state with an interest in these questions. New York is merely the sole state whose argument we have heard. The mobility of our population and the complexity of our life create many confusions in which the states may properly look to us for some standard by which they may know what and whom to claim for their

own. It seems to me that we should not unnecessarily confound what at best is confusion, by removing the landmarks of state jurisdiction erected by years of trial and error. *Cf.* dissenting or concurring opinion in *Duckworth* v. *Arkansas,* 314 U. S. 390; *State Tax Commission* v. *Aldrich,* 316 U. S. 174; *Williams* v. *North Carolina,* 317 U. S. 287; *General Trading Company* v. *State Tax Commission,* 322 U. S. 335; *International Harvester Co.* v. *Wisconsin,* 322 U. S. 435; *Northwest Airlines* v. *Minnesota,* 322 U. S. 292; *Greenough* v. *Tax Assessors,* 331 U. S. 486; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28; and others, probably, yet to come.

While we may evade it for a time, the competition and conflict between states for "escheats" will force us to some lawyerlike definition of state power over this subject. It is naive beyond even requirements of the judicial office to assume that this lately manifest concern of the states over abandoned insurance proceeds reflects only solicitude for the unknown claimants. If it did, the states' claims might reconcile more easily. But escheat of these interests is a newly exploited, if not newly discovered, source of state revenue. Escheat, of course, is not to be denied on constitutional grounds merely because the motive of the states savors more of the publican than of the guardian. But it is relevant to the caution and precision we should use in sustaining one state's claim, lest we be foreclosing other better-founded ones.

This competition and conflict between states already require us, in all fairness to them, to define the basis on which a state may escheat. The first Act of this kind was by Pennsylvania in 1937. Act of June 25, 1937, Pamphlet Laws 2063, Purdon's Pa. Stat., Title 27, § 434. It is also alleged, and not denied, that two other states have enacted similar laws which are now in force. The Pennsylvania statute "escheats," as the Court says, only proceeds of policies issued by companies incorporated in

Pennsylvania. But it escheats all of those regardless of residence of the insured or of where the policy was delivered. Its conflict with the law before us is patent and immediate. We cannot sustain New York's statute without, to the extent here indicated, striking down that of Pennsylvania, which is not a party here and whose claims have not been heard. The original New York statute, ch. 923, Laws of 1939, was similar to the Pennsylvania Act. It was attacked as unconstitutional, *New York Life Ins. Co.* v. *Pink,* New York Law Journal, Dec. 21, 1939, p. 2257, but was amended to apply only to policies issued by New York companies on the lives of residents of New York. Ch. 602, Laws of 1940. In 1943 these Acts were removed from the Insurance Law, re-enacted as part of the Abandoned Property Law. Ch. 697, Laws of 1943. In 1944 these present statutes were enacted, extending to foreign insurance companies and on the basis here in question. Chs. 497, 498, Laws of 1944. Thus, it represents a deliberate state plan of escheat based only on issuance, for delivery in New York, of a policy insuring the life of a then New York resident, and irrespective of location of the insurer or residence of the beneficiary.

For the reasons outlined herein, I should express disapproval of the declaratory judgment below, decline to certify the validity of this legislation at this time, and deal with this problem only as presented by concrete cases or controversies involving particular funds and facts. But if we are to render a decision in the abstract, I should say that New York by this statute overreaches its sister states by the tests I have set forth.

MOORE ET AL. *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 485. Argued February 12, 1948.—Decided March 29, 1948.

1. The validity of New York special jury statutes under the Federal Constitution is sustained as against a claim of invalidity based on the ratio of convictions to acquittals in cases tried by special juries and in cases tried by ordinary juries. *Fay* v. *New York,* 332 U. S. 261. Pp. 566–567.
2. The claim of systematic, intentional and deliberate exclusion of Negroes from the jury is not sustained by the record in this case. Pp. 567–569.

297 N. Y. 734, 77 N. E. 2d 25, affirmed.

Petitioners were convicted of murder by a special jury in a New York state court. The Court of Appeals of New York affirmed the convictions. 297 N. Y. 734, 77 N. E. 2d 25. This Court granted certiorari. 332 U. S. 843. *Affirmed,* p. 569.

John F. Wilkinson argued the cause for petitioners. With him on the brief was *Isidore Ehrman.*

George Tilzer argued the cause for respondent. With him on the brief was *Samuel J. Foley.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioners were indicted in Bronx County, New York, on February 11, 1947, for the crime of murder in the first degree. The District Attorney moved the court for an order that the trial be by a special jury, pursuant to New York law, which motion was granted over opposition on behalf of defendants by assigned counsel. One hundred and fifty names were drawn from the special jury panel,

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under supervision of a Justice of the State Supreme Court, in the presence of defendants' counsel and without objection.

When the case was called for trial defendants, as permitted by the state practice, served a written challenge to the panel of jurors upon the following grounds:

> 1. That § 749–aa of the Judiciary Law of the State of New York is in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States.
>
> 2. That qualified Negro jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.
>
> 3. That qualified women jurors were improperly excluded from the list of special jurors, from which said jury panel was drawn.

After full hearing, the challenge was disallowed and petitioners were tried and convicted. On appeal to the Court of Appeals, the third ground of challenge to the jury panel was abandoned and the convictions were affirmed. 297 N. Y. 734, 77 N. E. 2d 25. We granted certiorari on a petition raising the remaining grounds. 332 U. S. 843.

The constitutionality of the New York special jury statutes has but recently been sustained by this Court, *Fay* v. *New York,* 332 U. S. 261, against a better supported challenge than is here presented, and the issue warrants little discussion at this time.

Some effort is made by statistics to differentiate this case from the precedent one as to the ratio of convictions before special juries contrasted with that before ordinary juries. The defendants present to us a study from July 1, 1937, to June 30, 1946, which indicates that special juries in Bronx County returned 15 convictions and 4 acquittals

during the period and concludes that the special jury convicted in 79% of the cases while the general juries convicted in 57%. The District Attorney responds that in 5 of these 19 cases, the special jury returned conviction in a lesser degree than that charged and, hence in 9 out of 19 cases withheld all or part of what the State asked. Moreover, it is said that all but two were capital cases, another was for manslaughter and one for criminally receiving stolen property. It should be observed that the number of cases involved in these statements is too small to afford a secure basis for generalizing as to the convicting propensities of the two jury panels, even if the cases were comparable. But it appears that in Bronx County a system of special and intensive investigation is applied to capital cases from the moment they are reported, more careful preparation is given them and they are tried by the most experienced prosecutors. This makes this class of cases not fairly comparable with the run-of-the-mill cases, felony and misdemeanor, that are included in the ordinary jury statistics. Moreover, none of these facts were laid before the trial court, which was in the best position to analyze, supplement or interpret them. We think on this part of the challenge no question is presented that was not disposed of in *Fay* v. *New York, supra.* Indeed, on opening the hearing on defendants' challenge the trial court said, "I understand the inquiry now is to be directed to the intentional elimination or disqualification of women and Negroes on the special jury panel." Counsel for both defendants assented to this definition of the issues and no evidence on other subjects was offered.

Petitioners' remaining point is that "the trial of the petitioners, Negroes, by a jury selected from a panel from which Negroes were systematically, intentionally and deliberately excluded, denied petitioners the equal protec-

tion of law and due process of law guaranteed them by the Constitution of the United States." If the evidence supported the assumption of fact included in this statement, the point would be of compelling merit. The law on this subject is now so settled that we no longer find it necessary to write out expositions of the Constitution in this regard. See *Brunson* v. *North Carolina,* 333 U. S. 851, decided March 15, 1948.

It is admitted that on this panel of one hundred and fifty there were no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion—the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. The census figures give a proportion of Negro-to-white population in that county of .7% in 1920, 1.0% in 1930, and 1.7% in 1940. It is admitted that since the last census the Negro population has considerably increased. According to one estimate, the number of colored inhabitants, which in 1940 was 24,892, has increased to 192,066 in 1948. The same estimator later revised the figures to between 65,000 and 70,000. Neither estimate was before the trial court, and no evidence or finding gives us judicially approved data. Of course, new wartime arrivals take some time to qualify as active members of the community and its machinery of justice cannot be expected instantaneously to reflect their presence. The official who compiled the jury lists testified as to Negro jurors that "from 1946 on I must have examined at least 500 myself." The number accepted for service could not be ascertained from the records, which make no notation of color, but he testified that there were "maybe two dozen; maybe three dozen." For the special panel, he testified that he had examined an estimated one hundred Negroes and had accepted "maybe a dozen." The testimony is undenied.

The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty.

The judgment is

Affirmed.

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

This case represents a tragic consequence that can flow from the use of the "blue ribbon" jury. Two men must forfeit their lives after having been convicted of murder not by a jury of their peers, not by a jury chosen from a fair cross-section of the community, but by a jury drawn from a special group of individuals singled out in a manner inconsistent with the democratic ideals of the jury system. That group was chosen because they possessed some trait or characteristic which distinguished them from the general panel of jurors, some qualification which made them more desirable for the State's purpose of securing the conviction of the two petitioners. Such a basis for jury selection has no place in our constitutional way of life. It contravenes the most elementary notions of equal protection and I can no more acquiesce in its use in this case than I was able to do in *Fay* v. *New York*, 332 U. S. 261.

The constitutional invalidity of this "blue ribbon" system does not depend upon proof of the systematic and intentional exclusion of any economic, racial or social group. Nor does it rest upon a demonstration that "blue ribbon" juries are more inclined to convict than ordinary juries. Such factors are frequently, if not invariably, present in "blue ribbon" situations, though proof is extremely difficult. But they are at best only the end products of the system, not the root evil.

The vice lies in the very concept of "blue ribbon" panels—the systematic and intentional exclusion of all but the "best" or the most learned or intelligent of the general jurors. Such panels are completely at war with the democratic theory of our jury system, a theory formulated out of the experience of generations. One is constitutionally entitled to be judged by a fair sampling of all one's neighbors who are qualified, not merely those with superior intelligence or learning. Jury panels are supposed to be representative of all qualified classes. Within those classes, of course, are persons with varying degrees of intelligence, wealth, education, ability and experience. But it is from that welter of qualified individuals, who meet specified minimum standards, that juries are to be chosen. Any method that permits only the "best" of these to be selected opens the way to grave abuses. The jury is then in danger of losing its democratic flavor and becoming the instrument of the select few.

Hence the "blue ribbon" method of selecting only the "best" of the general jurors, a method instituted with the highest of intentions, does violence to the fundamental precepts of the jury system. Appeals to administrative convenience do not soften that violence. And since the method deprives the defendant of the protection accorded others who are able to draw upon the general panel, it falls under the ban of the Fourteenth Amendment. I would therefore reverse the judgment below.

PARKER *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 270. Argued February 13, 1948.—Decided April 5, 1948.

Petitioner was sentenced by an Illinois court to 90 days in jail for contempt. The State Supreme Court denied a direct review. The trial court then issued an amended order adjudging petitioner guilty of contempt and sentencing him to jail for 90 days. Petitioner appealed from this order to an intermediate state court, which sustained it on state grounds. The State Supreme Court affirmed. Neither the intermediate court nor the State Supreme Court considered petitioner's claimed denial of rights under the Federal Constitution. Under Illinois practice, a case involving a claim of federal right must be taken directly from the trial court to the State Supreme Court, else the federal question is deemed waived. *Held:*

1. In appealing the amended order to the intermediate state court rather than directly to the State Supreme Court, petitioner waived his claim of rights under the Federal Constitution. *Central Union Co.* v. *Edwardsville,* 269 U. S. 190. Pp. 572–576.

2. When federal rights are involved, it is for this Court to determine whether a claimant's failure to follow the procedure designed by a State for their protection constitutes a waiver of them. P. 574.

3. The Illinois practice of requiring constitutional questions to be taken directly to the State Supreme Court, and refusing to review them if review is first sought in an intermediate state court, affords litigants a reasonable opportunity to have constitutional questions heard and determined by the state court, and is valid. Pp. 574–575.

4. The fact that a petition to the State Supreme Court for review of the amended order may have seemed futile, in view of that court's denial of direct review of the original order, does not excuse petitioner's failure to proceed in the prescribed manner. Pp. 575–576.

5. If the petition to this Court for certiorari be considered as involving only the original order, it is out of time; if it involves the amended order, it presents federal questions which have been waived. Pp. 575–576.

6. The result in this case is no different if the original and amended orders are regarded as the same in substance though separate in point of time and form, since it is not unreasonable for Illinois to refuse a second appeal. P. 576.

396 Ill. 583, 72 N. E. 2d 848, affirmed.

The State Supreme Court denied direct review of an order of a trial court sentencing petitioner to imprisonment for contempt. An amended order of the trial court was affirmed by an appellate court, 328 Ill. App. 46, and by the State Supreme Court, 396 Ill. 583, 72 N. E. 2d 848. This Court granted certiorari. 332 U. S. 846. *Affirmed,* p. 577.

Petitioner argued the cause and filed a brief *pro se.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett,* Attorney General.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, who was engaged in litigation in the Illinois courts with one Shamberg, was ordered on a motion for discovery to produce certain documents. He produced them by filing them with the clerk of the Illinois courts. Shamberg thereupon moved that petitioner be punished for contempt because the documents reflected on the integrity of the court. After a hearing petitioner was adjudged guilty of contempt. The court held that the order required only that petitioner produce the documents, not that he file them in court so as to make them public records; and that the filing of the documents containing statements deemed to be scurrilous constituted an obstruction of justice and an abuse of the processes of the court, tending to lessen the court's dignity and

authority.[1] Petitioner was sentenced to jail for 90 days. That was on January 15, 1945. Petitioner thereupon sought a writ of error in the Illinois Supreme Court for review of the order of January 15. The writ of error was refused on January 23, 1945. Later in the same day the trial court, over petitioner's objection and in his presence, issued an amended order adjudging him guilty of contempt and sentencing him to jail for 90 days. This amendment was made, it is said, to cure certain defects in the order of January 15 and to bring it into conformity with the requirements of Illinois law.

The amended order of January 23 is the one before us. Petitioner did not seek to take it directly to the Illinois Supreme Court. Rather, he took it first to the Appellate Court of Illinois where he sought to attack it on the grounds, *inter alia,* that it violated the First and Fourteenth Amendments of the Federal Constitution. But the Illinois Appellate Court did not consider those constitutional questions. It sustained the amended order of January 23 on state grounds. 328 Ill. App. 46, 65 N. E. 2d 457. On writ of error the Illinois Supreme Court affirmed the judgment of the Appellate Court. 396 Ill. 583, 72 N. E. 2d 848. It likewise did not consider the constitutional questions which petitioner presented. For it is well-settled law in Illinois that if an appellant takes his case to the Appellate Court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. *People* v. *Rosenthal,* 370 Ill. 244, 247, 18 N. E. 2d 450, 452; *People* v. *McDonnell,* 377 Ill. 568, 569, 37 N. E. 2d 159, 160. That was the reason neither of the courts below passed on the

[1] The contents of the documents are reviewed in 328 Ill. App. 46, 50–54, 65 N. E. 2d 457, 459–461.

federal constitutional questions tendered by petitioner.[2] See 328 Ill. App. 46, 55, 65 N. E. 2d 457, 461; 396 Ill. 583, 587, 72 N. E. 2d 848, 850–851. The circumstance that the petitioner had taken the order of January 15 directly to the Illinois Supreme Court did not cause that Court to except this case from that well-settled rule of Illinois practice.

This Court held in *Central Union Co.* v. *Edwardsville,* 269 U. S. 190, that federal constitutional questions which Illinois held had been waived for failure to follow its procedure would not be entertained here. The nature of the questions presented in the present case seemed to us to warrant a grant of the petition for writ of certiorari to determine whether the rule of the *Edwardsville* case was applicable to the peculiar circumstances presented here.

When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara,* 266 U. S. 314; *Central Union Co.* v. *Edwardsville, supra.* The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the state court. 269 U. S., pp. 194–195. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois

[2] Constitutional questions are to be reviewed directly by the Illinois Supreme Court. Ill. Rev. Stat. c. 110, § 199 (1947). As held in this case those include questions arising under the Federal Constitution. And see *Central Union Co.* v. *Edwardsville,* 269 U. S. 190, 194. The procedure is applicable in criminal as well as civil cases. *People* v. *Terrill,* 362 Ill. 61, 199 N. E. 97; *People* v. *Rosenthal, supra; People* v. *McDonnell, supra.*

Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed.

Petitioner appears here *pro se*. But at the critical stages of this litigation he was represented by counsel of record. For the lawyer the choice was plain. Under these circumstances petitioner plainly had a reasonable opportunity to have his federal questions passed upon by the state court. When petitioner acting through counsel decided to seek review in the Appellate Court he made a choice which involved abandonment of the constitutional issues which he had raised in the proceedings. There is a suggestion that petitioner deemed it useless to try to take the amended order of January 23 to the Illinois Supreme Court since access to that court had been denied him when review of the order of January 15 was sought. But even though the attempt may have seemed futile,[3] it was only by first seeking review in the Illinois Supreme Court that he could bring to this Court the constitutional questions raised under the amended order of January 23. It is not an answer to say that he went to the Illinois Supreme Court for review of the order of January 15.[4] That is not the order under which he stands committed; it is not the order reviewed by the Illinois Supreme Court in this case. Nor could denial by the Illinois Supreme Court of his petition for a review of that earlier

[3] Cf. *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339.

[4] The writ of error by which petitioner challenged the order of January 15 does not appear in the present record. We assume most favorably to petitioner that the same constitutional questions were presented there as petitioner seeks to have adjudicated here.

order have been the foundation for this petition for certiorari. Review of that order was denied by the Illinois Supreme Court on January 23, 1945. Petition for certiorari was filed here August 15, 1947. His petition for certiorari is not timely if it challenges the earlier order.[5] It presents federal questions which have been waived if it involves, as it plainly does, the amended order.

The result is no different if the orders are treated as being the same in substance though separate in point of time and form. For if the January 15 order be regarded as merely an interlocutory version of the amended order of January 23, the fact remains that the latter order was not taken directly to the Illinois Supreme Court but to the Illinois Appellate Court, with the consequences we have indicated. We find it no more unreasonable for Illinois to require a second appeal than for this Court to do so, as it does when it refuses to review the judgment of a lower state court absent a second appeal to the highest court of the State, though that be a mere formality because governed by the law of the case established in an earlier appeal. *McComb* v. *Commissioners of Knox County,* 91 U. S. 1; *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339.

It is suggested that in this case there could be no final judgment within the meaning of § 237 of the Judicial Code, 28 U. S. C. § 344, which could be brought here by certiorari until all questions of state law had been resolved by the Illinois courts. But there would be nothing other than ministerial acts left to be done by the trial court once the Illinois Supreme Court denied direct review of the order. Cf. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 72–73. Any further proceedings in the

[5] Sec. 8 (a) of the Judiciary Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. § 350.

Illinois courts would be solely at the option of petitioner. In these circumstances, a judgment is no less final for purposes of our jurisdictional statute because it has been sustained solely on federal constitutional grounds.[6] That consequence is inherent in the rule formulated in *Central Union Co.* v. *Edwardsville, supra.*

Affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK and MR. JUSTICE MURPHY agree, dissenting.

Petitioner has been held in contempt and sentenced to imprisonment for complying with an order of court to produce specified documents. Technically he was ordered to show cause why the documents should not be produced. After his objections to that order were overruled he complied by bringing the documents into court and filing them with the clerk.[1] Thereupon he was cited

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[6] If direct review of the amended order were obtained in the Illinois Supreme Court, rather than denied for lack of a substantial constitutional question, that court would pass not only upon the constitutional questions but upon all other questions as well. *Groome* v. *Freyn Engineering Co.*, 374 Ill. 113, 28 N. E. 2d 274; *People* v. *Kelly*, 367 Ill. 616, 618, 12 N. E. 2d 612, 613; *Geiger* v. *Merle*, 360 Ill. 497, 505, 507, 196 N. E. 497, 500–501.

[1] At this time petitioner was not represented by counsel and there was a slight deviation from a strictly accurate compliance with the court's directive. But even if he had had counsel, the deviation was minuscule. It could not have furnished a sufficient basis, without more, for sustaining an order of contempt and commitment as for disobedience. The court's order indeed did not rest on any such ground. It rested rather on the grounds that the "filing of said scurrilous affidavit and exhibits . . . constitutes an obstruction of justice and an abuse of the [court's] processes . . . and tended to lessen . . . [its] dignity and authority . . . ." Obviously the mere filing of documents not scurrilous could have given no ground for entering or sustaining such an order. Cf. note 3.

for contempt because the documents reflected on the court's integrity and was sentenced to 90 days in jail.

Whether or not the documents would have given ground for punishment if they had been published voluntarily by petitioner,[2] the effect of the contempt judgment coupled with that of the order for production[3] has been first to compel petitioner to publish the statements by filing them and then to send him to jail for obeying the court's order. Cf. *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1073. I know of no constitutional power which permits a state to force a citizen into such a dilemma, and I think the most elementary conception of due process under the Fourteenth Amendment forbids any such action.

Yet this Court now acquiesces in this substantial and unconstitutional deprivation of petitioner's liberty by accepting an asserted procedural waiver of petitioner's substantive rights which, in my opinion, no more comports with basic conceptions of due process than does the substantive order for commitment. Constitutional rights may be nullified quite as readily and completely by hypertechnical procedural obstructions to their effective assertion and maintenance as by outright substantive denial. *Marino* v. *Ragen,* 332 U. S. 561, concurring opinion at 563.

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[2] Cf. *Craig* v. *Harney,* 331 U. S. 367; *Pennekamp* v. *Florida,* 328 U. S. 331; *Bridges* v. *California,* 314 U. S. 252.

[3] The state makes a weak effort to avoid the order's effect by attempting to distinguish between an order to show cause why the documents should not be produced and one for their production. We have been cited to no authority holding that in Illinois the order to show cause does not have the effect of an order for production if cause is not shown or, in that event, would not support an order of contempt for failing to produce.

The entire basis of the Court's action is that the original contempt order of January 15 and the so-called amended order of January 23 are different orders; petitioner is deemed to have waived his constitutional rights by taking an appeal from the latter order to the Illinois Appellate Court rather than to the Illinois Supreme Court. The case seems simple because it is said to be "well-settled Illinois law" that both federal and state constitutional rights are waived by taking this appellate route, and because this Court has previously determined that this appellate practice gives litigants a reasonable opportunity to be heard. See *Central Union Co.* v. *Edwardsville,* 269 U. S. 190, 194–195.

I cannot accept this hypertechnical procedural nullification of constitutional rights in a case involving the liberty of the individual. The original order of January 15 and the so-called amended order are in reality the same order. Moreover, prior to this case there was no "well-settled Illinois law" to apprise petitioner that his appeal to the intermediate court would constitute a waiver of his rights in circumstances such as these, where he had already sought review of his federal questions in the state supreme court. And finally, even if the contrary had been true, I would not consider this appellate practice reasonable within the doctrine of the *Central Union* case.

Petitioner filed the "scurrilous affidavits" which led to the contempt order on two different occasions. The first was on January 4 in response to the motion to produce them for inspection. The second was on January 15 as part of his answer to Shamberg's motion for a rule to show cause why he should not be adjudged in contempt for filing documents which he was only required to produce for inspection. On this second occasion the documents were included in the pleadings because relevant

to his defense that the statements made therein were true.[4] The court adjudged petitioner in contempt for both filings.[5]

In the original contempt order of January 15 the court specifically referred to the fact that the documents had been filed twice before, identified them carefully, and stated that they "should be by reference incorporated in this order and made a part hereof for

[4] Petitioner never obtained a hearing on the truth of the statements in the documents even though that issue was relevant to the merits of the slander action against Shamberg which gave rise to the contempt proceedings. Since this slander action was dismissed on the merits without trial, it is of interest that the Illinois Appellate Court pointed out in review of the contempt order discussed in note 5 *infra:* "When Shamberg's petition is considered in the light of the fact that Parker had demanded a jury trial in the slander case, it seems reasonably clear that the trial court should not have ruled Parker to answer the petition, as the evident purpose of that pleading was to have the trial court prejudge facts that Parker insisted should be submitted to a jury." 328 Ill. App. 46, 63.

[5] On January 23 the court also issued an additional contempt order based on the tone of petitioner's answer to still another motion filed by Shamberg asking that petitioner be placed in contempt for not producing all of the documents listed in the motion to produce. This contempt order was set aside by the Illinois Appellate Court. See note 4 *supra.* Among other things that court stated: "[Shamberg's] petition is a highly provocative pleading, and Shamberg probably intended that it should have that effect. There is some force in the contention of Parker that the petition was designed to provoke him into making some answer or statement that would subject him to criminal prosecution or contempt proceedings. There is also force in Parker's argument that if the statements he made in his answer, upon which Shamberg now relies, constitute contempt of court, why did not the many charges made against Parker in the petition also constitute contempt of court? . . . We think that when the statements made by Parker in his answer are considered in the light of the serious charges that were made against Parker and the Puritan Church in the petition, the answer seems to be a fairly temperate pleading." 328 Ill. App. 46, 67–68.

greater certainty." At a later point in the order the documents were again listed and adjudged to be "hereby incorporated by reference in this order and made a part hereof with the same force and effect as if set forth herein." Thus the documents which gave rise to the contempt order were twice made a matter of public record and twice incorporated in the original contempt order.

The so-called amended order of January 23 is absolutely identical with the original order with the immaterial exception that the documents, in addition to being incorporated in the order by reference were also "made a part hereof and marked Exhibits 'A' and 'B' respectively." The reason for the change is probably explained by Illinois cases such as *People* v. *Hogan,* 256 Ill. 496, holding that the record on review of a contempt order is limited to the order itself. But respondent has not called our attention to any Illinois cases holding that incorporation of matter of public record into an order by reference is insufficient to make that matter part of the order. Indeed, this very proceeding indicates that this requirement is not strictly applied. For the Illinois Appellate Court set aside one order adjudging petitioner in contempt for the tone of his answer to a certain pleading filed by Shamberg on the ground that the charges in Shamberg's pleading, which was not made a part of the contempt order, justified the tone of the answer. 328 Ill. App. 46, 60–68. But even if it is assumed that the amendment was necessary to satisfy the requirements of Illinois law, it was of such a trivial and ministerial nature that it obviously did not affect the merits of petitioner's constitutional allegations.

When petitioner sought review of the original contempt order in the Supreme Court of Illinois he obtained the only review of those constitutional contentions which

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the state procedure offered him. That court by denying the writ of error must be presumed to have passed on the merits of the constitutional questions in the case. It is inconceivable that the supreme court would have passed on them any differently if review of the so-called amended order had later been requested. For, as far as that court is concerned, it is likely that the law of the case as to the constitutional issues was already settled. But even if it were taken that the supreme court might have reversed its decision, the fact remains that the so-called amended order was the same order as the original January 15 order of which review had already been denied. Petitioner is deemed to have waived his federal constitutional rights not because he failed to seek review in the supreme court, but because he failed to do so twice.

It is definitely not "well-settled Illinois law" that a waiver results in these circumstances. In all of the cases cited in the opinion of the Court and in respondent's brief the petitioner initially sought review in the intermediate appellate court. In none did he do so only after having the state supreme court deny an application for review. There is no "well-settled Illinois law" to the effect that two applications to the state supreme court must be made in order to avoid waiver of constitutional rights. And if such a requirement did exist it certainly would not be reasonable.[6] Consequently I am unable to agree that the doctrine of waiver applied here to deprive a man of his personal freedom in violation of

[6] Even the opinions of the Illinois appellate courts in this proceeding would not enlighten future litigants because they do not mention the fact that writ of error was denied by the supreme court before review in the appellate court was sought. See 328 Ill. App. 46 and 396 Ill. 583.

his constitutional rights is a reasonable state procedure within the *Central Union* case.[7]

By stating that the petition for certiorari is not timely if it challenges the original order, the Court repeats its mistake of treating the so-called amended order as something entirely separate and distinct from the original contempt order. But with the two orders viewed as the same, there is clearly no question of timeliness. For the denial of writ of error by the Illinois Supreme Court left state issues that went to the core of the litigation for determination by appeal through the intermediate state court. The situation therefore is not the one presented in *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, where the only things remaining to be done were ministerial acts in the trial court. Here, even if nothing more was left for the trial court to do, a great deal more was left to be done by the Illinois Appellate Court, namely, to review and determine all questions of state law presented in the case.[8] The *Richfield* decision had no relation to a split procedure for review in the state courts such as this, sending federal questions to one tribunal and state questions to another. Until the final judgment was entered by the Supreme Court of Illinois on May 19, 1947, in review of the Illinois Appellate Court's judgment, the core of the litigation had not been terminated "by fully determining the rights of the parties." *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546. For only then were the state questions finally adjudicated. Hence any earlier application for certiorari would have met with the in-

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[7] That case declared that the state procedure "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." 269 U. S. 190, 195.

[8] These questions are discussed in 328 Ill. App. 46 and 396 Ill. 583.

superable obstacle that we were without jurisdiction, for want of any final judgment.[9]

Petitioner was thus placed in a second dilemma, arising in the appellate stage of the state proceedings. He first followed the only course afforded by the state procedure for securing review of his federal constitutional questions. When they were determined against him he was barred from coming here because state questions remained to be decided by the intermediate appellate court and thus as a matter of federal law under our decisions the judgment was not final. In order to surmount this jurisdictional hurdle petitioner then went to the only place he could go, the intermediate appellate court. When it decided the state issues against him, he took the necessary further step of going again to the state supreme court. Its adverse decision finally closed the trap upon him. For the first time a judgment dispositive of the whole controversy was rendered, and thus the way opened under federal law for review of the federal questions here. But at the same instant that door was closed, by application of the Illinois rule that taking appeal to the intermediate court "waived" petitioner's federal rights. And that ruling held on his application for rehearing.

I can imagine no better way to annihilate constitutional rights, both substantively and procedurally, than

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[9] Cf. *Prudential Ins. Co.* v. *Cheek*, 252 U. S. 567, 259 U. S. 530. It has been suggested that on the record we cannot ascertain whether the Illinois Supreme Court's denial of review of the order of January 15th was on federal or state grounds. But when the only purpose of review under state law can be to secure decision of federal questions and no more appears from the state court's order than that the application for review was denied, this Court has refused to allow a presumption that the denial was on state grounds only to cut off review here of federal constitutional questions determinative of the citizen's liberty. *Williams* v. *Kaiser*, 323 U. S. 471, 478, and authorities cited.

thus dovetailing federal jurisdictional limitations with state procedural ones. To secure review of federal questions here, petitioner must exhaust his state remedies. But if he exhausts those remedies he "waives" the federal questions.

This is not waiver. It is nullification. I do not think Congress intended to countenance such a denial by the requirement of finality or that its effect, in conjunction with state procedures, should be to cut off the very rights which the jurisdictional authorization for reviewing final judgments was enacted to safeguard.

The issue of federal procedure in this case is not one of timeliness. It is rather one of finality, now applied to deny rather than to assure review in protection of personal liberty from invasion by unconstitutional state action. *Central Union Co.* v. *Edwardsville, supra,* contemplated no such paradox.[10] Nor, to my knowledge, has any other decision of this Court. As a matter of federal procedure petitioner did not waive his constitutional rights either by failing to seek certiorari from the Illinois Supreme Court's judgment of January 23, 1945, or by taking the necessary steps to seek the writ when he appealed to the state intermediate appellate court.

The judgment of the Illinois Supreme Court should be reversed.

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[10] It is suggested that the *Central Union* case implicitly held that a judgment of the Illinois Supreme Court adjudicating the federal issues in a case is final even though state issues remain unresolved. That case, however, was decided on the express assumption that the Illinois Supreme Court would pass on the federal question *"together with all the other questions in the case."* 269 U. S. 190, 195. (Emphasis added.) Of course the state supreme court judgment is final when it settles all the state issues as well as the federal issues.

SHADE *v.* DOWNING ET AL.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 448. Argued February 11, 1948.—Decided April 5, 1948.

The United States is not a necessary party to a proceeding, brought under the Act of June 14, 1918, to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes. Pp. 586–590.

Petitioner brought suit against respondents in an Oklahoma state court, claiming an interest in lands of a deceased citizen allottee of the Five Civilized Tribes. Upon motion of the Superintendent for the Five Civilized Tribes, who had been served with notice of the proceeding, the cause was removed to the Federal District Court. Judgment was entered for respondents. On appeal, the Circuit Court of Appeals certified a question to this Court for determination. The question certified is here answered "No," p. 590.

Kelly Brown argued the cause for Shade, urging an affirmative answer.

Forrester Brewster argued the cause for Downing et al., urging a negative answer.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Circuit Court of Appeals for the Tenth Circuit, acting under Judicial Code § 239, 28 U. S. C. § 346, has certified the following question for our determination:

> "(1) Is the United States a necessary party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19 [14], 1918, 40 Stat. 606?"

On January 4, 1935, the County Court of Cherokee County, Oklahoma, decreed that the sole and only heirs

of Thompson Downing, a full-blood Cherokee, were his three daughters, the appellees below. Sometime thereafter Peggy Shade brought this suit in an Oklahoma court to claim, as the only heir of Downing's second wife, an undivided one-fourth interest in Downing's allotted lands. She attacked the 1935 decree on the ground, among others, that no notice of the pendency of the heirship proceedings had been served on the Superintendent for the Five Civilized Tribes under the Act of April 12, 1926, 44 Stat. 239, 240–241.[1] Notice of the pendency of the present action was duly served upon the Superintendent and on

[1] Sec. 3 of the Act, so far as material here, provides: "Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. . . . *Provided,* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. . . ." See *United States* v. *Rice,* 327 U. S. 742, cf. 61 Stat. 731, 732, § 3 (c); H. R. Rep. No. 740, 80th Cong., 1st Sess., p. 4.

his motion the cause was removed to the District Court for the Eastern District of Oklahoma. Judgment was entered for defendants on June 6, 1945, the court holding that the United States was not a necessary party to the 1935 heirship proceedings, and that notice under the 1926 Act was not necessary to the validity of that decree. On appeal, the court below certified the above question for our determination.

The Act of June 14, 1918, 40 Stat. 606, 25 U. S. C. §§ 375, 355,[2] vested in the Oklahoma courts jurisdiction to determine heirship of restricted Indian lands and to entertain proceedings to partition such lands.[3] See §§ 1 and 2. It is a jurisdictional statute only (see *United States* v. *Hellard,* 322 U. S. 363, 365) and leaves open the question whether the United States is a necessary or indispensable party to proceedings under either section.

We held in *United States* v. *Hellard, supra,* that the United States is a necessary party to partition proceedings

[2] Sec. 1 provides: "That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question . . . ."

Sec. 2 provides: "That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

[3] It is well-settled that Congress has authority to select state agencies to perform such functions. *United States* v. *Hellard, supra,* p. 365.

brought under § 2 of that Act. That holding was based upon the direct and important interests of the government in the course and outcome of partition proceedings, interests flowing from the statutory restrictions on alienation of allotted lands. Lands partitioned in kind to full-blood Indians remain restricted under § 2. Thus the United States, as guardian of the Indians, is directly interested in obtaining a partition in kind, where that course conforms to its policy of preserving restricted lands for the Indians, or, if a sale is desirable, in insuring that the best possible price is obtained. Moreover, if the lands are both restricted and tax-exempt, it has an interest in the reinvestment of the proceeds of the sale in similarly tax-exempt and restricted lands. Act of June 30, 1932, 47 Stat. 474, 25 U. S. C. § 409a. And there is a further interest in protecting the preferential right of the Secretary of the Interior to purchase the land for another Indian under § 2 of the Act of June 26, 1936, 49 Stat. 1967. For these reasons we held in *United States* v. *Hellard, supra,* that the United States was a necessary party to the partition proceedings, even absent a statutory requirement to that effect.

Heirship proceedings, however, present quite different considerations. They involve no governmental interests of the dignity of those involved in partition proceedings. Restrictions on alienation do not prevent inheritance. *United States* v. *Hellard, supra,* p. 365. Death of the allottee operates to remove the statutory restrictions on alienation; and the determination of heirship does not of itself involve a sale of land.[4] The heirship proceeding

[4] The Act of April 12, 1926, provides in part: "The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction

involves only "a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes." [5] As such, it is little more than an identification of those who by law are entitled to the lands in question and does not directly affect the restrictions on the land or the land itself. Important as these proceedings may be to the stability of Indian Land titles,[6] they are of primary interest only to the immediate parties. The United States is, indeed, hardly more than a stakeholder in the litigation.

That is the distinction between partition and heirship proceedings which we recognized in *United States* v. *Hellard, supra,* pp. 365–366. We adhere to it.[7] Accordingly the question certified is answered "No."

So ordered.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON would answer the question in the

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of the settlement of the estate of the deceased allottee or testator . . . ." See also 61 Stat. 731, § 1. We do not have before us the question as to whether or not the United States is a necessary party to a proceeding to obtain court approval of a deed under the 1926 Act.

[5] See § 1 of the 1918 Act, note 2, *supra.*

[6] See Sen. Rep. No. 330, 65th Cong., 2d Sess., p. 1.

[7] Subsequent to the institution of these heirship proceedings, and after the decision in the *Hellard* case, Congress marked this distinction by providing that the Oklahoma state courts should have exclusive jurisdiction in all actions to determine heirship under § 1 of the 1918 Act and that the United States is not a necessary or indispensable party to such proceedings. 61 Stat. 731, 732, § 3 (a) and (b). Moreover, Congress by § 3 of the Act of July 2, 1945, 59 Stat. 313, 314, provided that no order, judgment or decree in partition made subsequent to the 1918 Act and prior to the 1945 Act and involving inherited restricted lands of enrolled and unenrolled members of the Five Civilized Tribes nor any conveyance pursuant thereto should be invalid because the United States was not a party or was not served with any notice or process in connection therewith.

affirmative because, in their view, the purpose of Congress was to permit the intervention of the United States in cases in which a restricted member of the Five Civilized Tribes is a party and therefore the United States is a necessary party to the proceedings.

COMMISSIONER OF INTERNAL REVENUE *v.* SUNNEN.

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

No. 227. Argued December 17, 1947.—Decided April 5, 1948.

1. A taxpayer owned 89% of the stock of a manufacturing corporation and his wife owned 10%. The corporation was managed by five directors, including the taxpayer and his wife, elected annually by the stockholders. A vote of three directors was required to take binding action. In exchange for a specified royalty, the taxpayer gave the corporation non-exclusive licenses to manufacture and sell devices covered by certain patents which he owned. The licenses were cancellable by either party upon giving appropriate notice, specified no minimum royalties, and did not bind the corporation to manufacture and sell any particular number of the patented devices. The taxpayer assigned his interest in the royalty agreements to his wife, who reported the income therefrom as hers. *Held:* The facts were sufficient to support a finding by the Tax Court that the taxpayer retained sufficient interest in the royalty contracts and sufficient control over the amount of income derived therefrom to justify taxing the income as his. Pp. 607–610.
2. The general rule of *res judicata* applies to tax proceedings involving the same claim and the same tax year, while the doctrine of collateral estoppel, which is a narrower version of the *res judicata* rule, applies to tax proceedings involving similar or unlike claims and different tax years. P. 598.
3. An earlier decision of the Board of Tax Appeals involving a similar royalty agreement and assignment but different license contracts and different tax years was not conclusive of the controversy under the doctrine of collateral estoppel. P. 602.

4. An earlier decision of the Board of Tax Appeals involving the same facts, issues and parties but different tax years and made prior to the decisions of this Court in *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579; *Commissioner* v. *Tower,* 327 U. S. 280; and *Lusthaus* v. *Commissioner,* 327 U. S. 293, was not conclusive of the controversy under the doctrine of collateral estoppel. Pp. 602–607.
5. The doctrine of collateral estoppel or estoppel by judgment is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers. P. 599.
6. Where two cases involve income taxes in different tax years, collateral estoppel must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first and where the controlling facts and applicable legal rules remain unchanged. Pp. 599–600.
7. The doctrine of collateral estoppel is inapplicable in litigation regarding income taxes for different years where decisions of this Court intervening between the earlier and later litigation have changed the applicable legal principles. P. 600.
8. If the relevant facts in two cases involving income taxes for different years are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. P. 601.
9. The clarification and growth of the principles governing the effect of intra-family assignments and transfers on liability for income taxes through decisions of this Court since 1939 effected a sufficient change in the legal climate to render a 1935 decision of the Board of Tax Appeals inapplicable under the doctrine of collateral estoppel to cases arising subsequently and involving these principles. Pp. 606–607.

161 F. 2d 171, reversed.

The Tax Court held a husband taxable on the income from certain royalties assigned by him to his wife but not taxable on the income from certain other royalties for a certain year. 6 T. C. 431. The Circuit Court of Appeals affirmed the part of the judgment favorable to

the taxpayer and reversed the part adverse to him. 161 F. 2d 171. This Court granted certiorari. 332 U. S. 756. *Reversed,* p. 610.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *L. W. Post.*

C. Powell Fordyce argued the cause and filed a brief for respondent.

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

The problem of the federal income tax consequences of intra-family assignments of income is brought into focus again by this case.

The stipulated facts concern the taxable years 1937 to 1941, inclusive, and may be summarized as follows:

The respondent taxpayer was an inventor-patentee and the president of the Sunnen Products Company, a corporation engaged in the manufacture and sale of patented grinding machines and other tools. He held 89% or 1,780 out of a total of 2,000 shares of the outstanding stock of the corporation. His wife held 200 shares, the vice-president held 18 shares and two others connected with the corporation held one share each. The corporation's board of directors consisted of five members, including the taxpayer and his wife. This board was elected annually by the stockholders. A vote of three directors was required to take binding action.

The taxpayer had entered into several non-exclusive agreements whereby the corporation was licensed to manufacture and sell various devices on which he had applied

for patents.[1] In return, the corporation agreed to pay to the taxpayer a royalty equal to 10% of the gross sales price of the devices. These agreements did not require the corporation to manufacture and sell any particular number of devices; nor did they specify a minimum amount of royalties. Each party had the right to cancel the licenses, without liability, by giving the other party written notice of either six months or a year.[2] In the absence of cancellation, the agreements were to continue in force for ten years. The board of directors authorized the corporation to execute each of these contracts. No notices of cancellation were given. Two of the agreements were in effect throughout the taxable years 1937–

[1] The various devices involved were as follows:

(1) A cylinder grinder. The taxpayer applied for a patent on Nov. 17, 1927, and was issued one on Dec. 4, 1934. The royalty agreement to manufacture and sell this device was dated Jan. 10, 1928. This agreement expired on Jan. 10, 1938; a renewal agreement in substantially the same terms was then executed for the balance of the life of the patent, which ends on Dec. 4, 1951.

(2) A pinhole grinder. The taxpayer applied for a patent on Dec. 4, 1931, and was issued one on June 13, 1933. The royalty agreement to manufacture and sell this device was dated Dec. 5, 1931.

(3) A crankshaft grinder. The taxpayer applied for a patent on May 22, 1939, and was issued one on May 6, 1941. The royalty agreement to manufacture and sell this device was dated June 20, 1939.

(4) Another crankshaft grinder. The taxpayer applied for a patent on Dec. 29, 1939. He assigned this application to his wife on Dec. 29, 1942, and she was issued a patent on Jan. 26, 1943. The royalty agreement to manufacture and sell this device was dated June 20, 1939.

The taxpayer remained the owner of the first three patents throughout the year 1941, and he remained the owner of the patent application on the fourth device throughout that year.

[2] Six months' notice was provided in the agreement dated Jan. 10, 1928, covering the cylinder grinder. The other three agreements provided for one year's notice of cancellation.

1941, while the other two were in existence at all pertinent times after June 20, 1939.

The taxpayer at various times assigned to his wife all his right, title and interest in the various license contracts.[3] She was given exclusive title and power over the royalties accruing under these contracts. All the assignments were without consideration and were made as gifts to the wife, those occurring after 1932 being reported by the taxpayer for gift tax purposes. The corporation was notified of each assignment.

In 1937 the corporation, pursuant to this arrangement, paid the wife royalties in the amount of $4,881.35 on the license contract made in 1928; no other royalties on that contract were paid during the taxable years in question. The wife received royalties from other contracts totaling $15,518.68 in 1937, $17,318.80 in 1938, $25,243.77 in 1939, $50,492.50 in 1940, and $149,002.78 in 1941. She included all these payments in her income tax returns for those years, and the taxes she paid thereon have not been refunded.

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[3] On Jan. 8, 1929, the taxpayer assigned to his wife "all my rights title and interest in and to the Royalty which shall accrue hereafter to me" upon the royalty contract of Jan. 10, 1928, with respect to the cylinder grinder device. Since the Commissioner of Internal Revenue raised some question as to the sufficiency and completeness of this assignment, the taxpayer executed a further assignment on Dec. 21, 1931. This second assignment confirmed the first one and stated further that his wife was assigned "all of my right, title and interest in and to said royalty contract of January 10, 1928 . . . . And I hereby state that the royalties accruing under said royalty contract have heretofore been and are hereafter the sole and exclusive property of the said Cornelia Sunnen [his wife], and hereby declare that said royalties shall be paid to the said Cornelia Sunnen or to her order, and that she shall have the sole right to collect, receive, receipt for, retain or sue for said royalties."

Assignments similar in form and substance to the assignment of Dec. 21, 1931, were made as to the other three royalty contracts.

Relying upon its own prior decision in *Estate of Dodson* v. *Commissioner,* 1 T. C. 416,[4] the Tax Court held that, with one exception, all the royalties paid to the wife from 1937 to 1941 were part of the taxable income of the taxpayer. 6 T. C. 431. The one exception concerned the royalties of $4,881.35 paid in 1937 under the 1928 agreement. In an earlier proceeding in 1935, the Board of Tax Appeals dealt with the taxpayer's income tax liability for the years 1929–1931; it concluded that he was not taxable on the royalties paid to his wife during those years under the 1928 license agreement. This prior determination by the Board caused the Tax Court to apply the principle of *res judicata* to bar a different result as to the royalties paid pursuant to the same agreement during 1937.

The Tax Court's decision was affirmed in part and reversed in part by the Eighth Circuit Court of Appeals. 161 F. 2d 171. Approval was given to the Tax Court's application of the *res judicata* doctrine to exclude from the taxpayer's income the $4,881.35 in royalties paid in 1937 under the 1928 agreement. But to the extent that the taxpayer had been held taxable on royalties paid to his wife during the taxable years of 1937–1941, the decision was reversed on the theory that such payments were not income to him. Because of that conclusion, the Circuit Court of Appeals found it unnecessary to decide

[4] In the *Dodson* case, Dodson owned 51% of the stock of a corporation and his wife owned the other 49%. He was the owner of a formula and trade mark. Pursuant to a contract which he made with the corporation, the corporation was given the exclusive use of the formula and trade mark for 5 years, renewable for a like period. Dodson was to receive in return a royalty measured by a certain percentage of the net sales. He then assigned a one-half interest in the contract to his wife, retaining his full interest in the formula and trade mark. The Tax Court held that his dominant stock position permitted him to cancel or modify the contract at any time, thus rendering him taxable on the income flowing from his wife's share in the contract.

the taxpayer's additional claim that the *res judicata* doctrine applied as well to the other royalties (those accruing apart from the 1928 agreement) paid in the taxable years. We then brought the case here on certiorari, the Commissioner alleging that the result below conflicts with prior decisions of this Court.

If the doctrine of *res judicata* is properly applicable so that all the royalty payments made during 1937–1941 are governed by the prior decision of the Board of Tax Appeals, the case may be disposed of without reaching the merits of the controversy. We accordingly cast our attention initially on that possibility, one that has been explored by the Tax Court and that has been fully argued by the parties before us.

It is first necessary to understand something of the recognized meaning and scope of *res judicata,* a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac,* 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L. J. 299; Restatement of the Law of Judgments, §§ 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principle of

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res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac, supra,* 353. And see *Russell* v. *Place,* 94 U. S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit. Col-

lateral estoppel operates, in other words, to relieve the government and the taxpayer of "redundant litigation of the identical question of the statute's application to the taxpayer's status." *Tait* v. *Western Md. R. Co.*, 289 U. S. 620, 624.

But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. Compare *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 235–236. Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that

decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. *Tait* v. *Western Md. R. Co., supra.* If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. See *Travelers Ins. Co.* v. *Commissioner,* 161 F. 2d 93. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. See *State Farm Ins. Co.* v. *Duel,* 324 U. S. 154, 162; 2 Freeman on Judgments (5th ed. 1925) § 713. As demonstrated by *Blair* v. *Commissioner,* 300 U. S. 5, 9, a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.[5] But the intervening decision need not necessarily be that of a state court, as it was in the *Blair* case. While such a state court decision may be considered as having changed the facts for federal tax litigation purposes, a modification or growth in legal principles as enunciated in intervening decisions of this Court may also effect a significant change in the situation. Tax inequality can result as readily from neglecting legal modulations by this Court as from disregarding factual changes wrought by state courts. In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel. *Henricksen* v. *Seward,* 135 F. 2d 986, 988–989; *Pelham Hall Co.* v. *Hassett,* 147 F. 2d 63, 68–69; *Commissioner* v. *Arundel-Brooks Concrete Corp.,* 152 F. 2d 225, 227; *Corrigan* v. *Commissioner,* 155 F. 2d 164, 165;

[5] See also *Henricksen* v. *Seward,* 135 F. 2d 986; *Monteith Bros. Co.* v. *United States,* 142 F. 2d 139; *Pelham Hall Co.* v. *Hassett,* 147 F. 2d 63; *Commissioner* v. *Arundel-Brooks Concrete Corp.,* 152 F. 2d 225; *Corrigan* v. *Commissioner,* 155 F. 2d 164. Compare *Grandview Dairy* v. *Jones,* 157 F. 2d 5.

and see *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654, 661–662; contra: *Commissioner* v. *Western Union Tel. Co.*, 141 F. 2d 774, 778. It naturally follows that an interposed alteration in the pertinent statutory provisions or Treasury regulations can make the use of that rule unwarranted. *Tait* v. *Western Md. R. Co.*, *supra*, 625.[6]

Of course, where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different. See *The Evergreens* v. *Nunan*, 141 F. 2d 927. And if the very same facts and no others are involved in the second case, a case relating to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.[7] Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of *stare decisis*. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second

[6] And see *Commissioner* v. *Security-First Nat. Bank*, 148 F. 2d 937.

[7] *Stoddard* v. *Commissioner*, 141 F. 2d 76, 80; *Campana Corporation* v. *Harrison*, 135 F. 2d 334; *Engineer's Club of Philadelphia* v. *United States*, 42 F. Supp. 182.

proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment. *Tait* v. *Western Md. R. Co., supra.* And see Griswold, "Res Judicata in Federal Tax Cases," 46 Yale L. J. 1320; Paul and Zimet, "Res Judicata in Federal Taxation," appearing in Paul, Selected Studies in Federal Taxation (2d series, 1938), p. 104.

It is readily apparent in this case that the royalty payments growing out of the license contracts which were not involved in the earlier action before the Board of Tax Appeals and which concerned different tax years are free from the effects of the collateral estoppel doctrine. That is true even though those contracts are identical in all important respects with the 1928 contract, the only one that was before the Board, and even though the issue as to those contracts is the same as that raised by the 1928 contract. For income tax purposes, what is decided as to one contract is not conclusive as to any other contract which is not then in issue, however similar or identical it may be. In this respect, the instant case thus differs vitally from *Tait* v. *Western Md. R. Co., supra,* where the two proceedings involved the same instruments and the same surrounding facts.

A more difficult problem is posed as to the $4,881.35 in royalties paid to the taxpayer's wife in 1937 under the 1928 contract. Here there is complete identity of facts, issues and parties as between the earlier Board proceeding and the instant one. The Commissioner claims, however, that legal principles developed in various intervening decisions of this Court have made plain the error of the Board's conclusion in the earlier proceeding, thus creating a situation like that involved in *Blair* v. *Commissioner, supra.* This change in the legal picture is said to have been brought about by such cases as *Helvering* v.

Clifford, 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579; *Commissioner* v. *Tower,* 327 U. S. 280; and *Lusthaus* v. *Commissioner,* 327 U. S. 293. These cases all imposed income tax liability on transferors who had assigned or transferred various forms of income to others within their family groups, although none specifically related to the assignment of patent license contracts between members of the same family. It must therefore be determined whether this *Clifford-Horst* line of cases represents an intervening legal development which is pertinent to the problem raised by the assignment of the 1928 agreement and which makes manifest the error of the result reached in 1935 by the Board. If that is the situation, the doctrine of collateral estoppel becomes inapplicable. A different result is then permissible as to the royalties paid in 1937 under the agreement in question. But to determine whether the *Clifford-Horst* series of cases has such an effect on the instant proceeding necessarily requires inquiry into the merits of the controversy growing out of the various contract assignments from the taxpayer to his wife. To that controversy we now turn.[8]

Had the taxpayer retained the various license contracts and assigned to his wife the right to receive the royalty

[8] The pertinent statutory provisions are of little help to the matter in issue. Section 22 (a) of the Revenue Act of 1936, 49 Stat. 1648, and § 22 (a) of the Revenue Act of 1938, 52 Stat. 447, cover the taxable years in question. Those sections, which are identical with the current § 22 (a) of the Internal Revenue Code, define "gross income" to include "gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the trans-

payments accruing thereunder, such payments would clearly have been taxable income to him. It has long been established that the mere assignment of the right to receive income is not enough to insulate the assignor from income tax liability. *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136. As long as the assignor actually earns the income or is otherwise the source of the right to receive and enjoy the income, he remains taxable. The problem here is whether any different result follows because the taxpayer assigned the underlying contracts to his wife in addition to giving her the right to receive the royalty payments.

It is the taxpayer's contention that the license contracts rather than the patents and the patent applications were the ultimate source of the royalty payments and constituted income-producing property, the assignment of which freed the taxpayer from further income tax liability. We deem it unnecessary, however, to meet that contention in this case. It is not enough to trace income to the property which is its true source, a matter which may become more metaphysical than legal. Nor is the tax problem with which we are concerned necessarily answered by the fact that such property, if it can be properly identified, has been assigned. The crucial question remains whether the assignor retains sufficient power and control over the assigned property or over receipt of the income to make it reasonable to treat him as the recipient of the income for tax purposes. As was said in *Corliss* v. *Bowers,* 281 U. S. 376, 378, "taxation is not so much

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action of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." See also Art. 22 (a)–1 of Treasury Regulations 94, promulgated under the 1936 Act; Art. 22 (a)–1 of Treasury Regulations 101, promulgated under the 1938 Act; and § 19.22 (a)–1 of Treasury Regulations 103, promulgated under the Internal Revenue Code.

concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."

It is in the realm of intra-family assignments and transfers that the *Clifford-Horst* line of cases has peculiar applicability. While specifically relating to short-term family trusts, the *Clifford* case makes clear that where the parties to a transfer are members of the same family group, special scrutiny is necessary "lest what is in reality but one economic unit be multiplied into two or more by devices which, though valid under state law, are not conclusive so far as § 22 (a) is concerned." 309 U. S. at 335. That decision points out various kinds of documented and direct benefits which, if retained by the transferor of property, may cause him to remain taxable on the income therefrom. And it also recognizes that the fact that the parties are intimately related, causing the income to remain within the family group, may make the transfer give rise to informal and indirect benefits to the transferor so as to make it even more clear that it is just to tax him. Even more directly pertinent, however, is the *Horst* case, together with the accompanying *Eubank* case. See 2 Mertens, Law of Federal Income Taxation (1942), §§ 18.02, 18.14. It was there held that the control of the receipt of income, which causes an assignor of property to remain taxable, is not limited to situations where the assignee's realization of income depends upon the future rendition of services by the assignor. See *Lucas* v. *Earl, supra; Burnet* v. *Leininger, supra.* Such may also be the case where the assignor controls the receipt of income through acts or services preceding the transfer. Or it may be evidenced by the possibility of some subsequent act by the assignor, or some failure to act, causing the income or property to revert to him. Moreover, the *Horst* case recognizes that the assignor may realize income

if he controls the disposition of that which he could have received himself and diverts payment from himself to the assignee as a means of procuring the satisfaction of his wants, the receipt of income by the assignee merely being the fruition of the assignor's economic gain.

In *Harrison* v. *Schaffner, supra,* 582, it was again emphasized that "one vested with the right to receive income did not escape the tax by any kind of anticipatory arrangement, however skillfully devised, by which he procures payment of it to another, since, by the exercise of his power to command the income, he enjoys the benefit of the income on which the tax is laid." And it was also noted that "Even though the gift of income be in form accomplished by the temporary disposition of the donor's property which produces the income, the donor retaining every other substantial interest in it, we have not allowed the form to obscure the reality." 312 U. S. at 583. *Commissioner* v. *Tower, supra,* and its companion case, *Lusthaus* v. *Commissioner, supra,* reiterated the various principles laid down in the earlier decisions and applied them to income arising from family partnerships.

The principles which have thus been recognized and developed by the *Clifford* and *Horst* cases, and those following them, are directly applicable to the transfer of patent license contracts between members of the same family. They are guideposts for those who seek to determine in a particular instance whether such an assignor retains sufficient control over the assigned contracts or over the receipt of income by the assignee to make it fair to impose income tax liability on him.

Moreover, the clarification and growth of these principles through the *Clifford-Horst* line of cases constitute, in our opinion, a sufficient change in the legal climate to render inapplicable, in the instant proceeding, the doctrine of collateral estoppel relative to the assignment of

the 1928 contract. True, these cases did not originate the concept that an assignor is taxable if he retains control over the assigned property or power to defeat the receipt of income by the assignee. But they gave much added emphasis and substance to that concept, making it more suited to meet the "attenuated subtleties" created by taxpayers. So substantial was the amplification of this concept as to justify a reconsideration of earlier Tax Court decisions reached without the benefit of the expanded notions, decisions which are now sought to be perpetuated regardless of their present correctness. Thus in the earlier litigation in 1935, the Board of Tax Appeals was unable to bring to bear on the assignment of the 1928 contract the full breadth of the ideas enunciated in the *Clifford-Horst* series of cases. And, as we shall see, a proper application of the principles as there developed might well have produced a different result, such as was reached by the Tax Court in this case in regard to the assignments of the other contracts. Under those circumstances collateral estoppel should not have been used by the Tax Court in the instant proceeding to perpetuate the 1935 viewpoint of the assignment.

The initial determination of whether the assignment of the various contracts rendered the taxpayer immune from income tax liability was one to be made by the Tax Court. That is the agency designated by law to find and examine the facts and to draw conclusions as to whether a particular assignment left the assignor with substantial control over the assigned property or the income which accrues to the assignee. And it is well established that its decision is to be respected on appeal if firmly grounded in the evidence and if consistent with the law. *Commissioner* v. *Scottish American Co.,* 323 U. S. 119; *Dobson* v. *Commissioner,* 320 U. S. 489. That is the standard, therefore, for measuring the propriety of

the Tax Court's decision on the merits of the controversy in this case.

The facts relative to the assignments of the contracts are undisputed. As to the legal foundation of the Tax Court's judgment on the tax consequences of the assignments, we are unable to say that its inferences and conclusions from those facts are unreasonable in the light of the pertinent statutory or administrative provisions or that they are inconsistent with any of the principles enunciated in the *Clifford-Horst* line of cases. Indeed, due regard for those principles leads one inescapably to the Tax Court's result. The taxpayer's purported assignment to his wife of the various license contracts may properly be said to have left him with something more than a memory. He retained very substantial interests in the contracts themselves, as well as power to control the payment of royalties to his wife, thereby satisfying the various criteria of taxability set forth in the *Clifford-Horst* group of cases. That fact is demonstrated by the following considerations:

(1) As president, director and owner of 89% of the stock of the corporation, the taxpayer remained in a position to exercise extensive control over the license contracts after assigning them to his wife. The contracts all provided that either party might cancel without liability upon giving the required notice. This gave the taxpayer, in his dominant position in the corporation, power to procure the cancellation of the contracts in their entirety. That power was nonetheless substantial because the taxpayer had but one of the three directors' votes necessary to sanction such action by the corporation. Should a majority of the directors prove unamenable to his desires, the frustration would last no longer than the date of the next annual election of directors by the stockholders, an election which the taxpayer could control by

reason of his extensive stock holdings. The wife, as assignee and as a party to contracts expressly terminable by the corporation without liability, could not prevent cancellation provided that the necessary notice was given.

And it is not necessary to assume that such cancellation would amount to a fraud on the corporation, a fraud which could be enjoined or otherwise prevented. Cancellation conceivably could occur because the taxpayer and his corporation were ready to make new license contracts on terms more favorable to the corporation, in which case no fraud would necessarily be present. All that we are concerned with here is the power to procure cancellation, not with the possibility that such power might be abused. And once it is evident that such power exists, the conclusion is unavoidable that the taxpayer retained a substantial interest in the license contracts which he assigned.

(2) The taxpayer's controlling position in the corporation also permitted him to regulate the amount of royalties payable to his wife. The contracts specified no minimum royalties and did not bind the corporation to manufacture and sell any particular number of devices. Hence, by controlling the production and sales policies of the corporation, the taxpayer was able to increase or lower the royalties; or he could stop those royalties completely by eliminating the manufacture of the devices covered by the royalties without cancelling the contracts.

(3) The taxpayer remained the owner of the patents and the patent applications. Since the licenses which he gave the corporation were non-exclusive in nature, there was nothing to prevent him from licensing other firms to exploit his patents, thereby diverting some or all of the royalties from his wife.

(4) There is absent any indication that the transfer of the contracts effected any substantial change in the tax-

payer's economic status. Despite the assignments, the license contracts and the royalty payments accruing thereunder remained within the taxpayer's intimate family group. He was able to enjoy, at least indirectly, the benefits received by his wife. And when that fact is added to the legal controls which he retained over the contracts and the royalties, it can fairly be said that the taxpayer retained the substance of all the rights which he had prior to the assignments. See *Helvering* v. *Clifford, supra,* 335–336.

These factors make reasonable the Tax Court's conclusion that the assignments of the license contracts merely involved a transfer of the right to receive income rather than a complete disposition of all the taxpayer's interest in the contracts and the royalties. The existence of the taxpayer's power to terminate those contracts and to regulate the amount of the royalties rendered ineffective for tax purposes his attempt to dispose of the contracts and royalties. The transactions were simply a reallocation of income within the family group, a reallocation which did not shift the incidence of income tax liability.

The judgment below must therefore be reversed and the case remanded for such further proceedings as may be necessary in light of this opinion.

Reversed.

Mr. Justice Frankfurter and Mr. Justice Jackson believe the judgment of the Tax Court is based on substantial evidence and is consistent with the law, and would affirm that judgment for reasons stated in *Dobson* v. *Commissioner,* 320 U. S. 489, and *Commissioner* v. *Scottish American Co.,* 323 U. S. 119.

MASSACHUSETTS ET AL. *v.* UNITED STATES.

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

No. 157. Argued December 10, 1947.—Decided April 19, 1948.

1. Under R. S. § 3466, the United States has priority for payment from an insolvent debtor's estate of federal insurance contribution taxes under Title 8 and unemployment compensation taxes under Title 9 of the Social Security Act, as against a state's claim for unemployment compensation taxes imposed by a state statute conforming to the federal act's requirements, *Illinois* v. *United States,* 328 U. S. 8; *Illinois* v. *Campbell,* 329 U. S. 362—even though the fund available for distribution was more than sufficient to pay either the Title 8 or Title 9 taxes to the United States but insufficient to pay both and the debtor's assignee had paid to the state the full amount of its claim. Pp. 612–623.

   (a) Upon the intervention of an act of bankruptcy, R. S. § 3466 cut off the taxpayer's right under Title 9 of the Social Security Act to pay the state 90% of the unemployment compensation tax and take federal credit therefor. Pp. 615–617.

2. Where the total assets of an insolvent debtor were not sufficient to pay all claims of the United States entitled to priority under R. S. § 3466, the part remaining for application to its claim under Title 9 of the Social Security Act after all other claims have been satisfied cannot be allocated between the United States and the state, but must be applied in settlement of the claim of the United States. Pp. 623–629.

   (a) The effect of R. S. § 3466 depends on the fact of insolvency, not on the degree of it. P. 625.

   (b) The priority given to the United States by R. S. § 3466 is absolute, not conditional; once attaching it is final and conclusive, and not subject to defeasance. Pp. 625–628.

   (c) Section 902 of the Social Security Act neither created an exception to R. S. § 3466 in favor of state claims for unemployment compensation taxes nor gives the state a claim prior to that of the United States for 90% of the amount of such taxes. Pp. 628–629.

3. *Illinois* v. *United States,* 328 U. S. 8, and *Illinois* v. *Campbell,* 329 U. S. 362, considered and reaffirmed. Pp. 629–635.

160 F. 2d 614, affirmed.

In a suit by the United States to recover from an insolvent debtor's estate federal insurance contribution taxes under Title 8 and unemployment compensation taxes under Title 9 of the Social Security Act, the District Court held that, under R. S. § 3466, the United States had priority as to the full amount of the Title 8 taxes due it and as to 10% of the Title 9 taxes due it. 65 F. Supp. 763. The Circuit Court of Appeals held that the United States was entitled to priority for the full amount of all its claims, including the Title 9 taxes. 160 F. 2d 614. This Court granted certiorari. 332 U. S. 754. *Affirmed,* p. 635.

Alfred E. LoPresti, Assistant Attorney General of Massachusetts, argued the cause for petitioners. With him on the brief were *Clarence A. Barnes,* Attorney General, and *John A. Brennan.*

Helen Goodner argued the cause for the United States. With her on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Helen R. Carloss* and *Lee A. Jackson.*

By special leave of Court, *Albert E. Hallett,* Assistant Attorney General, argued the cause for the State of Illinois, as *amicus curiae,* urging reversal. With him on the brief was *George F. Barrett,* Attorney General.

Mr. Justice Rutledge delivered the opinion of the Court.

This case is for all practical purposes a renewal of the litigation recently here in *Illinois* v. *United States,* 328 U. S. 8, and the companion case of *Illinois* v. *Campbell,* 329 U. S. 362. The former unanimously held that the United States has priority, by virtue of Rev. Stat. § 3466, 31 U. S. C. § 191, for payment from an insolvent debtor's estate of federal insurance contribution taxes under Title 8

and unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. 620, as against a state's claim for unemployment compensation taxes imposed by its statute conforming to the federal act's requirements. The *Campbell* case, which was reargued on other issues, rested on this ruling for disposition of the common issue concerning the effect of § 3466.

The facts are substantially identical with those in *Illinois* v. *United States*,[1] except in two respects. One is that the fund available here for distribution is more than sufficient to pay either the Title 8 or the Title 9 taxes, though inadequate to pay both, while in *Illinois* v. *United States* the fund was not large enough to satisfy either tax in full. Here too the debtor's assignee has paid to the commonwealth the full amount of its claim,[2] while in the *Illinois* cases the fund remained in the assignee's hands for distribution.

The District Court sustained the federal priority for capital stock and Title 8 taxes in full, and for 10 per cent of the Title 9 claim. It therefore deferred payment of any part of the state's claim until those claims were fully paid. But the court held the United States not

[1] Here, as in that case, the debtor made a common-law assignment for the benefit of creditors. The assignee here realized $1,135.11 from sale of the assets. The claim of the United States for Title 9 taxes amounted to $963.08; for Title 8 taxes, $690.05; and for capital stock taxes, $21. The commonwealth's claim was for $803.72 in unemployment taxes. Within the time allowed, but for intervention of the insolvency, the assignee paid the state's claim in full and then paid the remaining assets of $331.39 to the collector. He applied this sum on account of the Title 8 taxes, thus leaving unpaid the federal claims for capital stock and Title 9 taxes as well as $358.66 plus interest on the Title 8 claim.

[2] The commonwealth in effect has undertaken to indemnify the assignee, by paying over to the United States the $803.72, if the payment to the state should turn out to have been erroneously made. The United States has agreed that if it prevails the judgment shall be limited to $803.72.

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entitled to priority for the remaining 90 per cent of the Title 9 claim, on the ground that Title 9, § 902,[3] gives the assignee "the alternative right" to pay that amount to an approved state unemployment fund. Accordingly the judgment ordered Massachusetts to pay over to the United States, from the $803.72 received from the assignee, sufficient funds to satisfy in full the federal priorities sustained, and to retain the small balance remaining after making those payments to apply on its claim for 90 per cent of the Title 9 taxes. 65 F. Supp. 763. This action was taken in the view that, while our previous decisions had sustained the federal priority for the capital stock and Title 8 taxes, they had not determined the question for Title 9 claims.[4]

However, on appeal by both parties, the Circuit Court of Appeals held the United States entitled, under the *Illinois* rulings, to priority for the full amount of all its claims, including the Title 9 taxes. That court therefore affirmed the District Court's judgment except insofar as it denied the Government's Title 9 claim. As to this it reversed the District Court's ruling. 160 F. 2d 614.

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[3] The original § 902, 49 Stat. 639, provided that the taxpayer might credit against Title 9 taxes 90 per cent of his contributions under an approved state program. Subsequent amendments did not alter the conception of a basic 90 per cent credit. See, *e. g.*, notes 13, 15. The present "credit against tax" section is incorporated in the Internal Revenue Code, 26 U. S. C. § 1601.

[4] The District Court thought that in *Illinois* v. *United States*, the Title 9 issue had become moot either before or as of the time the case reached this Court, and that therefore we "had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States [by § 902] had not given the taxpayer the option to make payment to Illinois instead of to the United States." 65 F. Supp. 763, 765. The court thus regarded the Title 9 question as left open and "nicely analyzed . . . to be one not of priority but of alternative obligation." *Id.* at 764.

Because of the obvious confusion concerning the effects of our prior decisions and the asserted differences between this case and the *Illinois* cases, certiorari was granted. 332 U. S. 754.

I.

Massachusetts seeks to retain the entire $803.72 she has received, in priority to all the federal claims. She agrees with the district court that § 902 gives the taxpayer an "optional right" of payment, but does not accept its allocation creating priorities for all federal claims except 90 per cent of the Title 9 taxes. To sustain this broad claim would require reversal of both of the *Illinois* decisions. In no other way, on the facts, could Massachusetts retain the whole amount she was paid.[5]

Illinois as *amicus curiae* takes a narrower position, conceding that the *Illinois* cases stand as decisive adjudications of priority for Title 8 taxes but disputing that effect for Title 9 claims.[6] This position seeks an allocation paying the state's claim after the Title 8 and other federal claims, including 10 per cent of the Title 9 taxes, but before or rather in "satisfaction" of the remaining 90 per cent of them.[7]

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[5] Since the insolvent's assets are not large enough to pay either the Title 8 or the Title 9 claim and leave enough to pay the state claim in full. See note 1.

In the brief Massachusetts states the federal question as being whether the assignee may "make payment of the State unemployment tax to the exclusion of the Federal Government claim for Title IX taxes *or any other taxes due the Federal Government* from the taxpayer?" (Emphasis added.)

[6] Illinois has appeared with leave, both by brief and in the oral argument. It neither expressly disclaims nor expressly supports Massachusetts' broad position for reversal.

[7] On the facts, see note 1, after paying the capital stock claim, the Title 8 claim and 10 per cent of the Title 9 claim, this would leave $327.75 to apply on the state's claim; and hence require Massachu-

Notwithstanding their substantial differences, the two states rest their respective positions on the same basic arguments, which upon examination turn out to be identical with those vigorously presented by Illinois in the earlier cases, except for wording and detail. Much is made of the fact that here the debtor's assignee has paid to the commonwealth the full amount of its claim, while in *Illinois* v. *United States* the fund remained in the assignee's hands. Both states urge that § 902 gives the taxpayer, and here his assignee, the "optional right" of payment to the state. Moreover, with respect to the requirement of Rev. Stat. § 3466 that "the debts due to the United States shall be first satisfied," it is said that payment to the state with resulting credit to the United States for 90 per cent of the Title 9 claim "satisfies" the Government's debt as much as payment to it in cash.

In the *Illinois* cases the foundation for the state's claim to be paid in preference to any of the federal claims lay in the credit provision of § 902, which is the identical provision for "optional payment." There was no question whatever that § 902 gave the taxpayer the "alternate right." But the precise issue in both cases was whether that right had been cut off by Rev. Stat. § 3466 when he became insolvent.

Obviously there could have been but little point or effect to our decisions if, despite them, the assignee could have turned around immediately and deprived the Government of the priorities established simply by exercising a right to make the optional payment to the state. Nor would the decisions have been much more sensible or

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setts to pay over to the United States $475.97 plus interest from the $803.72 she has received, in order to complete the payment in full of the Title 8 claim.

Actually this represents the District Court's specific allocation, not exactly that of either Massachusetts or Illinois. Each would apply a somewhat different method of allocation. See note 20.

effective, had they purported to sustain the federal priorities when the assignee has retained the fund, but to disallow them if he has paid the state before the federal claims are filed. We made no such ineffective or capricious rulings. The decision was broadly that by intervention of the insolvency and the consequent bringing of Rev. Stat. § 3466 into play, the taxpayer's right to pay the state and take federal credit had been cut off.[8]

Our decisions went to the merits of that right and not merely to rule that the state was not a proper party to enforce its exercise. The taxes due the United States were held to be debts; and by virtue of § 3466 the debtor's prior obligation attaching as of the date of his insolvency was to the Government, not to the state. It followed necessarily that the assignee could not "satisfy" it by paying the state and giving the Government "credit." This was the very question at issue and the one adjudicated. The "alternate right" contention and the one that "satisfied" in § 3466 means "credit" are only verbal redressings of the basic issue decided in the *Illinois* cases.

II.

This is as true of the argument's bearing on Illinois' narrower position as it is for Massachusetts' broader one. But Illinois, apparently with Massachusetts' support, brings forward to sustain the less sweeping attack the additional contention that the *Illinois* decisions did not adjudicate Title 9 priority, although purporting to do so. Moreover, the facts present this narrower issue of distinguishing between Title 9 and other federal claims in sharper factual focus than did the *Illinois* cases. For

[8] See Part III. The federal priority under § 3466 attaches from the time the insolvent debtor transfers or loses control over his property. *Illinois* v. *Campbell,* 329 U. S. 362, 370; *United States* v. *Waddill Co.,* 323 U. S. 353, 355–358; *United States* v. *Oklahoma,* 261 U. S. 253, 260.

if the capital stock and Title 8 claims are first paid in full, as the District Court required, a small balance of the fund will remain, to be applied either in part payment of the federal Title 9 claim or in some form of allocation between it and Massachusetts' claim. This was not true of *Illinois* v. *United States,* or indeed of *Illinois* v. *Campbell,* in the posture in which that case was brought here.

The principal argument is that the Title 9 taxes, though litigated in the Illinois courts, were not involved on the facts in the *Illinois* cases as they came to and were decided by this Court. Hence it is said we did not acquire jurisdiction over the Title 9 claims. The argument is correct concerning *Illinois* v. *Campbell.*[9] But it is surprising as applied to *Illinois* v. *United States,* in view of the state supreme court's adverse decision on the Title 9 issue; Illinois' explicit application for certiorari on that issue and argument on the merits here to reverse the state court's decision; [10] the necessity on the facts for the state

[9] The state supreme court's judgment had sustained the federal priority for Title 8 taxes, ordering them paid first and the small remaining balance of about $150 to be paid to the state. This left the Title 9 taxes unpaid. The court denied priority for that claim because it fell within the explicit exception of § 602 (b) of the Revenue Act of 1943. See text *infra* at notes 13, 14. The Government's failure to apply for certiorari as to the $150 eliminated the Title 9 issue from the case in this Court.

[10] Illinois almost uniformly put the issues as involving Title 8 and Title 9 taxes indiscriminately. Thus, in stating "The Questions Presented," the petition for certiorari spoke of priority for "Social Security excise taxes and Capital Stock taxes," necessarily encompassing Title 8 and Title 9 levies. This was repeatedly true of the state's brief. Further, the petition at one point said: "In holding that the claim of the petitioner was subordinate to the claims of the United States for capital stock tax and for taxes arising under Titles VIII and IX of the Social Security Act, the Supreme Court of Illinois looked to form, not substance, and disregarded the character and significance of petitioner's claim." The Government's briefs were equally positive in seeking disposition of the Title 9 claim.

to bring the question up and secure reversal in order to establish its claim; [11] and finally our opinion's clear and explicit terms, indeed emphasis, in deciding the Title 9 issue, together with the Title 8 one, against Illinois.[12]

The idea that the state court decided only the Title 8 issue completely misconceives its action, and serves only to confuse the judgment in that case with the one in *Illinois* v. *Campbell.* Indeed it seeks to infuse into the former the latter's denial of Title 9 priority. Not only is this wholly incompatible with Illinois' earlier position; it ignores the fact that the state court disposed of the Title 9 issue in both cases, but in opposite ways on entirely different facts and legal issues.

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[11] The federal claims asserted were as follows: Capital stock taxes, $58.73; Title 8 taxes, $1,065.52; Title 9 taxes, $1,284.36; all plus interest from the date due. The Illinois claim for state unemployment compensation contributions was $721.29. And the fund available to satisfy all these claims was $1,010.81.

Since the assets were insufficient to pay in full either the Title 8 or the Title 9 claim, Illinois had to override both to establish her claim. Illinois recognized this both by her application for review and by the broad argument that the state claim was tantamount to a federal tax and the credit provisions of § 902 exempted it completely from the priority of Rev. Stat. § 3466 for all federal taxes, not simply one.

[12] The opinion in *Illinois* v. *United States* explicitly stated: "The claim of the United States is for federal unemployment compensation taxes under Title 9 and federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620." 328 U. S. 8, 9. The opinion throughout treated Title 9 taxes on a parity with those under Title 8. We accepted fully the state's view that the credit or "optional payment" provision of § 902 was designed to stimulate the creation of sound state systems. 328 U. S. 8, 10. See *Illinois* v. *Campbell,* 329 U. S. 362, 367, n. 5. But we rejected the argument that the state claim was tantamount to a federal one and said: "But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims." 328 U. S. 8, 11. The ruling applied to both types of tax without distinction.

In *Illinois* v. *Campbell,* the state court did not reach the basic question of the force of Rev. Stat. § 3466 to create priority for federal Title 9 claims; rather, it expressly avoided deciding that question. 391 Ill. 29, 32. This was because the insolvent's assets were in the hands of a court-appointed receiver, *id.* 31, and in that situation § 602 (b) of the Revenue Act of 1943, 58 Stat. 77,[13] expressly allowed the receiver to pay the state and take credit up to 90 per cent of the Title 9 tax. The Illinois Supreme Court expressly so held, and on this ground alone denied the federal Title 9 claim. 391 Ill. 29, 34. The effect was to rule that § 602 (b) created a legislative exception to § 3466, limited to payments by such receivers, within the times and for the tax periods specified, up to 90 per cent of the Title 9 taxes.[14]

[13] This section was one of the relaxing amendments, see Part IV, to Title 9, § 902, of the Social Security Act. For Title 9 taxes due for the years 1939, 1940, 1941 and 1942 it allowed credit up to 90 per cent, without regard to previous failure to pay as required, if the assets of the debtor had been, during the period specified, "in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

Section 602 (a) of the 1943 Act, 58 Stat. 77, also created a similar relaxation of § 902, for Title 9 taxes due for the years 1936, 1937 and 1938, with credit limited however to 81 per cent, when the state payments for those years were made after December 6, 1940. This section formed the basis for a claim to credit in *Illinois* v. *United States* rejected by the Illinois court. See note 15.

[14] See also Part IV. The court, however, in giving directions for the decree to be entered by the trial court ordered the federal Title 8 claim paid first in full "and any balance remaining" to the state. 391 Ill. at 46; see also *id.* 42. Thus apparently it inadvertently lost sight of the fact, earlier expressly noted, *id.* 34, 39, that § 602 (b) allowed the receiver to take credit only up to 90 per cent of the Title 9 taxes.

This oversight seemingly was responsible for the court's failure to award priority to the United States for 10 per cent of its Title 9 claim, from the small balance remaining after paying the Title 8 taxes. Cf. note 9. Had this amount, some $128, also been awarded

But § 602 (b) did not apply in *Illinois* v. *United States,* because the insolvent's assets were held by a common-law assignee, not a court-appointed official.[15] So holding, 391 Ill. at 37, the Illinois court went on to rule that the federal claims for Title 8 and Title 9 taxes were debts within the meaning of § 3466 and were therefore entitled to priority over the state's claim. It not only rejected the argument that the credit provision of Title 9, § 902, made that claim "in reality a claim of the Nation . . . tantamount to a claim of the United States,"[16] but also carefully guarded the wording of the opinion's dispositive paragraphs[17] and the directions given the trial court for entering the judgments on remand so as to differentiate

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to the United States, roughly only $22 would have been left for the state. The opinion gave no consideration to this question, and by the Government's failure to apply for certiorari regarding it we were prevented from considering it.

[15] An additional reason was that the taxes against which credit was claimed were not taxes for the years to which § 602 (b) expressly limited the credit it allowed. Instead § 602 (a) of the 1943 Act, see note 13, allowed conditional credit for the tax years involved in *Illinois* v. *United States* and the state sought to secure it. But the Illinois court held § 602 (a) also inapplicable on the facts and denied the 81 per cent credit because the assets were in the hands of a common-law assignee, not in the custody or control of a court-appointed receiver or other official as the section required for the credit to be available. 391 Ill. at 37.

[16] 391 Ill. at 39, 40; cf. 328 U. S. at 11. The Illinois court held "the full amount" of the payroll (Title 9) taxes to be "taxes due the Federal government." In the first instance, it said, this was true of "100 per cent of the taxes levied," which "continues to be taxes due the Federal government either until it is all paid to the Federal government, or 90 per cent is paid to the State and the balance to the Federal government." The provisions for credit, the opinion continued, "do not change the character of the taxes imposed. They are still taxes due the Federal government and constitute a debt due to the United States within the purview of section 3466 of the Revised Statutes." *Id.* 40, 41.

[17] 391 Ill. 42, 46.

the two cases and to avoid any direction that the fund in *Illinois* v. *United States* apply on only one of the federal claims.[18] The judgment thus left the United States free to apply it in partial satisfaction of either claim or both.

This was also the effect of our own decision and judgment. It generally and without distinction between the Title 8 and Title 9 claims adjudicated priority for both. As in the Illinois court's decision, no restriction was placed upon allocation of the fund, nor is any hint to be found in the opinion that such an allocation was intended. Indeed we were not asked to make one and to have done so would have disregarded the basic position of both parties, each of which sought a full and favorable disposition of the controversy including decision upon all the issues presented.[19]

It is true that, as in the Illinois Supreme Court, the decision and judgment could have been made on the narrower basis that the Title 8 claim was more than sufficient to exhaust the fund, and therefore to sustain the priority for that claim alone would dispose of the case. But this would have been equally true of the Title 9 claim. Neither claim was either more or less essential to decision than the other, indeed decision upon both was necessary to a judgment favorable to Illinois. To have eliminated either would have required some in-

[18] *Ibid.* The order for judgment in *Illinois* v. *United States* merely reversed the trial court's judgment and remanded the cause "with directions to enter a decree finding that the United States is entitled to priority of payment to the extent of the funds on deposit, and ordering distribution accordingly." 391 Ill. at 46. See note 14 for the directions in the *Campbell* case.

[19] See notes 10, 11. The cases were obviously test cases designed to settle the question of priority generally, *i. e.*, not merely for one but for all federal taxes and thus provide a certain basis for administration of the Social Security Act in both its insurance and its unemployment compensation features.

dication of that purpose. Since none was given, it cannot be said that the judgment rested on the one ground or claim more than the other.

While therefore the case is one which might have been decided on either of two independent grounds favorably to the Government, it is neither one in which that course was followed nor one which could have been determined the opposite way in that manner. Instead, as we were asked to do and rightly could do on the record and the issues, we decided both issues, and the judgment rested as much upon the one determination as the other. In such a case the adjudication is effective for both. *United States* v. *Title Ins. Co.*, 265 U. S. 472; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160; see *Richmond Co.* v. *United States*, 275 U. S. 331, 340.

III.

Finally, it is urged that in *Illinois* v. *United States* we had no occasion to consider and hence our opinion did not discuss whether in a case like this, where the fund is more than sufficient to pay all federal claims except 100 per cent of the Title 9 claim, the balance remaining after paying those other claims must go first to pay the federal Title 9 claim in full, or may be allocated between that claim and the state claim to pay 10 per cent of the federal claim first and then to apply what remains on the state claim.[20]

[20] Cf. the District Court's view, note 4 *supra;* and note 7. Illinois and Massachusetts in fact urge different methods of allocation, each differing from the one applied by the District Court. From the funds available for Title 9 distribution, Massachusetts would pay the state claim first and correspondingly reduce the federal claim. Illinois would make a *pro rata* distribution of 10 per cent of the available funds to the Federal Government and 90 per cent to the state, while the District Court would pay the federal 10 per cent first and apply the balance remaining on the state claim.

Closely related to this, though not involved on the facts in *Illinois* v. *United States* or here,[21] is the Government's apparent concession that if all the federal claims are paid in full, including 100 per cent of the Title 9 claim, and any balance then remains in the fund, the insolvent taxpayer is nevertheless given the right by § 902 to pay that balance to the state and receive credit on his federal Title 9 tax. In such a case, it is said, the Government would be overpaid on Title 9 taxes and obligated to refund the excess. Then the taxpayer could apply the amount received in further payment of the state claim, with corresponding federal credit, overpayment and refund, only to start the cycle again and repeat it until he had paid the state its claim in full and received the entire 90 per cent credit.[22] Hence in this situation, it is said, short-cut distribution might well be made to the state in the first place, to eliminate the cycle.

The effect of the concession, if it is valid, goes far toward cutting the ground from beneath the Government's basic position.[23] That effect is heightened by the further surprising statement in its brief that in a case like this, not covered by the concession, compliance with the credit conditions of § 902 becomes impossible "not because Section 3466 operates to exclude Section 902 or to nullify it, but because the terms of Section 902 itself deny it [credit] where no payment can be made." The state-

[21] Since the fund was not large enough in either case to pay all the federal claims in full.

[22] Hypothetical examples are stated in the District Court's opinion, 65 F. Supp. 763, and in the briefs filed here.

[23] Possibly the concession was intended as an argumentative alternative to other and broader positions. In any event, we are not bound to accept it as either sound or conclusive of the litigation. It is not, even in terms, a confession of error.

These observations apply equally to the Government's further damaging statement set forth in the sentence following the one to which this footnote is appended.

ment would be understandable, if it had been that § 3466 and § 902 both work to deny the credit in this situation. But to say that § 3466 has no effect to cut off the right to credit either in the present situation or in the different hypothetical one stated is to take away the basic grounding of all federal priority as against the state's claim.

The concessions cannot be accepted. In the first place, the effect of § 3466 depends on the fact of insolvency, not on the degree of it as the first concession seems to contemplate. And it is only by force of § 3466 that the Government has any priority at all. Section 902 may work to deny credit, if its conditions for credit are not fulfilled. But it does not give federal priority over valid state claims. Moreover, both concessions are altogether inconsistent with the basic decisions in the *Illinois* cases and the grounds on which they rested. The matter requires brief restatement. It is one which goes fundamentally to the effect of Rev. Stat. § 3466, as distinguished from, though not unrelated to, § 902 of the Social Security Act. These of course are entirely distinct statutes, with different functions.

Rev. Stat. § 3466 gives priority explicitly for "*debts* due to the United States" and the priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive. A long line of decisions has held that taxes due the Government are "debts" within the meaning of the section.[24] In the *Illinois* cases we applied this ruling to Title 8 and Title 9 taxes as against the state's claim

[24] The federal priority has been uniformly sustained for tax claims. *United States* v. *Waddill Co.*, 323 U. S. 353 (unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction); *United States* v. *Texas*, 314 U. S. 480 (gasoline taxes); *New York* v. *Maclay*, 288 U. S. 290 (income taxes and a claim for expenses incurred in the replacement of a buoy damaged by the insolvent); *Spokane County* v. *United States*, 279 U. S. 80 (income taxes and penalties); *Price* v. *United States*, 269 U. S. 492 (income

for "contributions." Prior decisions also have held that the priority attaches as of the time of the insolvency,[25] a ruling also applied in the *Illinois* cases.

But if credit can be taken after § 3466 attaches, *i. e.*, after insolvency, effective to set aside the federal priority up to 90 per cent of the Title 9 claim, the priority to that extent becomes conditional, not absolute. Its effectiveness then becomes contingent upon the happening of subsequent events, namely, the concurrence of the conditions of § 902 for paying the state and taking the credit together with the taxpayer's election to do this. In short, § 3466 never conclusively attached and § 902 works retroactively on occurrence of those contingencies to upset the priority.

A further effect might be to make the statute applicable beyond the scope of the term "debts due to the United States." For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the "debt" itself becomes contingent. And it is at

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taxes and customs duties); *Stripe* v. *United States,* 269 U. S. 503 (income, excess profits, and capital stock taxes).

Judgments recovered by the United States also are debts entitled to priority. *United States* v. *Knott,* 298 U. S. 544 (against surety on estreated bail bonds); *Hunter* v. *United States,* 5 Pet. 173 (against surety).

Other debts for which the Government has been held to have priority under § 3466 are: *United States* v. *Remund,* 330 U. S. 539 (emergency loans made by Farm Credit Administration); *United States* v. *Emory,* 314 U. S. 423 (sum due on note held under the National Housing Act); *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483 (Indian funds deposited in bank); *United States* v. *National Surety Co.,* 254 U. S. 73 (losses where contractor defaulted); *Bayne* v. *United States,* 93 U. S. 642 (misappropriated Army paymaster funds); *Lewis* v. *United States,* 92 U. S. 618 (funds held by Navy disbursing agents); *United States* v. *State Bank of North Carolina,* 6 Pet. 29 (bonds for customs duties); *United States* v. *Fisher,* 2 Cranch 358 (claim against endorser of protested bill of exchange).

[25] See note 8 *supra.*

least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of "debts due" as of the time of insolvency.[26]

However this may be, we know of no previous application of § 3466 creating such a conditional priority.[27] Nor do we see how one could be made consistently with the section's terms or purposes. The only such consistent application would seem to be one giving the Government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment.[28] In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities.

The defeasance conceded possible by the Government, therefore, together with the further conceded ineffective-

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[26] It has been held that the term "debts due to the United States" should be construed with some liberality. See, *e. g., Price* v. *United States,* 269 U. S. 492, 500; *United States* v. *Emory,* 314 U. S. 423, 426. And there is apparently no decision expressly ruling the matters of contingency of the obligation or of the priority upon subsequent events not certain. Cf. *United States* v. *Marxen,* 307 U. S. 200. But the fact that the problem has not squarely arisen in the long history of § 3466 and that all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, *viz.,* that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of "debt" as distinguished from other forms of obligation.

[27] See notes 24, 26.

[28] Again the distinction between "payment" and "satisfaction" becomes pertinent. To construe the term "satisfied" in § 3466 as being fulfilled by taking subsequent credit, as the states urge, would be to qualify the word "debts" so as to make it include conditional obligations.

ness of § 3466 (though not of § 902) in circumstances like these to deny the right to credit, destroys the fundamental character of the priority created by § 3466 and thereby removes the foundation from the Government's basic position, which is that § 3466 applies as of the time of insolvency to create the priority it contemplates. Through these concessions the section is made, by virtue of the effect of § 902, to create only a defeasible federal priority as against claims for credit. This actually is but another way of making § 902 effective as an exception to Rev. Stat. § 3466, like § 602 (a) and (b) of the Revenue Act of 1943, noted above in Part II.

This of course was Illinois' earlier position, rejected by this Court. If that position is now to be accepted, we do not see how § 3466 can be regarded as applying to Title 9 taxes or, indeed, how the effect of treating § 902 as an exception can be limited to Title 9 taxes. For if § 902 works as an exception to § 3466, then Illinois was right in the first place, and the exception would seem to apply to all federal taxes, not just the one.[29]

Accordingly, the Government's concessions cannot be accepted as consistent either with our prior decisions or with its own basic position in the *Illinois* cases and this one. That position, apart from the concessions, rests ultimately on § 3466 and its applicability to these claims.

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[29] Congress, of course, could provide for federal priority as to all taxes except Title 9 claims. But, apart from the explicit exceptions created by § 602 (a) and (b) of the Revenue Act of 1943 with reference to funds of insolvents in the hands of court-appointed officials, see Part II, notes 13, 15, Congress has not done so either by any wording or intent of Rev. Stat. § 3466, nor in our view by § 902 of the Social Security Act. We do not think that it intended to make the state's claim subject to all other federal taxes, but prior to all but 10 per cent of the Title 9 taxes. See text *infra* Part IV. No instance has been found where § 3466 has been applied to create such a selective priority as among federal claims qualifying as "debts" within the meaning of § 3466.

This necessarily denies that § 902 creates an exception to § 3466 or a qualification inconsistent with its terms. The qualifications now conceded are not consistent with those terms, for they do not contemplate the tenuous, destructible sort of "priority" the concessions involve.

Moreover, the fact that in *Illinois* v. *United States* we did not discuss expressly the 10–90 per cent distribution of Title 9 taxes now suggested does not mean that our decision did not encompass that possibility. It extended generally to all cases where credit is sought after insolvency. It was federal *priority* attaching as of the time of insolvency that we adjudicated, not something less. As we have indicated, in making the adjudication we neither were nor could have been ignorant of § 902's allowance of the taxpayer's election. Our decision held that right cut off by the incidence of § 3466 at the time of insolvency. Any other would have been wholly inconsistent with the ruling that § 3466 applies as against the state's claim for "contributions" or the taxpayer's right to make them after the incidence of his insolvency.

IV.

We have taken pains to state the effect of our previous decisions, because of the confusion concerning them and the fact that two states have earnestly presented the questions. Ordinarily this would end the matter. But, again for those reasons, we turn briefly to the merits and to the question whether the *Illinois* decisions should now be reversed.

Apart from the arguments already discussed, two stand out as reasons for the change sought. Both reiterate contentions rejected in the *Illinois* cases. The primary one is that the objects of the legislation will be defeated unless the change is made, namely, the encouragement of the state systems and correspondingly of taxpayers to make "contributions" to state funds, thereby insuring that

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the moneys so paid in will go out for unemployment benefits rather than into the Treasury as revenue. The second is a heightened emphasis on the subsequent amendments to § 902 as showing Congress' intent to waive, in progressively broadening scope though still only in specified situations, the original limitations of § 902 upon securing credit.[30]

From the second contention is drawn the conclusion that Congress, by its carefully, even meticulously drawn relaxations, meant credit to be given not only in the circumstances so carefully prescribed but also in other situations not within those prescriptions. This conclusion when added to the first argument amounts in sum to reiterating that the state exaction is "tantamount to a claim of the United States," and that not to disregard the tax and credit structure in which Congress molded the Act would be to "observe the form and ignore the substance of the legislation."

We shall not repeat the answers made in *Illinois* v. *United States,* except to say that "while the state and federal governments were to cooperate, the underlying philosophy of the Federal Act was to keep the state and federal systems separately administered." 328 U. S. 8, 11. To the considerations there stated, however, we now add the following ones, not expressly mentioned in the earlier opinion, prefaced however with the observation that the grounding of each plea for reversal affords basis for conclusion against that action as well as in its favor.

Thus the many relaxations which Congress has made respecting the conditions permitted for taking credit, by force of their very number and careful limitation, show

[30] Of the several amendments, none is applicable to this case. The only ones relating expressly to insolvents' estates are those noted in Part II, see notes 13, 15 and text, 31, applying to payments by court-appointed receivers, etc.

that Congress was not offering a broadside exemption to be applied in situations, such as this case, other than those specifically defined.[31] Rather the intention disclosed is to limit the credit to the precise situations specified for allowing it. That view accords with Congress' deliberate choice of the tax and conditional credit devices for framing the Act's structure. These are well-known techniques, adopted apparently in this instance for constitutional as well as administrative reasons.[32] But those very motivations warn us to be wary of disregarding the form which Congress has chosen advisedly, in order to substitute a substance we can only be doubtful it may have intended.[33]

But it is said that if payment to the state is not allowed and the right to receive credit is cut off, the money will not be paid out in unemployment benefits but will go into the Treasury as general revenue; the states will be compelled to make payments to the insolvent's employees;

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[31] Thus, as has been noted, the provision for payment and credit given by the Revenue Act of 1943, §§ 602 (a) (3) and (b), 58 Stat. 77, is limited to situations where an insolvent's assets were under the control of a court or its appointed official. Congress quite obviously had the insolvent taxpayer in mind. But even so it excluded nonjudicial custodians of his assets by its failure to extend the relaxation to them. The omission cannot be taken to have been unintentional The necessary effect in the one case was to create a legislative exception to § 3466, in the other to deny it by the withholding of the like privilege. So also with the other easing amendments.

[32] Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

[33] It is precisely in matters where Congress has used the tax and credit technique that disregarding the form chosen offers the gravest dangers of perverting a statute's purposes. We think that possibility is equally as great here from ignoring Congress' expressed intent, both in limiting the right of credit to defined situations and in its failure expressly to qualify the broad policy of § 3466, as would be the other one of reaching its purpose by giving effect to its explicit limitations.

and thus the primary purposes of the Act will be defeated. There are several answers.

One is that Congress has guaranteed the solvency of the state funds and, if need be, the revenues thus paid into the Treasury will be available for that purpose.[34] Moreover, but especially in view of this guaranty, it may be more likely that the funds, if paid into the Treasury rather than to the state, will be saved for application to the Act's purposes. For there is no assurance, if the state's prior right to them is once established, that they will go for the payment of unemployment benefits.

It must be remembered that we are dealing with an insolvent's assets. And the states have statutes by which such assets are distributed according to local priorities whenever § 3466 is not operative. Only a few of them place unemployment benefits at the top.[35] Depending therefore upon the number and the amounts of claims standing ahead of the unemployment benefit claims in the particular state would be the certainty or probability of payment of the latter. In short, reversing our decisions and conceding the validity of the state's position, either as to Title 9 taxes alone or as to all federal taxes, would give no definite and certain assurance that the funds thus acquired by the states would go to satisfy the Act's

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[34] Sections 904 and 1201 of the Social Security Act, 58 Stat. 789, 50 U. S. C. App. (Supp. V, 1946) §§ 1666–1667, as amended, 61 Stat. 793, 794, §§ 4–5. Section 904 established a federal employment account in the United States Treasury, and appropriated the excess of Title 9 taxes over unemployment administrative expenses to such account. Section 1201 authorized loans from such account to the states for unemployment insurance payments when a state's unemployment insurance fund becomes dangerously low, repayment of such advances not being required unless the state fund regains a stable condition. See S. Rep. No. 477, 80th Cong., 1st Sess. 9–10.

[35] See, *e. g.*, Mass. Ann. Laws, c. 151A, § 17 (1942); Cal. Gen. Laws, Act 8780d, § 46 (1944); Iowa Code, § 96.14 (3) (1946); Okla. Stat., tit. 40, § 224 (c) (1941).

purposes.[36] In many cases payment to the state would be the means of diverting them to wholly extraneous objects. Especially would this be true when smaller employers within the Act's terms are involved, as they seem to be much more often than others.[37] In the absence of any explicit or clearly implied direction we do not believe that Congress intended to require that the state's claim for unemployment contributions take precedence over all other debts of the insolvent or to authorize us to make this a condition of allowing payment to the state to be made from his estate. There was no evident purpose thus broadly to upset state schemes of priority.

These examples are enough to show that the premises of the states' contentions are capable of supporting other conclusions than they draw from them. Other examples might be stated. But in each instance the inferences drawn by the states are counterbalanced with opposing ones quite or nearly as tenable. In some they are of greater weight.

It follows that Massachusetts and Illinois have not shown the clear inconsistency between the Act's explicit

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[36] Unless in this case we should undertake to say, as we have not been asked or authorized to do, that by implied force of § 902, state priorities are relegated to a position inferior to the taxpayer's right to pay the state and take federal credit. Nothing in the statute suggests that Congress intended to give the taxpayer or this Court the power thus to disorder the states' schemes of priorities.

[37] If the litigated cases, of which the ones that have come here seem to be typical, and common observation may be taken as fairly accurate bases for judgment.

It is true that in some cases of insolvency the business continues without being wound up. But this perhaps is much more often the case when operation is continued under judicial control than otherwise. And when that is the situation, insofar as the 1943 amendment applies the payment may be made and credit obtained. Insofar as it does not apply the amendment is a clear mandate against allowing that to be done.

terms and our previous decisions, on the one hand, and achieving the Act's purposes, on the other, which is necessary to make out a case for reversal and thus for negating the force of Rev. Stat. § 3466 as creating federal priorities for Title 9 or other federal tax claims. The *Illinois* decisions were advisedly made, after full deliberation. There was no dissent on the basic question of priority, even though the issue seemed close. No substantially new argument or consideration of policy has been put forward. The case for reversal is no more clear or convincing than Illinois' position on the merits in the earlier litigation.

Nor are we persuaded that our former decisions were erroneous. For the strict policy of § 3466 had permitted few exceptions [38] and, as we repeated in *Illinois* v. *United States,* quoting *United States* v. *Emory,* 314 U. S. 423, 433, "only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." 328 U. S. 8, 12. See also *United States* v. *Remund,* 330 U. S. 539, 544–545. There is no such inconsistency here.

Until the federal claims for taxes, whether under Title 8, Title 9 or other taxing provision, are paid in full, the

[38] The original departures indeed did not contemplate that exceptions were being made. They conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor. *Thelusson* v. *Smith,* 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; *Brent* v. *Bank of Washington,* 10 Pet. 596, 611; see *Savings Society* v. *Multnomah County,* 169 U. S. 421, 428; cf. *United States* v. *Fisher,* 2 Cranch 358; *United States* v. *Hooe,* 3 Cranch 73. The Court has been loath to expand these exceptions, cf. *Illinois* v. *Campbell,* 329 U. S. 362, 370, to include other types of lien. The claims of Massachusetts and Illinois do not fall within the scope of those exceptions or of others as to which the Court has felt that subsequent legislation authorized them. Cf. *Cook County National Bank* v. *United States,* 107 U. S 445; *United States* v. *Guaranty Trust Co.,* 280 U. S. 478.

states are not entitled either to collect or to retain any part of the insolvent debtor's assets. We do not anticipate that any of the state unemployment insurance programs will fail or be seriously impaired by reason of this decision, or their consequent failure to secure the small sums characteristically at stake in this extended litigation and, apparently, in other cases most likely to produce similar controversy. Nor would the Federal Treasury have been rendered bankrupt by a contrary result.

The judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE JACKSON, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON join, dissenting.

This decision announces an unnecessarily ruthless interpretation of a statute that at its best is an arbitrary one. The statute by which the Federal Government gives its own claims against an insolvent priority over claims in favor of a state government must be applied by courts, not because federal claims are more meritorious or equitable, but only because that Government has more power. But the priority statute is an assertion of federal supremacy as against any contrary state policy. It is not a limitation on the Federal Government itself, not an assertion that the priority policy shall prevail over all other federal policies. Its generalities should not lightly be construed to frustrate a specific policy embodied in a later federal statute.

The Federal Government has sued to enforce a personal liability against one who, as assignee, paid to the State of Massachusetts funds which the Federal Government claims by virtue of its statutory priority. Defendant was the assignee of a small concern under a common-law assignment for benefit of creditors. The assets did not

realize enough to pay both federal and state tax claims. The United States filed a claim, among other things, for 100% of the taxes laid by Title 9 of the Social Security Act, which, however, provides for a 90% credit against the federal tax if that amount has been paid into an approved state unemployment compensation fund. Believing that he was entitled thereby to pay the State and to claim the credit against the federal tax, this assignee paid $803.72 on the claim of Massachusetts for taxes under the Massachusetts Unemployment Compensation Act. This is the sum now demanded by the Federal Government.

The reasoning on which the assignee is held liable and the State is required to turn this amount over to the Federal Government is this: True § 902 gives a 90% credit. But, literally, it is only for actual payment to the State. On insolvency, the federal priority statute, so it is held, intervenes and freezes the funds in the assignee's hands so that he cannot pay the State until he has first paid the Federal Government. Hence, unless he has enough money to pay both claims in full, the priority statute prevents him from taking the credit which the Social Security Act grants him, the Federal Government collects a windfall ten times what would normally be its due, and the State government gets nothing on its tax claim. This Court now so construes the priority statute as not merely to prefer net claims of the Federal Government, but also as a prohibition against courts marshaling the assets of an insolvent in an equitable manner.

The District Judge declined to support this harsh reasoning. He is one whose views of the meaning of the Social Security Act are entitled to great weight, because of his experience with it. See *Steward Machine Co.* v. *Davis,* 301 U. S. 548, at 553. He considered that as to 90% of the federal tax, the taxpayer in effect was given an option to pay it to the approved state fund or to the Federal Government. He said:

> "The force of that analysis seemed to me the more persuasive when the true nature of Title IX of the Social Security Act as portrayed in Charles C. Steward Machine Co. v. Davis, 301 U. S. 548, . . . was stressed. As to 90 per cent of the taxes under that title the objective of Congress was not to collect federal revenues but to stimulate the creation of and payment to state unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under state unemployment compensation plans."

The consequences of this Court's refusal to follow his reasoning are so inconsistent with the purposes of the Social Security Act that they could not have been intended by a reasonable Congress. What the Court is doing practically is this:

1. The Court is giving the Federal Treasury a payment from an insolvent taxpayer ten times as large as Congress exacted from a solvent taxpayer under like circumstances. The 90% was never contemplated as federal revenue, but credit for that amount was intended to be availed of, to induce states to create unemployment compensation funds and to maintain them in solvent condition.

2. The Court is depriving the State of a revenue Congress not only tried to assure it, but one which it used the tax and credit device to impel the state to collect. See *Steward Machine Co.* v. *Davis,* 301 U. S. 548.

3. This unjust enrichment of the Federal Government and the depletion of state unemployment funds is accomplished by holding that the priority statute prohibits simultaneous distribution to each, State and Federal Government, of the net amount actually due, taking into account such simultaneous payments, and by requiring

instead that the total federal tax be paid in full and first in point of time, which in this case depletes the estate so that the assignee cannot thereafter make the state payment to obtain the federal credit. It seems to me that the federal priority statute cannot have been intended to do more than secure to the Federal Government what becomes fairly due it on a marshaling of assets as courts of equity usually do.

4. This interpretation prejudices general creditors by placing ahead of them $190 of tax claims for every $100 actually owing. For example, the maximum tax for both the State and Federal Governments is that laid by the Federal Act—let us say it amounts to $1,000. It can be discharged by payment of $1,000, $900 paid to the approved state fund and $100 to the Federal Government. But under this ruling the insolvent must pay the $1,000 in full to the Federal Government. That, of course, leaves the state tax undischarged, which calls for payment of another $900 before anything can be left for the general creditors. Thus, where an equitable marshaling of assets to pay just claims would put $1,000 of taxes ahead of general creditors, the Court's ruling puts $1,900 ahead of general creditors. The Court even goes so far as to reject concessions by the Government designed to mitigate, in this respect at least, the harshness of this rule.

The interpretation of the Priority Act to thus gouge the states and private creditors is contrary to the purpose and spirit of the Act itself. Over a century ago Mr. Justice Story defined the "motives of public policy" which underlie the priority statutes of the Federal Government to be "in order to secure an adequate revenue to sustain the public burthens and discharge the public debts. . . ." *United States* v. *State Bank of North Carolina* (1832), 6 Pet. 29, 35. It is obvious that as to the

90% of the Social Security tax here involved, it was not contemplated as federal revenue to meet federal burdens but was laid to induce and to enable the State to assume specific obligations to the unemployed. The priority statute is now invoked to deny, in this class of cases, the aid promised in meeting these obligations.

When a later statute has enacted a comprehensive federal policy in another field and created a federal interest in the adverse claimant's solvency or function, this Court has rarely, and never until recently, hesitated to interpret the old and general priority statute as yielding to the newer and specific statutory scheme. *Cook County National Bank* v. *United States,* 107 U. S. 445; *United States* v. *Guaranty Trust Co.,* 280 U. S. 478; *cf. Callahan* v. *United States,* 285 U. S. 515. See also dissent in *United States* v. *Emory,* 314 U. S. 423 at 433. The problem here is not whether a mere state claim can defeat one of the Federal Government, but whether one federal statute will be so construed as to defeat the manifest policy of another.

The Court's opinion, however, goes to some lengths to show that the Court as a whole and without dissent on this point has become committed to the interpretation it adopts, and by unusual deference to the doctrine of *stare decisis* declares itself bound hand and foot to full federal priority. I am unable to detect the commitment which the Court so clearly sees. But if I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it. However, no rights have vested and no prejudicial action has been taken in reliance upon such a ruling. It does not appear to have been called to the attention of Congress and in effect approved by failure to act. Under these circumstances, except for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no

reason why I should be consciously wrong today because I was unconsciously wrong yesterday.

I would reverse the judgment and allow federal priority only subject to the 90% credit for sums disbursed to the State on account of its unemployment compensation tax.

BUTE *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 398. Argued February 12, 1948.—Decided April 19, 1948.

1. Petitioner, a 57-year-old man, pleaded guilty in a state court to two indictments for the noncapital offense of "taking indecent liberties with children" and was sentenced to prison for one to 20 years for each offense. The indictments were in simple language and easy to understand; and there was no claim that petitioner failed to understand them or that he was incapable of intelligently and competently pleading guilty. The records showed that petitioner appeared "in his own proper person" and that, before accepting his pleas of guilty, the court explained the consequences and penalties; but the records were silent on the subject of counsel for his defense. *Held:*

   (a) In the circumstances of this case, such silence in the records as to counsel for the defense does not suffice to invalidate the sentences under the due process clause of the Fourteenth Amendment. Pp. 644, 670–677.

   (b) In the absence of any showing beyond that in the records in this case, the due process clause of the Fourteenth Amendment did not require the state court to inquire as to petitioner's desire to be represented by counsel, his ability to procure counsel, or his desire to have counsel assigned to him; nor did it require the state court to offer or assign counsel to him. Pp. 644, 670–677.

2. The due process clause of the Fourteenth Amendment does not require the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. Pp. 649, 656.

3. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political situations." P. 649.
4. It leaves room for much of the freedom which, under the Constitution and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts in the light of their respective histories and needs. Pp. 649–653, 663, 675.
5. It is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-existing power of the states over court procedures in state criminal cases. P. 653.
6. Because the Constitution, during nearly 80 formative years, permitted each state to establish, maintain and accustom its people to its own forms of "due process of law," a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the Federal Government as "due process of law." P. 653.
7. While such a presumption does not arise in favor of any practice against which the Fourteenth Amendment was particularly directed, there is no reason to feel that it was particularly directed against the practice involved in this case. Pp. 653–654.
8. A procedure followed by a state in criminal trials should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless it violates "the very essence of a scheme of ordered liberty" and its continuance would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " P. 659.
9. Rule 44 of the Federal Rules of Criminal Procedure, pertaining to the assignment of counsel to defendants in criminal cases in federal courts, cannot be regarded as defining, even by analogy, the minimum requirement of due process for the states under the Fourteenth Amendment. Pp. 662–663.
10. The Fourteenth Amendment does not authorize this Court to require all states to enforce in substance either Rule 44 of the Federal Rules of Criminal Procedure or § 203 of the proposed Code of Criminal Procedure recommended by the American Law Institute. P. 665.

11. It is not the province of this Court to prescribe which procedure it considers preferable among many permissible procedures which could be followed by a state court in connection with counsel for the defense of a party accused of a state crime. P. 670.
12. It is the province of this Court to decide whether the practice followed by a state court in a particular case, although admittedly in conformity with state law, was so clearly at variance with the procedure constituting "due process of law" under the Fourteenth Amendment that the judgments must be completely invalidated. P. 670.
13. The common-law record of a criminal trial in a state court for a noncapital offense is not to be considered unreliable solely because it is almost exactly in the language of the state statute prescribing the procedure in such cases. P. 670.
14. In passing upon claims of denial of due process of law contrary to the Fourteenth Amendment in state criminal trials, doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the state's attorney lawfully chosen to discharge serious public responsibilities under their oaths of office. Pp. 671–672.
15. If any presumption is to be indulged as a result of silence regarding counsel for the defense in the record of a state criminal trial for a noncapital offense, it should be presumed that the state court constitutionally discharged, rather than unconstitutionally disregarded, its state and federal duties to the defendant, including those relating to his right, if any, to the assistance of counsel. P. 672.
16. Affirmance of the sentences by the state supreme court conclusively established their compliance with state law. P. 668.
17. While such a finding of compliance with state law is not necessarily sufficient to satisfy the requirements of due process under the Fourteenth Amendment, it is helpful, in measuring compliance with the latter, to know exactly what were the requirements of state law. Pp. 668–670.
18. In view of the requirements of the state statutes (quoted in the opinion at pp. 668–670), the affirmance of the sentences by the state supreme court, and the absence of findings to the contrary, the silence of the records is adequate ground for the minimum conclusion that petitioner did not request counsel and did not state under oath that he was "unable to procure counsel." Pp. 672–673.
19. In the absence of any request by petitioner for counsel and in the absence of any statement by him that he was unable to procure counsel, the court did not violate the requirements of due process

of law under the Fourteenth Amendment by the procedure which it followed and which accorded with the procedure approved by the state for noncapital cases such as these. Pp. 673–674.

20. It is not necessary to consider whether petitioner, by his plea of guilty or otherwise, affirmatively waived any right to counsel, for no constitutional right to the assistance of counsel had arisen in his favor. P. 673.

21. Since the offenses with which petitioner was charged were of a noncapital nature, the due process clause of the Fourteenth Amendment, in and of itself, did not require the state trial court in the circumstances of these cases to initiate an inquiry into his desire to be represented by counsel or into his ability to obtain counsel, nor, in the event of his inability to obtain counsel, did it require the trial court to assign counsel to conduct his defense—though it would have been required both by the state statute and the Fourteenth Amendment to take some such steps if he had been charged with a capital offense. P. 674.

396 Ill. 588, 72 N. E. 2d 813, affirmed.

The Supreme Court of Illinois affirmed petitioner's convictions under two indictments for the noncapital offense of "taking indecent liberties with children." 396 Ill. 588, 72 N. E. 2d 813. This Court granted certiorari. 332 U. S. 756. *Affirmed,* p. 677.

Victor Brudney argued the cause and filed a brief for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief was *George F. Barrett,* Attorney General.

Mr. Justice Burton delivered the opinion of the Court.

In the Circuit Court of La Salle County, Illinois, the petitioner, Roy Bute, pleaded guilty to the crime of "taking indecent liberties with children" as charged in each of two indictments and, on each plea, was sentenced to confinement in the Illinois State Penitentiary for not

less than one nor more than 20 years, the sentences to run consecutively. Each common law record is silent on the subject of counsel for the petitioner's defense. The issue here is whether or not each state sentence shall be held to have been imposed in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States[1] because each common law record shows that the petitioner appeared "in his own proper person" and does not show that the court inquired as to the petitioner's desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist him in his defense, or that such counsel was offered or assigned to him. We hold that such a silence in the respective records does not suffice to invalidate the sentences. We hold further that, in the absence of any showing beyond that in these records, the due process clause of the Fourteenth Amendment did not require the Illinois court to make the inquiries or the offer or assignment of counsel now claimed to have been the right of the petitioner.

At the time of these indictments, June 17, 1938, the petitioner was 57 years old. Each indictment, in its first count, charged him with taking indecent liberties on May 19, 1938, with a girl under the age of 15, and, in its second count, with attempting to do so. The first indictment related to a girl of eight and the second to a girl of 11. The offenses charged were violations of Ill. Rev. Stat. c. 38, § 109 (1937).[2]

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[1] ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. XIV, § 1.

[2] ". . . any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent

The intelligibility of the indictments is evident from the following language quoted from the first:

> "That Roy Bute late of said County, on to wit: the 19th day of May in the year of our Lord one thousand nine hundred and thirty-eight at and within the said County of La Salle, the said Roy Bute being a male person of the age of seventeen (17) years and upwards, did then and there unlawfully and feloniously take certain immoral, improper and indecent liberties with a certain female child, under the age of fifteen (15) years, and of the age of eight (8) years, to-wit, . . . with intent of arousing, appealing to and gratifying the lust, passion and sexual desires of him the said Roy Bute contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois." [3]

The material portions of the records in these cases are identical, except for the names and ages of the children. They contain all that was before the Supreme Court of

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liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, . . . shall be imprisoned in the penitentiary not less than one year nor more than twenty years: . . . ."

[3] An indictment stating this offense substantially in the language of the statute, though not setting out facts constituting the elements of the crime, was sufficient. *People* v. *Rogers,* 324 Ill. 224, 229, 154 N. E. 909, 911; *People* v. *Butler,* 268 Ill. 635, 641, 109 N. E. 677, 679; *People* v. *Scattura,* 238 Ill. 313, 314–315, 87 N. E. 332, 333.

A copy of each indictment, with both counts on the same sheet, was furnished to the petitioner and the devastating frankness of the second count in describing the acts complained of rendered impossible any misunderstanding of the charge. The petitioner does not contend that he failed to understand it. By leave of court, the State entered "Nolle Prosequi" as to each second count.

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Illinois or that is before this Court. The following appears in each:

"ARRAIGNMENT AND PLEA OF GUILTY—June 20, 1938

"Now on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant in his own proper person also comes; Whereupon the said defendant is furnished with a copy of the indictment, a list of witnesses and jurors herein.

"And the said defendant being now arraigned before the bar of this Court moves the Court for leave to enter his plea of Guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein; and the Court having admonished and explained to the said defendant the consequences and penalties, which will result from said plea, and the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave.

"Thereupon the said defendant enters his plea of guilty of the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein.

"Thereupon the Court finds the age of the said defendant to be fifty-seven (57) years.

"JUDGMENT

"Now again on this day come the said People by Taylor E. Wilhelm, State's Attorney, and the said defendant Roy Bute, in his own proper person also comes, and the said defendant, Roy Bute, not saying anything further why the judgment of the Court

should not now be pronounced against him on his plea of guilty of the crime of taking indecent liberties with children in manner and form as charged in the first count of the indictment herein, heretofore entered herein.

"Whereupon it is Ordered by the Court that the said defendant, Roy Bute, be and he is hereby sentenced on said plea of guilty as aforesaid to confinement in the Illinois State Penitentiary at Joliet for a period of not less than one (1) year, nor more than twenty (20) years."

In October, 1946, the petitioner, while serving his sentence in the Illinois State Penitentiary, and appearing *pro se,* filed in the Supreme Court of Illinois motions asking leave "to Sue as a Poor Person for Writ of Error . . ." to review each of the original proceedings. These were granted and he filed his petitions, *pro se,* based upon the common law records in the respective cases. He relied particularly upon the claim that he had been denied representation by counsel, that the trial court had not advised him of his rights or of his right to the assistance of counsel and that he had been rushed to trial with such expedition as to deprive him of a fair and impartial trial, all of which rights he claimed were guaranteed to him by the State and Federal Constitutions.

The Supreme Court of Illinois affirmed both judgments. 396 Ill. 588, 72 N. E. 2d 813. It denied expressly each of the above-mentioned claims and denied a rehearing. We granted certiorari in recognition of the frequently arising constitutional principle involved. 332 U. S. 756. The petitioner's presentations, *pro se,* were marked with professional accuracy and clarity but the petition for certiorari states that the petitioner is ignorant of the law as he was at the time of his trial, and that the documents filed by him *pro se* had been prepared for him. We

appointed a member of the Bar of this Court to act as counsel for the petitioner here and the petitioner's claims have been fully and competently presented to this Court.

EFFECT OF FOURTEENTH AMENDMENT.

The cases turn upon the meaning of "due process of law" under the Fourteenth Amendment in relation to the assistance of counsel for the defense of the accused in state criminal trials such as these. In *Powell* v. *Alabama,* 287 U. S. 45, this Court granted relief in a group of capital cases which demonstrated the essential need for applying the full force of the Fourteenth Amendment to the invalidation of purportedly valid judgments rendered in a state court under the circumstances there shown. Those and other less extreme cases have well illustrated the kind of service to the cause of justice which can be rendered by this Court in thus giving effect to the Fourteenth Amendment.

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation." *Hebert* v. *Louisiana,* 272 U. S. 312, 316–317.
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> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that

> there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defence." *Holden* v. *Hardy,* 169 U. S. 366, 389–390.

The foregoing statements were referred to with approval in *Powell* v. *Alabama, supra,* at pp. 67, 71–72.

The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ." *Hebert* v. *Louisiana, supra,* at p. 316. This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of

their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts.[4]

One of the major contributions to the science of government that was made by the Constitution of the United States was its division of powers between the states and the Federal Government. The compromise between state rights and those of a central government was fully considered in securing the ratification of the Constitution in 1787 and 1788.[5] It was emphasized in the "Bill of Rights," ratified in 1791. In the ten Amendments constituting such Bill, additional restrictions were placed upon the Federal Government and particularly upon procedure in the federal courts.[6] None were placed upon

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[4] One long recognized difference between the trial procedure in the federal courts and that in many state courts is the greater freedom that is allowed to a federal court, as compared with that allowed to a state court, to comment upon the evidence when submitting a case to a jury. See *Quercia* v. *United States*, 289 U. S. 466, 469; *Patton* v. *United States*, 281 U. S. 276, 288; *Simmons* v. *United States*, 142 U. S. 148, 155. The federal practice is based upon the rules of common law comparable to those mentioned in the Seventh Amendment. The federal and state practices have their respective proponents and opponents, but both practices unquestionably represent "due process of law."

[5] See The Federalist, Number XLIV, Restrictions on the Authority of the Several States; Number XLV, The Alleged Danger from the Powers of the Union to the State Governments Considered; Number XLVI, The Influence of the State and Federal Governments Compared.

[6] "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.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

the states. On the contrary, the reserved powers of the states and of the people were emphasized in the Ninth and Tenth Amendments.[7] The Constitution was conceived in large part in the spirit of the Declaration of Independence which declared that to secure such "unalienable Rights" as those of "Life, Liberty and the pursuit of Happiness . . . . Governments are instituted among Men, deriving their just powers from the consent of the governed, ..." It sought to keep the control over individual rights close to the people through their states. While there have been modifications made by

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Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const. Amend. IV, V, VI, VII and VIII.

[7] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. Amend. IX and X.

the states, the Congress and the courts in some of the relations between the Federal Government and the people, there has been no change that has taken from the states their underlying control over their local police powers and state court procedures. They retained this control from the beginning and, in some states, local control of these matters long antedated the Constitution. The states and the people still are the repositories of the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, ..."[8] The underlying control over the procedure in any state court, dealing with distinctly local offenses such as those here involved, consequently remains in the state. The differing needs and customs of the respective states and even of the respective communities within each state emphasize the principle that familiarity with, and complete understanding of, local characteristics, customs and standards are foundation stones of successful self-government. Local processes of law are an essential part of any government conducted by the people. No national authority, however benevolent, that governs over 130,000,000 people in 48 states, can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions. The principle of "Home Rule" was an axiom among the authors of the Constitution. After all, the vital test of self-government is not so much its satisfactoriness weighed in the scales of outsiders as it is its satisfactoriness weighed in the scales of "the governed."[9] While, under the Constitution of

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[8] U. S. Const. Amend. X, note 7, *supra*.

[9] ". . . Due process of law in the latter [*i. e.*, the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the

the United States, the Federal Government, as well as each state government, is at bottom a government by the people, nevertheless, the federal sphere of government has been largely limited to certain delegated powers. The burden of establishing a delegation of power to the United States or the prohibition of power to the states is upon those making the claim. This point of view is material in the instant cases in interpreting the limitation which the Fourteenth Amendment places upon the processes of law that may be practiced by the several states, including Illinois. In our opinion this limitation is descriptive of a broad regulatory power over each state and not of a major transfer by the states to the United States of the primary and pre-existing power of the states over court procedures in state criminal cases.

Until the taking effect of the Fourteenth Amendment in 1868, there was no question but that the states were free to establish their own court procedures. This freedom included state practice as to the assistance of counsel to be permitted or assigned to the accused for his defense in state criminal cases. Because the Constitution of the United States, during nearly 80 formative years, thus permitted each state to establish, maintain and accustom its people to that state's own forms of "due process of law," a substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the Federal Government as "due process of law." While such a pre-

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Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." *Hurtado* v. *California,* 110 U. S. 516, 535.

sumption does not arise in favor of any practice against which the Fourteenth Amendment was particularly directed, there is no reason to feel that, in 1868, such Amendment was particularly directed against the practice now before us.

ILLINOIS CONSTITUTIONAL PROVISIONS.

From the inception of their statehood, the people of Illinois have recognized their own responsibility for the preservation of local due process of law and of the civil rights of individuals within the jurisdiction of that State. They dealt at length with such matters in their original constitution of 1818. In Article VIII they provided—

> "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:
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> . . . .
>
> "§ 9. That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, and that he shall not be compelled to give evidence against himself." [10] Reprinted in Ill. Rev. Stat. (1937).

[10] Article VIII of the Illinois Constitution of 1818 contained 23 sections dealing with the types of matters that are found in the Federal Bill of Rights. On the subject of "due process" it included the following:

"§ 8. That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the judgment of his peers or the law of the land. . . ."

The Illinois Constitution of 1848 contained a comparable "Declaration of Rights" in Article XIII. Among that Article's 26 sections were §§ 8 and 9, substantially readopting language used in §§ 8 and 9 of Article VIII of the original constitution.[11]

In the Illinois Constitution of 1870, a "Bill of Rights" was set forth in Article II dealing with these subjects and including §§ 2 and 9 in the following form:

> "§ 2. No person shall be deprived of life, liberty or property, without due process of law.
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> . . . . .
>
> "§ 9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel

[11] Article XIII of the Illinois Constitution of 1848 contained the following:

"That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare:

. . . . .

"§ 8. That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.

"§ 9. That in all criminal prosecutions the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, to speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law, and that he shall not be compelled to give evidence against himself." Reprinted in Ill. Rev. Stat. (1937).

the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Reprinted in Ill. Rev. Stat. (1937).

These latter provisions were in effect in Illinois at the time of the trial of the instant cases. There is and can be no question raised here but that the procedure in the instant cases conformed to the Illinois Constitution as interpreted by the Supreme Court of that State.

The Constitution of the United States thus left the power to regulate the procedure as to the assistance of counsel for the defense of the accused in state criminal cases to the discretion of the respective states, at least until 1868. The Fourteenth Amendment then was adopted to meet the crying needs of that time.[12]

JUDICIAL INTERPRETATION OF FOURTEENTH AMENDMENT.

After exhaustive consideration of the subject, this Court has decided that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. There is nothing in the Fourteenth Amendment specifically stating that the long rec-

[12] For historical treatments of the Sixth and Fourteenth Amendments in decisions of this Court in relation to the general subject matter of the instant cases see especially, *Adamson* v. *California,* 332 U. S. 46, concurring opinion pp. 61–68, dissenting opinion pp. 68–123; *Betts* v. *Brady,* 316 U. S. 455, 464–472, dissenting opinion pp. 477–480; *Johnson* v. *Zerbst,* 304 U. S. 458, 462–463; *Palko* v. *Connecticut,* 302 U. S. 319, 322–328; *Powell* v. *Alabama,* 287 U. S. 45, 59–69; *Hurtado* v. *California,* 110 U. S. 516, 520–538, dissenting opinion pp. 538–558; *Davidson* v. *New Orleans,* 96 U. S. 97, 100–104.

ognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. Unlike the Bill of Rights, the Fourteenth Amendment made no mention of any requirement of grand jury presentments or indictments as a preliminary step in certain criminal prosecutions; any universal prohibition against the accused being compelled, in a criminal case, to be a witness against himself; any jurisdictional requirement of juries in all criminal trials; any guaranty to the accused that he have a right to the assistance of counsel for his defense in all criminal prosecutions; or any need to observe the rules of the common law in the re-examination of all facts tried by a jury.[13] In spite of such omissions, it is claimed here,

[13] A classic statement of why it is due process to do many things in the state courts, particularly of a procedural nature, that may not be done in federal courts because of the specific procedural requirements of the Federal Bill of Rights was made by Mr. Justice Cardozo in the light of his long experience in state courts.

"We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

"The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California*, 110 U. S. 516; *Gaines* v. *Washington*, 277 U. S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey*, 211 U. S. 78, 106, 111, 112. Cf. *Snyder* v. *Massachusetts*, *supra*, p. 105; *Brown* v. *Mississippi*, 297 U. S. 278, 285. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in con-

on behalf of the petitioner, that even though the failure of the state court in these cases to inquire of the accused as to his desire to be represented by counsel, or his ability to procure counsel, or his desire to have counsel assigned to him to assist him in his defense, and even though the failure of the state court in these cases to offer or assign counsel to the accused for his defense may have satisfied the Illinois law and have amounted to "due process of law" under the Illinois Constitution,[14] yet such practices did not satisfy the "due process of law" required of the states by the Fourteenth Amendment to the Constitution of the United States.

To sustain this claim, it is necessary for the petitioner to establish that, in spite of the constitutionality of the process of law developed by Illinois in its own criminal cases, prior to 1868, yet that same Illinois process of law, after 1868, no longer is constitutionally valid as "due process of law" under the Fourteenth Amendment. We recognize that the Fourteenth Amendment, as part of the supreme law of the land under Article VI of the original Constitution, supersedes "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The important question remains, however: what shall be considered to be to the contrary? It is the established policy of both the State and Federal Governments to treat possible conflicts between their powers in such a

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troversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker* v. *Sauvinet*, 92 U. S. 90; *Maxwell* v. *Dow*, 176 U. S. 581; *New York Central R. Co.* v. *White*, 243 U. S. 188, 208; *Wagner Electric Mfg. Co.* v. *Lyndon*, 262 U. S. 226, 232. As to the Fourth Amendment, one should refer to *Weeks* v. *United States*, 232 U. S. 383, 398, and as to other provisions of the Sixth, to *West* v. *Louisiana*, 194 U. S. 258." *Palko* v. *Connecticut*, 302 U. S. 319, 323–324.

[14] Art. II, § 2, of the Illinois Constitution of 1870, *supra*.

manner as to produce as little conflict and friction as possible. So here the procedure followed by Illinois should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Illinois procedure violates "the very essence of a scheme of ordered liberty" and its continuance would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Cardozo, J., in *Palko* v. *Connecticut,* 302 U. S. 319, 325, with quotation from his opinion in *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. See *Foster* v. *Illinois,* 332 U. S. 134, 137; *Adamson* v. *California,* 332 U. S. 46, concurring opinion at pp. 61–67; *Betts* v. *Brady,* 316 U. S. 455, 465; *Brown* v. *Mississippi,* 297 U. S. 278, 285–286; *Powell* v. *Alabama,* 287 U. S. 45, 61–62, 67, 71–72; *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Twining* v. *New Jersey,* 211 U. S. 78; *Holden* v. *Hardy,* 169 U. S. 366, 389–390; *Hurtado* v. *California,* 110 U. S. 516, 532, 535, 537.

It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts. These may differ from comparable practices developed in the courts of other states or of the United States. Before examining the Illinois practice and the precise facts of the cases before us, it is helpful to see what has been the practice in the courts of the United States and especially to see what such practice was in 1938, at the time of the trial of the instant cases. While such federal court practice does not establish a constitutional minimum standard of due process which must be observed in each state under the Fourteenth Amendment, yet such practice does afford an example approved by the courts of the United States. It thus contributes something toward establishing a general

standard of due process currently and properly applicable to the states under the Fourteenth Amendment.

PRACTICE IN FEDERAL COURTS.

The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense.[15] There is no proof possible that the same practice would have developed under the due process clause of the Fifth Amendment had there been no specific provision on the subject in the Sixth Amendment. It is obvious also that there is no specific provision in the Fourteenth Amendment comparable to that in the Sixth Amendment. Furthermore, at the time of the trial of this case in 1938, the rule of practice even in the federal courts was not as clear as it is today. The federal statutes were then, and they are now, in practically the same form as when they were enacted in 1789 and 1790. They provided merely for a right of representation in the federal courts by the accused's own counsel and required assignment of counsel by the court only on accusations for treason or other capital crimes.[16] In fact, until the decision of this Court in May, 1938 (one month before the trial of the instant cases in the Illinois state court), in

[15] See note 6, *supra*. "By virtue of that provision [in the Sixth Amendment], counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances." *Foster* v. *Illinois*, 332 U. S. 134, 136–137. See also, *Betts* v. *Brady*, 316 U. S. 455, 461, 464–465; *Glasser* v. *United States*, 315 U. S. 60, 70; *Johnson* v. *Zerbst*, 304 U. S. 458; *Palko* v. *Connecticut*, 302 U. S. 319, 327.

[16] "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts,

Johnson v. *Zerbst,* 304 U. S. 458, there was little in the decisions of any courts to indicate that the practice in the federal courts, except in capital cases, required the appointment of counsel to assist the accused in his defense, as contrasted with the recognized right of the accused to be represented by counsel of his own if he so desired. That pre-1938 practice, however, was in the face of the language of the Sixth Amendment which was held in *Johnson* v. *Zerbst, supra,* to require the appointment of counsel in any federal criminal case where the accused had no counsel and did not waive the assistance of counsel.[17]

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respectively, are permitted to manage and conduct causes therein." Jud. Code, § 272, 36 Stat. 1164, 28 U. S. C. § 394.

This is almost verbatim as it was enacted as § 35 in the First Judiciary Act, September 24, 1789, 1 Stat. 92.

"Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. . . ." R. S. § 1034, 18 U. S. C. § 563.

This conforms closely to § 29 in the first Federal Crimes Act, approved April 30, 1790, 1 Stat. 118.

[17] "It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him. It was not assumed that this constitutional privilege comprised the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel. The Sixth Amendment was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant.

. . . . . .

"The marked departure effected by the decision in *Johnson* v. *Zerbst* created a practical difficulty in respect to cases previously

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"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at p. 463. See *Powell* v. *Alabama,* 287 U. S. 45, 68, 69 and *Patton* v. *United States,* 281 U. S. 276, 308, as quoted in the *Zerbst* case. See also, *Walker* v. *Johnston,* 312 U. S. 275.

The view of this Court as to the practice best adapted to the needs of the federal courts and most responsive to the requirements of the Federal Constitution and statutes as well as to the decisions of this Court is now stated in Rule 44 of the Federal Rules of Criminal Procedure which became effective March 21, 1946.[18] In view, however, of the applicability to the state courts of the Fourteenth rather than the Sixth Amendment, this new rule cannot be

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tried. No obstacle existed in connection with the application of this ruling to subsequent proceedings." Holtzoff, The Right of Counsel Under the Sixth Amendment, 20 N. Y. U. L. Q. Rev. 1, 7–8, 10 (1944).

At the time of making the above statement, Judge Holtzoff was the Secretary for the Advisory Committee on Federal Rules of Criminal Procedure.

[18] "Rule 44. Assignment of Counsel. If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel." Fed. R. Crim. P., effective March 21, 1946, 327 U. S. 866–867, 18 U. S. C. 1946 ed., following § 687.

"This rule is a restatement of existing law in regard to the defendant's constitutional right of counsel as defined in recent judicial decisions. . . . The present extent of the right of counsel has been defined recently in *Johnson* v. *Zerbst,* 304 U. S. 458; *Walker* v. *Johnston,* 312 U. S. 275; and *Glasser* v. *United States,* 315 U. S. 60. The rule is a restatement of the principles enunciated in these decisions." Notes to the Rules of Criminal Procedure for the District Courts of the United States, as prepared under the direction of the Advisory Committee on Rules of Criminal Procedure, March, 1945, p. 38 [revised edition, pp. 40–41].

regarded as defining, even by analogy, the minimum requirement of due process for the states under the Fourteenth Amendment. The new rule is evidence only of what this Court considers suitable in the federal courts and the states, in their discretion, may or may not follow it. The states are free to determine their own practice as to the assistance of counsel, subject to the general limitation that such practice shall not deprive the accused of life, liberty or property without due process of law. Accordingly, the lack of conformity of Illinois practice in 1938 to the standards illustrated by the present Federal Rules of Criminal Procedure is by no means determinative of the issue before us.

PRACTICE IN STATE COURTS.

As throwing light on the general practice in the several states, the National Commission on Law Observance and Enforcement, under the chairmanship of George W. Wickersham, in its Report on Prosecution in 1931, said:

> "In America counsel was allowed from an early date and State and Federal Constitutions guarantee to accused in all prosecutions 'the assistance of counsel for his defense,' in this or some equivalent language. It will be seen from this bit of history that, as indeed the courts have held, the right guaranteed is one of employing counsel, not one of having counsel provided by the Government. But in the spirit of the guaranty most of the States have by legislation authorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners. As to capital cases, all the States so provide. Thirty-four States so provide for felonies and 28 for misdemeanors." Vol. I, p. 30.

The foregoing suggests the existence of a gradual voluntary trend among the states toward the authorization by

them of the appointment of counsel to assist the accused in his defense in all criminal prosecutions, with special consideration to the seriousness of the charge faced and to the actual needs of the accused under the circumstances of each case. Much of this trend has taken place since 1868. It is neither universal nor uniform. The above summary shows that 20 states, in 1931, had no statute authorizing such appointments of counsel in misdemeanor cases and 14 had none, even in felony cases, unless the charges were for capital offenses. Furthermore, some of these authorizations, as in Illinois, were subject to special limitations requiring an affirmative showing to be made by the accused of his inability to procure counsel for himself.

Another indication of the opinion of representative members of the Bench, Bar and law school faculties appears in the following quotation from § 203 of the Code of Criminal Procedure, approved by the American Law Institute in 1930:

> "Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court." At p. 88.

The Commentary of the Institute accompanying this Section shows that the assistance recommended for the accused in § 203 of the proposed Code was then far in advance of the statutes in most of the states. The Com-

mentary also illustrates the variations existing among the processes adopted by the states in their search for a satisfactory process of law in this regard. It demonstrates that, up to 1930, but limited progress had been made by statute toward the standard now claimed by the petitioner to have become constitutionally essential to a valid judgment in the instant cases in 1938.[19] It illustrates the wide difference naturally and constitutionally existing between what has been prescribed by the several states and what has been recommended to them by the Institute. We do not find in the Fourteenth Amendment authority for this Court to do what is asked of us here, namely, to require all the states to enforce in substance either Rule 44 of the new Federal Rules of Criminal Procedure or the proposed § 203 of the Code of Criminal Procedure recommended by the American Law Institute, all under penalty of the invalidation of every past and future nonconforming state judgment.

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[19] The tabulations show that, as of 1930, 13 states "provide that if the defendant appear for arraignment without counsel he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel." Six states "provide that the accused has a right to counsel: . . . ." Eighteen states, including Illinois, provide under varying conditions "that the court shall assign counsel if the accused desire it, and be unable to employ counsel: . . . ." Fifteen states, including Illinois, provide under varying conditions "that the court shall assign counsel if the accused be unable to employ counsel: . . . ." Both Illinois and Louisiana required a showing of inability to be made by the accused under oath. Five states "provide that the court shall assign counsel if accused desire it: . . . ." Three states provide that the court may appoint one or more attorneys to represent the accused and 14 "provide that the appointment of counsel by the court for defense of the accused shall not exceed two: . . . ." Thirteen states "provide that counsel for the defense shall have free access to the prisoner at all reasonable hours: . . . ." Code of Criminal Procedure, Commentary to § 203 (1930) 630–634.

In reviewing the situation further, in 1942, this Court, in *Betts* v. *Brady,* 316 U. S. 455, indicated that it did not regard it to be a violation of the Fourteenth Amendment for a Maryland trial court to refuse to appoint counsel to represent an indigent defendant charged with robbery under the circumstances of that case.[20] We there stated the general principle as follows:

> "The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. . . . Asserted denial [of counsel] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set

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[20] This Court summarized those circumstances as follows:

"In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure." *Id.* at p. 472.

of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed." *Id.* at pp. 461–462.[21]

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[21] The Court also reviewed the material constitutional and statutory provisions of the thirteen original states. *Id.* at p. 467. It then summarized as follows other constitutional and statutory provisions currently in force:

"The constitutions of all the States, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in criminal trials. Those of nine States may be said to embody a guarantee textually the same as that of the Sixth Amendment, or of like import. In the fundamental law of most States, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice.

. . . . . .

"In eighteen States the statutes now require the court to appoint in all cases where defendants are unable to procure counsel. . . . And it seems to have been assumed by many legislatures that the matter was one for regulation from time to time as deemed necessary, since laws requiring appointment in all cases have been modified to require it only in the case of certain offenses." *Id.* at pp. 467–468, 470–471.

Particularly from the failure of the states to treat the requirement of inquiry by the court as to counsel or the requirement of appointment of counsel, either uniformly or as a matter for incorporation in the state constitutions, the Court concluded—

"we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness." *Id.* at pp. 471–472.

The dissenting opinion also marshals the states and collects them under the following headings: 35 states, including Illinois, by constitutional or statutory provision or by judicial decision or established practice judicially approved, require "that indigent defendants in noncapital as well as capital criminal cases be provided with counsel *on request:* . . ." (Italics supplied); of the remaining 13, nine "are without constitutional provision, statutes, or judicial decisions clearly establishing this requirement: . . ."; there are two states "in which dicta of judicial opinions are in harmony with the decision by the court below in this case: . . ." (here affirmed); and there are two

If, in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures (subject only to a broad constitutional prohibition in the Fourteenth Amendment against the abuse of that power) but it would introduce extraordinary confusion and uncertainty into local criminal procedure where clarity and certainty are the primary essentials of law and order.

PRACTICE IN ILLINOIS COURTS.

The precise question here is whether the sentences in the two Illinois cases before us violated the Fourteenth Amendment. The Supreme Court of Illinois has affirmed both sentences, *supra,* 396 Ill. 588, 72 N. E. 2d 813. It has thus conclusively established their compliance with Illinois law. While such a finding of compliance with local law is not necessarily sufficient to satisfy the requirements of due process under the Fourteenth Amendment, we shall be helped, in measuring the compliance of these judgments with such due process, if we note exactly the requirements of Illinois law with which the Supreme Court of that State has found compliance.

The material Sections of the Illinois Constitution have been quoted. Illinois Constitution of 1870, Art. II, §§ 2 and 9, *supra.* They provided that no person should be deprived of life, liberty or property, without due process

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states "in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected: . . . ." *Id.* at pp. 477–480. For the instant cases, the important point is that this tabulation shows that only 35 states required the appointment of counsel for indigent defendants in noncapital cases, *even upon the accused's request for such appointment.* No such request was present here.

of law and that, in all criminal prosecutions, the accused had the right to appear and defend in person and by counsel. The statutes of Illinois in effect in 1938 contained the following requirements as to the allowance and assignment of counsel to a person charged with crime and differentiated between the procedure required in a capital case and that required in other cases:

> "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.
>
> "Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, ..." Ill. Rev. Stat. c. 38, § 730 (1937).

An Illinois statute also provided expressly for cases in which the party accused had pleaded "guilty." The record in the instant cases shows complete compliance with this provision which, in effect, placed upon the trial court primary responsibility for seeing to it that the procedure met all legal requirements, whether of state or federal origin.

> "In cases where the party pleads 'guilty,' such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persist in pleading 'guilty,' such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court pos-

sesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense." Ill. Rev. Stat. c. 38, § 732 (1937).

PRACTICE IN THE INSTANT CASES.

It is not our province to prescribe which procedure we consider preferable among many permissible procedures which lawfully could be followed by an Illinois or any other state court in connection with counsel for the defense of a party accused of a state crime. It is our province to decide whether the practice of the Illinois court in these cases, although admittedly in conformity with the law of Illinois, was so clearly at variance with procedure constituting "due process of law" under the Fourteenth Amendment that these sentences must be completely invalidated. This brings us to an analysis of the precise facts presented by the records. Each crime was punishable by a mandatory sentence of from one to 20 years in the penitentiary. The charges were stated in simple terms, not ordinarily capable of being misunderstood by a 57-year old man, however elementary or primitive his understanding. There is no claim that this petitioner failed to understand the charges. Before he pleaded guilty, the court "admonished and explained to the said defendant the consequences and penalties, . . ." which would result from his plea of guilty if made. The records then recite, largely in the language of the statute, that "the said defendant still persisting in his desire to enter his plea of guilty to the crime of taking indecent liberties with children, in manner and form as charged in the first count of the indictment herein, the court grants such leave." We do not accept the argument that these records are to be considered unreliable because they are almost exactly in the language of the statute. The important point is not so much that a certain phraseology is

used, as it is that the court actually represented the State at the trial and that the court did what the statute required of it. It cannot be argued, without factual support, that the court failed to do its full duty with an intelligent, competent and understanding appreciation of all of its state and federal obligations. In the light of all the circumstances which must have been obvious to the judge presiding in the courtroom, but are incapable of reproduction here, the court granted leave to the petitioner to enter his plea of guilty in each case. Before sentence was passed, the record shows that the State's attorney and the petitioner, in his own proper person, came before the court and the petitioner "not saying anything further why the judgment of the Court should not now be pronounced . . ." the court pronounced, in each case, the mandatory sentence for the crime to which the petitioner had pleaded guilty. On the facts thus before us in these records, which must be our sole guides in these cases, there is no good reason to doubt either the due process or the propriety of the procedure followed by the trial court. There is nothing in the records on which to base a claim that the petitioner's conduct did not fit the charges made against him. There is nothing in them on which to base a claim of abnormality, intoxication, or insanity on the part of the petitioner or on which to base a claim that there was any indignation, prejudice or emotional influence affecting the conduct or thought of anyone connected with these trials. The presence of the judge, the State's attorney, and the petitioner, together with a natural wish on the part of the petitioner not to expand upon the shame of these crimes, provide no ground for a conclusion that there has been any failure, much less any constitutional failure, of fair judicial process. Doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney.

They were state officials lawfully chosen to discharge serious public responsibilities under their oaths of office. Especially in a self-governing state and nation, governmental stability depends upon the giving of full faith and credit in form, substance and spirit to public acts, records and judicial proceedings not only among the states but among individuals and between their State and Federal Governments.

Although the records disclose no affirmative basis for invalidating the sentences, it is suggested that an error of omission appears in the failure of the records to show either the presence of counsel for the accused, or an inquiry by the court as to counsel for the accused, or the appointment of counsel by the court to assist the accused. Here also if any presumption is to be indulged it should be one of regularity rather than that of irregularity. Eight years after the trial, in the complete absence of any showing to the contrary, such a presumption of regularity indicates that the court constitutionally discharged, rather than unconstitutionally disregarded, its state and federal duties to the petitioner, including those relating to his right, if any, to the assistance of counsel. *People* v. *Fuhs,* 390 Ill. 67, 60 N. E. 2d 205. It is not necessary, however, for us to depend upon such a presumption.

In the light of the affirmance of the instant judgments by the Supreme Court of Illinois and in the absence of evidence to the contrary, it is clear that the trial court at least did not violate any express requirements of any state statutes calling for affirmative action by the court. *People* v. *Russell,* 394 Ill. 192, 67 N. E. 2d 895; *People* v. *Stack,* 391 Ill. 15, 62 N. E. 2d 807; *People* v. *Fuhs, supra; People* v. *Braner,* 389 Ill. 190, 58 N. E. 2d 869; *People* v. *Corrie,* 387 Ill. 587, 56 N. E. 2d 767; *People* v. *Corbett,* 387 Ill. 41, 55 N. E. 2d 74; *People* v. *Childers,* 386 Ill. 312, 53 N. E. 2d 878. In view of the statutory requirements previously quoted (Ill. Rev. Stat. c. 38,

§ 730 (1937)), the silence of the records affords adequate ground for the minimum conclusions that the petitioner did not request counsel and did not, under oath, state that he, the petitioner, was "unable to procure counsel." In fact, the petitioner does not now claim that he did either of those things. The issue is, therefore, whether, in the absence of any request by the petitioner for counsel and, in the absence of any statement under oath by the petitioner that he was unable to procure counsel, the court violated due process of law under the Fourteenth Amendment by the procedure which it took and which accorded with the procedure approved by Illinois for noncapital cases such as these. This procedure called upon the court to use its own judgment in the light of the nature of the offenses, the age, appearance, conduct and statements of the petitioner in court. These circumstances included the petitioner's plea of guilty, persisted in after the court's admonishment of him and explanation to him of the consequences and penalties involved in his plea. The court thereupon granted leave to the petitioner to enter a plea of guilty and such a plea was entered by the petitioner in each case.

In this view of the two cases before us it is not necessary to consider whether the petitioner, by his plea of guilty or otherwise, affirmatively waived any right to the assistance of counsel in his defense, for, under these circumstances, no constitutional right to such assistance had arisen in his favor. Under the procedure followed by the trial court, there was no affirmative duty upon it, either of state or federal origin, to do more than it did. In the present cases the state statute allowed the petitioner to be represented by counsel if the petitioner desired to be so represented. The state statute and practice, however, did not require that the accused must be so represented or that the trial court must initiate inquiry into the petitioner's desires. The statute did require that the court

must assign counsel to conduct the defense for the accused if the accused stated under oath that he was unable to procure counsel. There is nothing in these records, however, either under oath or otherwise, to show that the petitioner, at the time of trial, either desired counsel or was unable to procure counsel.

The final question is therefore, whether, even in the absence of any state requirement to that effect, the provision requiring due process of law under the Fourteenth Amendment, in and of itself, required the court in these cases to initiate an inquiry into the desire of the accused to be represented by counsel, to inquire into the ability of the accused to procure counsel or, in the event of the inability of the accused to procure counsel, to assign competent counsel to the accused to conduct his defense. We recognize that, if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps.

These, however, were not capital charges. They were charges of the commission of two elementary offenses, carrying mandatory sentences of from one to 20 years each. We have considered the special circumstances as shown by these records. We do not find in them adequate ground for concluding that the state court, by failing to take the affirmative procedure suggested, violated due process of law under the Fourteenth Amendment. In reaching this conclusion it is not necessary for us to rely upon the statutory procedure of Illinois. It is appropriate, however, for us to consider the Illinois statutes and practice, as well as the statutes and practices of other states, as indicative that, in the judgment of the people of many of the states, it is not necessary to require further assurance of assistance of counsel to conduct the defense of a person accused of crimes of this character and under these circumstances.

It is established that it is permissible and well within "due process of law" for a person, accused of such crimes, to waive his rights, if any, to the assistance of counsel for his defense, whether or not the accused also shall plead guilty.[22] If such waiver is to be effective, it must be intelligently, competently, understandingly and voluntarily made. In the instant cases, the only evidence before us of any affirmative waiver of a right to the assistance of counsel, if any such right existed, appears in the petitioner's pleas of guilty. There was, however, no need in these cases for a waiver by the petitioner of additional action by the trial court because the petitioner had no state or federal right to such action. Consequently, it is not necessary to inquire into the effectiveness of the petitioner's pleas as amounting to waivers of counsel, as well as admissions of guilt.

It may be that the state laws of some other states would have required affirmative inquiries to have been made by the court. It may be that, some day, all of the states will have adopted practices corresponding to the new rule in the federal courts[23] or to the recommendations of the American Law Institute, *supra*. However, as the matter now stands, the states have substantial discretion to determine, in the light of their respective histories and needs, many practices in their criminal procedure, including this practice.

The issue in the instant cases is only whether or not the action taken by the state court violated the Fourteenth Amendment. In answering that question in the

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[22] *Carter* v. *Illinois*, 329 U. S. 173, 174–175; *Rice* v. *Olson*, 324 U. S. 786, 788–789; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 276–279; *Walker* v. *Johnston*, 312 U. S. 275, 286; *Johnson* v. *Zerbst*, 304 U. S. 458, 464, 467–469. See The Right to Benefit of Counsel Under the Federal Constitution, 42 Col. L. Rev. 271, 277–280 (1942).

[23] See note 17, *supra*.

negative, this opinion follows the principles which have been announced by this Court in passing upon somewhat similar issues where the accused has been tried in a state court for a noncapital offense and where complaint has been made that there was violation of due process of law under the Fourteenth Amendment. Recently, this Court said that, although failure to assign counsel to assist an accused in his defense in a federal court for a noncapital crime might violate the express provisions of the Sixth Amendment, that did not mean that a like failure to do so in an Illinois prosecution for the noncapital felony of burglary would violate due process of law under the Fourteenth Amendment. *Foster* v. *Illinois,* 332 U. S. 134. A comparable conclusion has been reached under the Fifth and Fourteenth Amendments as to self-incrimination by a defendant in a criminal case, particularly in relation to the right of counsel for the state to comment on the defendant's failure to testify. *Adamson* v. *California,* 332 U. S. 46. Refusal by a Maryland court to appoint counsel requested by the accused to assist him in his defense against a charge of commission of the noncapital felony of robbery was held not to violate the Fourteenth Amendment. *Betts* v. *Brady,* 316 U. S. 455. In that case the commission or nature of the offense charged was not the issue because the defense was merely that of an alibi.

On the other hand, this Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment. *Carter* v. *Illinois,* 329 U. S. 173; *Hawk* v. *Olson,* 326 U. S. 271; *Tomkins* v. *Missouri,* 323 U. S. 485; *Williams* v. *Kaiser,* 323 U. S. 471; *Powell* v. *Alabama,* 287 U. S. 45; *Moore* v. *Dempsey,* 261 U. S. 86. See also, *De Meerleer* v. *Michigan,* 329 U. S. 663 (con-

victed of first degree murder and sentenced to life imprisonment).

In a noncapital state felony case, this Court has recognized the constitutional right of the accused to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defendant would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge. *Rice* v. *Olson,* 324 U. S. 786. In that case the immediate issue was one of waiver, but the underlying question involved a charge of burglary against an ignorant Indian, coupled with a complex legal issue arising from the claim that the crime was committed on an Indian reservation. For discussions bearing on the absence of due process resulting from the inability of the defendant, intelligently and competently, either to plead guilty or to defend himself in certain noncapital cases see *Foster* v. *Illinois,* 332 U. S. 134, 137–138; *Canizio* v. *New York,* 327 U. S. 82, 84–85 (robbery in the first degree); *House* v. *Mayo,* 324 U. S. 42, 45–46 (burglary); *Smith* v. *O'Grady,* 312 U. S. 329, 332–334 (burglary); *Powell* v. *Alabama,* 287 U. S. 45, 70 (dictum as to deportation cases).

For the foregoing reasons, and under the principles previously announced by this Court, the judgment of the Supreme Court of Illinois is

Affirmed.

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

In considering cases like this and the ill-starred decision in *Betts* v. *Brady,*[1] 316 U. S. 455, we should ask ourselves

[1] *Betts* v. *Brady* was decided June 1, 1942. Benjamin V. Cohen and Erwin N. Griswold, writing in the New York Times, August 2, 1942, stated:

"Most Americans—lawyers and laymen alike—before the decision

this question: Of what value is the constitutional guaranty of a fair trial if an accused does not have counsel to advise and defend him?

The Framers deemed the right of counsel indispensable, for they wrote into the Sixth Amendment that in all criminal prosecutions the accused "shall enjoy the right . . . to have the Assistance of Counsel for his defence." Hence, if this case had been tried in the federal court, appointment of counsel would have been mandatory, even though Bute did not request it. See *Johnson* v. *Zerbst,* 304 U. S. 458, 463. I do not think the constitutional standards of fairness depend on what court an accused is in. I think that the Bill of Rights is applicable to all courts at all times. MR. JUSTICE BLACK demonstrated in his dissent in *Adamson* v. *California,* 332 U. S. 46, 68, 71, that a chief purpose of the Fourteenth Amendment was to protect the safeguards of the Bill of Rights against invasion by the states. If due process as defined in the Bill of Rights requires appointment of counsel to represent defendants in federal prosecutions, due process demands that the same be done in state prosecutions. The basic requirements for fair trials are those which the Framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impos-

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in Betts v. Brady would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in Betts v. Brady would not wish their decision to be used to discredit the significance of that right and the importance of its observance.

"Yet at a critical period in world history, Betts v. Brady dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law."

sible for either legislatures or courts to tinker with them. I fail to see why it is due process to deny an accused the benefit of counsel in a state court when by constitutional standards that benefit could not be withheld from him in a federal court.

But if we take the view more hostile to the rights of the individual and assume that procedural due process guaranteed by the Fourteenth Amendment provides lesser safeguards than those of the Bill of Rights, the result should be the same. Then the question is whether the appointment of counsel for Bute was required "by natural, inherent, and fundamental principles of fairness." *Betts* v. *Brady, supra,* p. 464.

Illinois allows counsel to everyone charged with crime. To obtain counsel, however, the accused has to ask for one and also to state upon oath that he is unable to procure counsel.[2] *People* v. *Van Horn,* 396 Ill. 496, 498, 72 N. E. 2d 187, 188. But, as held by the Illinois Supreme Court in the present case, the court need not advise him of his right to counsel.[3] The Illinois rule apparently proceeds from the premise that the average person knows of his right to counsel and resorts to an attorney in case he gets caught in the toils of the law. That view, if logically applied, would not require appointment of counsel in any case—capital or otherwise. For a man charged

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[2] "Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense. In all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.

"Whenever it shall appear to the court that a defendant or defendants indicted in a capital case, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the court to appoint one or more competent counsel for said defendant or defendants, ..." Ill. Rev. Stat. c. 38, § 730 (1937).

[3] For a summary of the Illinois cases, see the dissenting opinion of MR. JUSTICE RUTLEDGE in *Foster* v. *Illinois,* 332 U. S. 134, 143–144.

with murder usually knows whether or not it was his blow or shot that killed the deceased and therefore whether he is unjustly accused. And he certainly knows he is in serious trouble when he is faced with such a charge. The logic of the Illinois view would lead to the conclusion that the average man in those circumstances would know enough to demand a lawyer to defend him and that the court need not offer one to him.

Fortunately for the liberal tradition the law has followed a different course. At least where the offense charged is a capital one, due process requires appointment of counsel in state as well as in federal prosecutions. *Powell* v. *Alabama,* 287 U. S. 45; *Williams* v. *Kaiser,* 323 U. S. 471; *De Meerleer* v. *Michigan,* 329 U. S. 663. The reason is that the guilty as well as the innocent are entitled to a fair trial, that a layman without the experience and skill of counsel to guide him may get lost in the intricacies of the law and lose advantages which it extends to every accused, that without expert appraisal of the circumstances surrounding his arrest, detention, arraignment, and conviction the penalties he suffers may be aggravated by his own ignorance or by overreaching of the prosecution or police.[4] Hence the need for counsel

[4] The classic statement is that of Mr. Justice Sutherland in *Powell* v. *Alabama, supra,* pp. 68–69:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the pro-

exists in capital cases whether the accused contests the charge against him or pleads guilty. *Foster* v. *Illinois,* 332 U. S. 134, 137.

Those considerations are equally germane though liberty rather than life hangs in the balance. Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself.

Bute was charged with a most repulsive crime. It may seem easy to say that it is a simple and uncomplicated one, and therefore that he should know whether he committed it and whether he stood in need of counsel. But it has long been recognized that the charge of taking indecent liberties with a child is, like rape, "an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale's Pleas of the Crown 634. As stated by the Illinois Supreme Court in *People* v. *Freeman,* 244 Ill. 590, 594, 91 N. E. 708, 709–710, "Public indignation is even more apt to be aroused in prosecutions for crimes of this kind against children than when the charge is brought by an adult." Certainly the appraisal of such imponderables, the weight of the prosecution's case, the character of the defense which is available [5] are all questions which only a skilled lawyer can consider intelligently. A layman might rush to confession where counsel would see advantages in a trial before judge or jury. Counsel might see weakness in the prosecution's case which could be

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ceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

[5] The specific intent which is an ingredient of this offense may be disproved by a showing of intoxication (*People* v. *Klemann,* 383 Ill. 236, 48 N. E. 2d 957) or insanity. Ill. Rev. Stat. (1937) c. 38, §§ 590, 592.

utilized either in standing trial or in pleading guilty to a lesser offense. These are the circumstances of the present case which Bute uses to appeal to our conscience. They without more convince me that we could be sure Bute had a fair trial only if counsel had stood at his side and guided him across the treacherous ground he had to traverse.

Betts v. *Brady, supra,* holds that we must determine case by case, rather than by the Sixth Amendment, whether an accused is entitled to counsel. A man who suffers up to 20 years in prison as a penalty is undergoing one of the most serious of all punishments. It might not be nonsense to draw the *Betts* v. *Brady* line somewhere between that case and the case of one charged with violation of a parking ordinance, and to say the accused is entitled to counsel in the former but not in the latter. But to draw the line between this case and cases where the maximum penalty is death is to make a distinction which makes no sense in terms of the absence or presence of *need* for counsel. Yet it is the *need* for counsel that establishes the real standard for determining whether the lack of counsel rendered the trial unfair. And the need for counsel, even by *Betts* v. *Brady* standards, is not determined by the complexities of the individual case or the ability of the particular person who stands as an accused before the court. That need is measured by the *nature* of the *charge* and the *ability* of the *average* man to face it alone, unaided by an expert in the law. As *Powell* v. *Alabama, supra,* indicates, the need for counsel in capital cases is great even though the defendant is an intelligent and educated layman. The need is equally as great when one stands accused of the serious charge confronting Bute.

FEDERAL TRADE COMMISSION *v.* CEMENT INSTITUTE ET AL.

NO. 23. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

Argued October 20–21, 1947.—Decided April 26, 1948.

The Federal Trade Commission instituted a proceeding before itself against an unincorporated trade association composed of corporations which manufacture, sell and distribute cement; corporate members of the association; and officers and agents of the association. The complaint charged: (1) That respondents had engaged in an unfair method of competition in violation of § 5 of the Federal Trade Commission Act by acting in concert to restrain competition in the sale and distribution of cement through use of a multiple basing-point delivered-price system, which resulted in their quoting and maintaining identical prices and terms of sale for cement at any given destination; and (2) that this system of sales resulted in price discriminations violative of § 2 of the Clayton Act, as amended by the Robinson-Patman Act. Upon a hearing and findings, the Commission ordered respondents to cease and desist from any concerted action to do specified things, including use of the multiple basing-point delivered-price system to maintain identical prices for cement. *Held:*

1. The Commission has jurisdiction to conclude that conduct tending to restrain trade is an unfair method of competition violative of § 5 of the Federal Trade Commission Act, even though the selfsame conduct may also violate the Sherman Act. Pp. 689–693.

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*Together with No. 24, *Federal Trade Comm'n* v. *Aetna Portland Cement Co. et al.;* No. 25, *Federal Trade Comm'n* v. *Marquette Cement Mfg. Co.;* No. 26, *Federal Trade Comm'n* v. *Calaveras Cement Co. et al.;* No. 27, *Federal Trade Comm'n* v. *Huron Portland Cement Co.;* No. 28, *Federal Trade Comm'n* v. *Superior Portland Cement, Inc.;* No. 29, *Federal Trade Comm'n* v. *Northwestern Portland Cement Co.;* No. 30, *Federal Trade Comm'n* v. *Riverside Cement Co.;* No. 31, *Federal Trade Comm'n* v. *Universal Atlas Cement Co.;* No. 32, *Federal Trade Comm'n* v. *California Portland Cement Co.;* No. 33, *Federal Trade Comm'n* v. *Monolith Portland Cement Co. et al.;* and No. 34, *Federal Trade Comm'n* v. *Smith et al.*, also on certiorari to the same court.

2. The legislative history of the Federal Trade Commission Act shows that the purpose of Congress was not only to continue enforcement of the Sherman Act by the Department of Justice and the federal courts but also to supplement that enforcement through the administrative process of the Federal Trade Commission. Pp. 692–693.

3. The filing by the United States of a civil action in a federal district court to restrain the respondents and others from violating § 1 of the Sherman Act, though based largely on the same alleged misconduct as in the Commission proceeding, does not require that the Commission proceeding be dismissed. Pp. 693–695.

4. Since all of the respondents were charged with combining to maintain a delivered-price system in order to eliminate price competition in interstate commerce, some who sold cement in intrastate commerce exclusively were nevertheless subject to the jurisdiction and order of the Commission. Pp. 695–696.

5. The Commission was not disqualified to pass upon the issues involved in this proceeding, even assuming that the members of the Commission, as a result of its prior *ex parte* investigations, had previously formed the opinion that the multiple basing-point system operated as a price-fixing restraint of trade violative of the Sherman Act. Pp. 700–703.

6. It was not a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing-point system was illegal. *Tumey* v. *Ohio*, 273 U. S. 510, distinguished. Pp. 702–703.

7. Although the alleged combination be treated as having had its beginning in 1929, evidence of respondents' activities during years long prior thereto and during the NRA period was admissible for the purpose of showing the existence of a continuing combination among respondents to utilize the basing-point pricing system. Pp. 703–706.

(a) The Commission's consideration of respondents' pre-1929 and NRA code activities was within the rule that testimony as to prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. Pp. 704–705.

(b) Administrative agencies such as the Commission are not restricted by rigid rules of evidence. Pp. 705–706.

(c) A letter written prior to the filing of the complaint by one, since deceased, who was president of a respondent company

and an active trustee of the association, in which he stated that free competition would be ruinous to the cement industry, was admissible in evidence even though the statement may have been only the writer's conclusion. P. 706.

8. *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588, is not decisive of the issues in the present case. Pp. 706–709.

9. Individual conduct or concerted action may fall short of violating the Sherman Act and yet constitute an "unfair method of competition" prohibited by the Federal Trade Commission Act. P. 708.

10. The Commission made adequate findings that respondents collectively maintained a multiple basing-point delivered-price system for the purpose of suppressing competition. Pp. 709–712.

11. There was substantial evidence to support these findings. Pp. 712–720.

12. Maintenance by concerted action of the basing-point delivered-price system employed by respondents is an unfair trade practice prohibited by the Federal Trade Commission Act. Pp. 720–721.

13. Respondents' multiple basing-point delivered-price system resulted in price discriminations between purchasers, in violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act. *Corn Products Co.* v. *Federal Trade Comm'n,* 324 U. S. 726; *Federal Trade Comm'n* v. *Staley Co.,* 324 U. S. 746. Pp. 721–726.

14. The differences in respondents' net returns from different sales in different localities, resulting from use of the multiple basing-point delivered-price system, were not justifiable under § 2 (b) of the amended Clayton Act as price discriminations "made in good faith to meet an equally low price of a competitor." Pp. 721–726.

15. The objections to the form and substance of the Commission's order are without merit. Pp. 726–730.

157 F. 2d 533, reversed.

A cease-and-desist order issued by the Federal Trade Commission in proceedings against respondents under the Federal Trade Commission Act and the amended Clayton Act was set aside by the Circuit Court of Appeals. 157 F. 2d 533. This Court granted certiorari. 330 U. S. 815–816. *Reversed,* p. 730.

Charles H. Weston and *Walter B. Wooden* argued the cause for petitioner. With them on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Robert G. Seaks, Philip Elman* and *W. T. Kelley.*

William J. Donovan argued the cause for the Cement Institute et al., respondents in Nos. 23, 24 and 34. With him on the brief were *George S. Leisure, Breck P. McAllister, James R. Withrow, Jr., Henry Herrick Bond, Ira C. Werle, Robert E. McKean, F. Carroll Taylor, James F. Oates, Jr., Russell J. Burt, A. O. Dawson, George W. Jaques, George Nebolsine, Harry Scherr, Horace G. Hitchcock, Paul Brown, J. T. Stokely, C. Alfred Capen, Edward D. Lyman, William M. Robinson, Charles H. Smith* and *Emil H. Molthan. Thomas J. McFadden* and *Francis A. Brick* were also of counsel.

Herbert W. Clark argued the cause for the Calaveras Cement Co. et al., respondents in Nos. 24 and 26. With him on the brief were *Walter C. Fox, Jr., Marshall P. Madison, Robert H. Gerdes, William J. Donovan, George S. Leisure* and *Edward D. Lyman.*

Edward A. Zimmerman argued the cause for respondent in No. 25. With him on the brief were *H. W. Norman* and *W. R. Engelhardt. A. K. Shipe* was also of counsel.

Charles Wright, Jr. argued the cause for respondent in No. 27. With him on the brief was *Laurence A. Masselink.*

Herbert S. Little argued the cause for respondent in No. 28. With him on the brief was *F. A. LeSourd.*

S. Harold Shefelman argued the cause and filed a brief for respondent in No. 29.

Pierce Works argued the cause for respondent in No. 30. With him on the brief was *Louis W. Myers.*

Nathan L. Miller argued the cause for the Universal Atlas Cement Co., respondent in No. 31. With him on the brief were *Roger M. Blough* and *John H. Hershberger.*

Alex W. Davis argued the cause for respondent in No. 32. With him on the brief was *Robert B. Murphey.*

No appearance for respondents in No. 33.

Thurlow M. Gordon and *Neil C. Head* filed a brief for the General Electric Co., as *amicus curiae,* supporting respondents in Nos. 23, 24 and 34.

MR. JUSTICE BLACK delivered the opinion of the Court.

We granted certiorari to review the decree of the Circuit Court of Appeals which, with one judge dissenting, vacated and set aside a cease and desist order issued by the Federal Trade Commission against the respondents. 157 F. 2d 533. Those respondents are: The Cement Institute, an unincorporated trade association composed of 74 corporations [1] which manufacture, sell and distribute cement; the 74 corporate members of the Institute; [2] and 21 individuals who are associated with the Institute. It took three years for a trial examiner to hear the evidence which consists of about 49,000 pages of oral testimony and 50,000 pages of exhibits. Even the findings and conclusions of the Commission cover 176 pages. The briefs with accompanying appendixes submitted by the parties contain more than 4,000 pages. The legal questions raised by the Commission and by the different re-

[1] The Commission dismissed the proceedings without prejudice against respondent Castalia Portland Cement Co., which went into bankruptcy.

[2] Respondent Valley Forge Cement Co. is associated with the Institute only by reason of its affiliation with a member company.

spondents are many and varied. Some contentions are urged by all respondents and can be jointly considered. Others require separate treatment. In order to keep our opinion within reasonable limits, we must restrict our record references to the minimum consistent with an adequate consideration of the legal questions we discuss.

The proceedings were begun by a Commission complaint of two counts. The first charged that certain alleged conduct set out at length constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. 38 Stat. 719, 15 U. S. C. § 45. The core of the charge was that the respondents had restrained and hindered competition in the sale and distribution of cement by means of a combination among themselves made effective through mutual understanding or agreement to employ a multiple basing point system of pricing. It was alleged that this system resulted in the quotation of identical terms of sale and identical prices for cement by the respondents at any given point in the United States. This system had worked so successfully, it was further charged, that for many years prior to the filing of the complaint, all cement buyers throughout the nation, with rare exceptions, had been unable to purchase cement for delivery in any given locality from any one of the respondents at a lower price or on more favorable terms than from any of the other respondents.

The second count of the complaint, resting chiefly on the same allegations of fact set out in Count I, charged that the multiple basing point system of sales resulted in systematic price discriminations between the customers of each respondent. These discriminations were made, it was alleged, with the purpose of destroying competition in price between the various respondents in violation of § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526. That section, with

certain conditions which need not here be set out, makes it "unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . ." 15 U. S. C. § 13.

Resting upon its findings, the Commission ordered that respondents cease and desist from "carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to do a number of things, 37 F. T. C. 87, 258–262, all of which things, the Commission argues, had to be restrained in order effectively to restore individual freedom of action among the separate units in the cement industry. Certain contentions with reference to the order will later require a more detailed discussion of its terms. For the present it is sufficient to say that, if the order stands, its terms are broad enough to bar respondents from acting in concert to sell cement on a basing point delivered price plan which so eliminates competition that respondents' prices are always identical at any given point in the United States.

We shall not now detail the numerous contentions urged against the order's validity. A statement of these contentions can best await the separate consideration we give them.

Jurisdiction.—At the very beginning we are met with a challenge to the Commission's jurisdiction to entertain the complaint and to act on it. This contention is pressed by respondent Marquette Cement Manufacturing Co. and is relied upon by other respondents. Count I of the complaint is drawn under the provision in § 5 of the Federal Trade Commission Act which declares that "Unfair methods of competition . . . are hereby declared unlawful." Marquette contends that the facts alleged in Count I do not constitute "an unfair method of competition" within the meaning of § 5. Its argument runs this way: Count I in reality charges a combination to restrain trade. Such

a combination constitutes an offense under § 1 of the Sherman Act which outlaws "Every . . . combination . . . in restraint of trade." 26 Stat. 209, 15 U. S. C. § 1. Section 4 of the Sherman Act provides that the Attorney General shall institute suits under the Act on behalf of the United States, and that the federal district courts shall have exclusive jurisdiction of such suits. Hence, continue respondents, the Commission, whose jurisdiction is limited to "unfair methods of competition," is without power to institute proceedings or to issue an order with regard to the combination in restraint of trade charged in Count I. Marquette then argues that since the fact allegations of Count I are the chief reliance for the charge in Count II, this latter count also must be interpreted as charging a violation of the Sherman Act. Assuming, without deciding, that the conduct charged in each count constitutes a violation of the Sherman Act, we hold that the Commission does have jurisdiction to conclude that such conduct may also be an unfair method of competition and hence constitute a violation of § 5 of the Federal Trade Commission Act.

As early as 1920 this Court considered it an "unfair method of competition" to engage in practices "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Federal Trade Comm'n* v. *Gratz,* 253 U. S. 421, 427. In 1922, the Court in *Federal Trade Comm'n* v. *Beech-Nut Packing Co.,* 257 U. S. 441, sustained a cease and desist order against a resale price maintenance plan because such a plan "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain." *Id.* at 454. The Court, in holding that the scheme before it constituted an unfair method of competition, noted that

the conduct in question was practically identical with that previously declared unlawful in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, and *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, the latter a suit brought under § 1 of the Sherman Act. Again in 1926 this Court sustained a Commission unfair-method-of-competition order against defendants who had engaged in a price-fixing combination, a plain violation of § 1 of the Sherman Act. *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52. In 1941 we reiterated that certain conduct of a combination found to conflict with the policy of the Sherman Act could be suppressed by the Commission as an unfair method of competition. *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 465. The Commission's order was sustained in the *Fashion Originators'* case not only because the prohibited conduct violated the Clayton Act but also because the Commission's findings brought the "combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself." In other cases this Court has pointed out many reasons which support interpretation of the language "unfair methods of competition" in § 5 of the Federal Trade Commission Act as including violations of the Sherman Act.[3] Thus it appears that soon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act,[4] and

[3] *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 310; *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 649–650; see also *United States Alkali Assn.* v. *United States*, 325 U. S. 196, and see *Eugene Dietzgen Co.* v. *Federal Trade Comm'n*, 142 F. 2d 321, 326–327, and cases there cited, among the numerous Circuit Courts of Appeals cases on the same subject.

[4] "The Commission had issued up to October, 1939 a total of 267 orders to cease and desist in cases involving cooperation, conspiracy or combination." Beer, Federal Trade Law and Practice, 94 (1942). Other writers have also commented on the recognition by the Com-

that this Court has consistently approved that interpretation of the Act.

Despite this long and consistent administrative and judicial construction of § 5, we are urged to hold that these prior interpretations were wrong and that the term "unfair methods of competition" should not be construed as embracing any conduct within the ambit of the Sherman Act. In support of this contention, Marquette chiefly relies upon its reading of the legislative history of the Commission Act. We have given careful consideration to this contention because of the earnestness with which it is pressed. Marquette points to particular statements of some of the Act's sponsors which, taken out of their context, might lend faint support to its contention that Congress did not intend the Commission to concern itself with conduct then punishable under the Sherman Act. But on the whole the Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission. Far from being regarded as a rival of the Justice Department and the district courts in dissolving combinations in restraint of trade, the new Commission was envisioned as an aid to them and was specifically authorized to assist them in the drafting of

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mission and courts that unfair methods of competition include violations of the Sherman Act. Handler, *Unfair Competition and the Federal Trade Commission,* 8 G. W. L. Rev., 399, 416–417, 419. Montague, *The Commission's Jurisdiction Over Practices in Restraint of Trade: A Large-scale Method of Mass Enforcement of the Antitrust Laws,* 8 G. W. L. Rev. 365; Miller, Unfair Competition, Chapter XI (1941); Henderson, The Federal Trade Commission, a Study in Administrative Law and Procedure, 22–28 (1924); Beer, Federal Trade Law and Practice, 93 *et seq.* (1942).

appropriate decrees in antitrust litigation.[5] All of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages. These congressional purposes are revealed in the legislative history cited below, most of which is referred to in respondents' briefs.[6] We can conceive of no greater obstacle this Court could create to the fulfillment of these congressional purposes than to inject into every Trade Commission proceeding brought under § 5 and into every Sherman Act suit brought by the Justice Department a possible jurisdictional question.

We adhere to our former rulings. The Commission has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act.

There is a related jurisdictional argument pressed by Marquette which may be disposed of at this time. While review of the Commission's order was pending in the Circuit Court of Appeals, the Attorney General filed a civil action in the Federal District Court for Denver, Colorado,

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[5] Section 7 of the Act empowered the Commission, upon the request of the district courts, to serve as a master in chancery in framing appropriate decrees in antitrust suits brought by the Attorney General. Section 6 (c) authorized the Commission to investigate compliance with antitrust decrees upon application of the Attorney General and to report its findings and recommendations to him. 38 Stat. 722, 15 U. S. C. §§ 47, 46.

[6] 51 Cong. Rec. 11083, 11104, 11528–11533, 12146, 12622–12623, 12733–12734, 12787, 13311–13312, 14251, 14460, 14926, 14929; H. R. Rep. No. 533, 63d Cong., 2d Sess. 1, 6 (1914); H. R. Rep. No. 1142, 63d Cong., 2d Sess. 18–19 (1914); Sen. Rep. No. 597, 63d Cong., 2d Sess. 12–13 (1914).

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to restrain the Cement Institute, Marquette and 88 other cement companies, including all of the present respondents, from violating § 1 of the Sherman Act. Much of the evidence before the Commission in this proceeding might also be relevant in that case, which, we are informed, has not thus far been brought to trial. Marquette urges that the Commission proceeding should now be dismissed because it is contrary to the public interest to force respondents to defend both a Commission proceeding and a Sherman Act suit based largely on the same alleged misconduct.

We find nothing to justify a holding that the filing of a Sherman Act suit by the Attorney General requires the termination of these Federal Trade Commission proceedings. In the first place, although all conduct violative of the Sherman Act may likewise come within the unfair trade practice prohibitions of the Trade Commission Act, the converse is not necessarily true. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of Sherman Act violations. *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U. S. 304; *Federal Trade Comm'n* v. *Gratz*, 253 U. S. 421, 427. Hence a conclusion that respondents' conduct constituted an unfair method of competition does not necessarily mean that their same activities would also be found to violate § 1 of the Sherman Act. In the second place, the fact that the same conduct may constitute a violation of both acts in nowise requires us to dismiss this Commission proceeding. Just as the Sherman Act itself permits the Attorney General to bring simultaneous civil and criminal suits against a defendant based on the same misconduct, so the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition. Both the legislative history of the Trade Commission Act and its specific language indicate a congres-

sional purpose, not to confine each of these proceedings within narrow, mutually exclusive limits, but rather to permit the simultaneous use of both types of proceedings. Marquette's objections to the Commission's jurisdiction are overruled.

Objections to Commission's Jurisdiction by Certain Respondents on Ground That They Were Not Engaged in Interstate Commerce.—One other challenge to the Commission's jurisdiction is specially raised by Northwestern Portland and Superior Portland. The Commission found that "Northwestern Portland makes no sales or shipments outside the State of Washington," and that "Superior Portland, with few exceptions, makes sales and shipments outside the State of Washington only to Alaska." These two respondents contend that, since they did not engage in interstate commerce and since § 5 of the Trade Commission Act applies only to unfair methods of competition in interstate commerce, the Commission was without jurisdiction to enter an order against them under Count I of the complaint. For this contention they chiefly rely on *Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349. They also argue that for the same reason the Commission lacked jurisdiction to enforce against them the price discrimination charge in Count II of the complaint.

We cannot sustain this contention. The charge against these respondents was not that they, apart from the other respondents, had engaged in unfair methods of competition and price discriminations simply by making intrastate sales. Instead, the charge was, as supported by the Commission's findings, that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce. The combination, as found, includes the Institute and cement companies located in many different states. The Commission has further found that "In general, said corporate respondents

have maintained, and now maintain, a constant course of trade and commerce in cement among and between the several States of the United States." The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all of the parties to the combination is essential in order to make wholly effective the restraint of commerce among the states.[7] The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. We hold that the Commission did have jurisdiction to make an order against Superior Portland and Northwestern Portland.

The Multiple Basing Point Delivered Price System.— Since the multiple basing point delivered price system of fixing prices and terms of cement sales is the nub of this controversy, it will be helpful at this preliminary stage to point out in general what it is and how it works. A brief reference to the distinctive characteristics of "factory" or "mill prices" and "delivered prices" is of importance to an understanding of the basing point delivered price system here involved.

Goods may be sold and delivered to customers at the seller's mill or warehouse door or may be sold free on board (f. o. b.) trucks or railroad cars immediately adjacent to the seller's mill or warehouse. In either event the actual cost of the goods to the purchaser is, broadly speaking, the seller's "mill price" plus the purchaser's cost of

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[7] See *Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 511; *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255, 260–261; *United States* v. *Frankfort Distilleries*, 324 U. S. 293, 297–298.

transportation. However, if the seller fixes a price at which he undertakes to deliver goods to the purchaser where they are to be used, the cost to the purchaser is the "delivered price." A seller who makes the "mill price" identical for all purchasers of like amount and quality simply delivers his goods at the same place (his mill) and for the same price (price at the mill). He thus receives for all f. o. b. mill sales an identical net amount of money for like goods from all customers. But a "delivered price" system creates complications which may result in a seller's receiving different net returns from the sale of like goods. The cost of transporting 500 miles is almost always more than the cost of transporting 100 miles. Consequently if customers 100 and 500 miles away pay the same "delivered price," the seller's net return is less from the more distant customer. This difference in the producer's net return from sales to customers in different localities under a "delivered price" system is an important element in the charge under Count I of the complaint and is the crux of Count II.

The best known early example of a basing point price system was called "Pittsburgh plus." It related to the price of steel. The Pittsburgh price was the base price, Pittsburgh being therefore called a price basing point. In order for the system to work, sales had to be made only at delivered prices. Under this system the delivered price of steel from anywhere in the United States to a point of delivery anywhere in the United States was in general the Pittsburgh price plus the railroad freight rate from Pittsburgh to the point of delivery.[8] Take Chicago, Illinois, as an illustration of the operation and consequences

[8] This was not true as to steel produced and shipped from Birmingham, Alabama. Under the system Birmingham steel had to be sold at the Pittsburgh price plus an arbitrary addition of $5 per ton. There were also other minor variations from the system as here described. See *United States Steel Corp. et al.*, 8 F. T. C. 1.

of the system. A Chicago steel producer was not free to sell his steel at cost plus a reasonable profit. He must sell it at the Pittsburgh price plus the railroad freight rate from Pittsburgh to the point of delivery. Chicago steel customers were by this pricing plan thus arbitrarily required to pay for Chicago produced steel the Pittsburgh base price plus what it would have cost to ship the steel by rail from Pittsburgh to Chicago had it been shipped. The theoretical cost of this fictitious shipment became known as "phantom freight." But had it been economically possible under this plan for a Chicago producer to ship his steel to Pittsburgh, his "delivered price" would have been merely the Pittsburgh price, although he actually would have been required to pay the freight from Chicago to Pittsburgh. Thus the "delivered price" under these latter circumstances required a Chicago (non-basing point) producer to "absorb" freight costs. That is, such a seller's net returns became smaller and smaller as his deliveries approached closer and closer to the basing point.

Several results obviously flow from use of a single basing point system such as "Pittsburgh plus" originally was. One is that the "delivered prices" of all producers in every locality where deliveries are made are always the same regardless of the producers' different freight costs. Another is that sales made by a non-base mill for delivery at different localities result in net receipts to the seller which vary in amounts equivalent to the "phantom freight" included in, or the "freight absorption" taken from the "delivered price."

As commonly employed by respondents, the basing point system is not single but multiple. That is, instead of one basing point, like that in "Pittsburgh plus," a number of basing point localities are used. In the multiple basing point system, just as in the single basing point system, freight absorption or phantom freight is an ele-

ment of the delivered price on all sales not governed by a basing point actually located at the seller's mill.[9] And all sellers quote identical delivered prices in any given locality regardless of their different costs of production and their different freight expenses. Thus the multiple and single systems function in the same general manner and produce the same consequences—identity of prices and diversity of net returns.[10] Such differences

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[9] A base mill selling cement for delivery at a point outside the area in which its base price governs, and inside the area where another base mill's lower delivered price governs, adopts the latter's lower delivered price. The first base mill thus absorbs freight and becomes as to such sales a non-base mill.

[10] The Commission in its findings explained how the multiple basing point system affects a seller's net return on sales in different localities and how the delivered price is determined at any particular point. "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser. In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of base price plus all-rail freight. Thus, if mill A has a base price of $1.50 per barrel, its delivered price at each location where it sells cement will be $1.50 per barrel plus the all-rail freight from its mill to the point of delivery, except that when a sale is made for delivery at a location at which the combination of the base price plus all-rail freight from another mill is a lower figure, mill A uses this lower combination so that its delivered price at such location will be the same as the delivered price of the other mill. At all locations where the base price of mill A plus freight is the lowest combination, mill A recovers $1.50 net at the mill, and at locations where the combination of base price plus freight of another mill is lower, mill A shrinks its mill net sufficiently to equal that price. Under these conditions it is obvious that the highest mill net which can be recovered by mill A is $1.50 per barrel, and on sales where it has been necessary to shrink its mill net in order to match the delivered price of another mill, its net recovery at the mill is less than $1.50." 37 F. T. C. at 147–148.

as there are in matters here pertinent are therefore differences of degree only.

Alleged Bias of the Commission.—One year after the taking of testimony had been concluded and while these proceedings were still pending before the Commission, the respondent Marquette asked the Commission to disqualify itself from passing upon the issues involved. Marquette charged that the Commission had previously prejudged the issues, was "prejudiced and biased against the Portland cement industry generally," and that the industry and Marquette in particular could not receive a fair hearing from the Commission. After hearing oral argument the Commission refused to disqualify itself. This contention, repeated here, was also urged and rejected in the Circuit Court of Appeals one year before that court reviewed the merits of the Commission's order. *Marquette Cement Mfg. Co.* v. *Federal Trade Comm'n,* 147 F. 2d 589.

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by § 6 of the Trade Commission Act. 15 U. S. C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees, make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices.[11] Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

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[11] Marquette in support of its motion to disqualify the Commission urged that the Department of Justice and the Commission had concurrent power or jurisdiction to enforce the prohibitions of the Sherman Act. 147 F. 2d at 593.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States,* 313 U. S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10–11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey* v. *Ohio,* 273 U. S. 510, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* at 523.

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in

a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.[12]

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

Alleged Errors in re *Introduction of Evidence.*—The complaint before the Commission, filed July 2, 1937, alleged that respondents had maintained an illegal combination for "more than 8 years last past." In the Circuit Court of Appeals and in this Court the Government treated its case on the basis that the combination began in August, 1929, when the respondent Cement Institute was organized. The Government introduced much evidence over respondents' objections, however, which showed the activities of the cement industry for many years prior to 1929, some of it as far back as 1902. It also introduced evidence as to respondents' activities from 1933 to May 27, 1935, much of which related to the preparation and administration of the NRA Code for the cement industry pursuant to the National Industrial Recovery Act, 48 Stat. 195, held invalid by this Court

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[12] "Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs." The Commission is not a court. It can render no judgment, civil or criminal. *Federal Trade Comm'n* v. *Klesner,* 280 U. S. 19, 25; and see *Humphrey's Executor* v. *United States,* 295 U. S. 602, 628; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 307.

May 27, 1935, in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. All of the testimony to which objection was made related to the initiation, development, and carrying on of the basing point practices.

Respondents contend that the pre-1929 evidence, especially that prior to 1919, is patently inadmissible with reference to a 1929 combination, many of whose alleged members were non-existent in 1919. They also urge that evidence of activities during the NRA period was improperly admitted because § 5 of Title I of the NRA provided that any action taken in compliance with the code provisions of an industry should be "exempt from the provisions of the antitrust laws of the United States." And some of the NRA period testimony relating to basing point practices did involve references to code provisions. The Government contends that evidence of both the pre-1929 and the NRA period activities of members of the cement industry tends to show a continuous course of concerted efforts on the part of the industry, or at least most of it, to utilize the basing point system as a means to fix uniform terms and prices at which cement would be sold, and that the Commission had properly so regarded this evidence. The Circuit Court of Appeals agreed with respondents that the Commission had erroneously considered both the NRA period evidence and the pre-1929 evidence in making its findings of the existence of a combination among respondents.

We conclude that both types of evidence were admissible for the purpose of showing the existence of a continuing combination among respondents to utilize the basing point pricing system.[13]

The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that

[13] We need not here determine what protection was afforded respondents by the exemption from the antitrust laws conferred by the Act later held unconstitutional. Nor need we decide whether this

any of respondents' pre-1929 or NRA code activities were illegal. The consideration given these activities by the Commission was well within the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 46–47; *United States* v. *Reading Co.,* 253 U. S. 26, 43–44. Here the trade practices of an entire industry were under consideration. Respondents, on the one hand, insisted that the multiple basing point delivered price system represented a natural evolution of business practices adopted by the different cement companies, not in concert, but separately in response to customers' needs and demands. That the separately adopted business practices produced uniform terms and conditions of sale in all localities was, so the respondents contended, nothing but an inevitable result of long-continued competition. On the other hand, the Government contended that, despite shifts in ownership of individual cement companies, what had taken place from 1902 to the date the complaint was filed showed continued concerted action on the part of all cement producers to develop and improve the basing point system so that it would automatically eliminate competition. In the Government's view the Institute when formed in 1929 simply took up the old practices for the old purpose and aided its member companies to carry it straight on through and beyond the NRA period. See *Fort Howard Paper Co.* v. *Federal Trade Comm'n,* 156 F. 2d 899, 906.

Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the

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provision also exempted respondents from the unfair methods of competition provisions of the Trade Commission Act. The Government does not press either contention here.

rigid rules of evidence. *Interstate Commerce Comm'n* v. *Baird,* 194 U. S. 25, 44. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.

The foregoing likewise largely answers respondents' contention that there was error in the admission of a letter written by one Treanor in 1934 to the chairman of the NRA code authority for the cement industry. Treanor, who died prior to the filing of the complaint, was at the time president of one of the respondent companies and also an active trustee of the Institute. In the letter he stated among other things that the cement industry was one "above all others that cannot stand free competition, that must systematically restrain competition or be ruined." This statement was made as part of his criticism of the cement industry's publicity campaign in defense of the basing point system. The relevance of this statement indicating this Institute official's informed judgment is obvious. That it might be only his conclusion does not render the statement inadmissible in this administrative proceeding.

All contentions in regard to the introduction of testimony have been considered. None of them justify refusal to enforce this order.

The Old Cement Case.—This Court's opinion in *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588, known as the *Old Cement* case, is relied on by the respondents in almost every contention they present. We think it has little relevance, if any at all, to the issues in this case.

In that case the United States brought an action in the District Court to enjoin an alleged combination to violate

§ 1 of the Sherman Act. The respondents were the Cement Manufacturers Protective Association, four of its officers, and nineteen cement manufacturers. The District Court held hearings, made findings of fact, and issued an injunction against those respondents. This Court, with three justices dissenting, reversed upon a review of the evidence. It did so because the Government did not charge and the record did not show "any agreement or understanding between the defendants placing limitations on either prices or production," or any agreement to utilize the basing point system as a means of fixing prices. The Court said "But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action." *Id.* at 606. In the *Old Cement* case and in *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, decided the same day, the Court's attention was focused on the rights of a trade association, despite the Sherman Act, openly to gather and disseminate statistics and information as to production costs, output, past prices, merchandise on hand, specific job contracts, freight rates, etc., so long as the Association did these things without attempts to foster agreements or concerted action with reference to prices, production, or terms of sale. Such associations were declared guiltless of violating the Sherman Act, because "in fact, no prohibited concert of action was found." *Corn Products Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, 735.

The Court's holding in the *Old Cement* case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day. The issues in the present Commission proceedings are quite different from those in the *Old Cement* case, although many of the trade practices shown here were also shown there. In the first place, unlike the *Old Cement* case, the Commission does here specifically charge a combination to utilize the basing point system as a means to bring about uniform prices and terms of sale. And here the Commission has focused attention on this issue, having introduced evidence on the issue which covers thousands of pages. Furthermore, unlike the trial court in the *Old Cement* case, the Commission has specifically found the existence of a combination among respondents to employ the basing point system for the purpose of selling at identical prices.

In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as "unfair" which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an "unfair method of competition." This general language was deliberately left to the "commission and the courts" for definition because it was thought that "There is no limit to human inventiveness in this field"; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct

would be an "endless task." See *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 310–312, and congressional committee reports there quoted.

These marked differences between what a court must decide in a Sherman Act proceeding and the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition are enough in and of themselves to make the *Old Cement* decision wholly inapplicable to our problem in reviewing the findings in this case. That basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so whether the findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing point system as practiced constitutes an "unfair method of competition," because it either restrains free competition or is an incipient menace to it.

Findings and Evidence.—It is strongly urged that the Commission failed to find, as charged in both counts of the complaint, that the respondents had by combination, agreements, or understandings among themselves utilized the multiple basing point delivered price system as a restraint to accomplish uniform prices and terms of sale. A subsidiary contention is that assuming the Commission did so find, there is no substantial evidence to support such a finding. We think that adequate findings of combination were made and that the findings have support in the evidence.

The Commission's findings of fact set out at great length and with painstaking detail numerous concerted activities carried on in order to make the multiple basing point system work in such way that competition in quality, price and terms of sale of cement would be nonexistent, and that uniform prices, job contracts, discounts, and terms of sale would be continuously maintained. The Commission found that many of these activities

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were carried on by the Cement Institute, the industry's unincorporated trade association, and that in other instances the activities were under the immediate control of groups of respondents. Among the collective methods used to accomplish these purposes, according to the findings, were boycotts; discharge of uncooperative employees; organized opposition to the erection of new cement plants; selling cement in a recalcitrant price cutter's sales territory at a price so low that the recalcitrant was forced to adhere to the established basing point prices; discouraging the shipment of cement by truck or barge; and preparing and distributing freight rate books which provided respondents with similar figures to use as actual or "phantom" freight factors, thus guaranteeing that their delivered prices (base prices plus freight factors) would be identical on all sales whether made to individual purchasers under open bids or to governmental agencies under sealed bids. These are but a few of the many activities of respondents which the Commission found to have been done in combination to reduce or destroy price competition in cement. After having made these detailed findings of concerted action, the Commission followed them by a general finding that "the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid . . . is to . . . promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use." [14] The Commission then concluded

[14] Paragraph 26 of the Findings is as follows:

"The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder,

that "The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act." And the Commission's cease and desist order prohibited respondents "from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents . . ." to do certain things there enumerated.

Thus we have a complaint which charged collective action by respondents designed to maintain a sales tech-

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lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental, of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; to prevent purchasers from utilizing motortrucks or water carriers for the transportation of cement and from obtaining benefits which might accrue from the use of such transportation agencies; to require that purchases of cement be made on a delivered price basis, and to prevent and defeat efforts of purchasers to avoid this requirement; frequently to deprive agencies of the Federal Government of the benefits of all or a part of the lower land-grant rates available to such purchasers; to require certain agencies of the Federal Government to purchase their requirements of cement through dealers at higher prices than are available in direct purchases from manufacturers; to establish and maintain an agreed classification of customers who may purchase cement from manufacturers thereof; to maintain uniform terms and conditions of sale; to hinder and obstruct the sale of imported cement through restraints upon those who deal in such cement; and otherwise to promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use." 37 F. T. C. at 257–258.

nique that restrained competition, detailed findings of collective activities by groups of respondents to achieve that end, then a general finding that respondents maintained the combination, and finally an order prohibiting the continuance of the combination. It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents collectively maintained a multiple basing point delivered price system for the purpose of suppressing competition in cement sales. The findings are sufficient. The contention that they are not is without substance.

Disposition of this question brings us to the related contention that there was no substantial evidence to support the findings. We might well dispose of the contention as this Court dismissed a like one with reference to evidence and findings in a civil suit brought under the Sherman Act in *Sugar Institute* v. *United States,* 297 U. S. 553, 601: "After a hearing of extraordinary length, in which no pertinent fact was permitted to escape consideration, the trial court subjected the evidence to a thorough and acute analysis which has left but slight room for debate over matters of fact. Our examination of the record discloses no reason for overruling the court's findings in any matter essential to our decision." In this case, which involves the evidence and findings of the Federal Trade Commission, we likewise see no reason for upsetting the essential findings of the Commission. Neither do we find it necessary to refer to all the voluminous testimony in this record which tends to support the Commission's findings.

Although there is much more evidence to which reference could be made, we think that the following facts shown by evidence in the record, some of which are in dispute, are sufficient to warrant the Commission's finding of concerted action.

When the Commission rendered its decision there were about 80 cement manufacturing companies in the United

States operating about 150 mills. Ten companies controlled more than half of the mills and there were substantial corporate affiliations among many of the others. This concentration of productive capacity made concerted action far less difficult than it would otherwise have been. The belief is prevalent in the industry that because of the standardized nature of cement, among other reasons, price competition is wholly unsuited to it. That belief is historic. It has resulted in concerted activities to devise means and measures to do away with competition in the industry. Out of those activities came the multiple basing point delivered price system. Evidence shows it to be a handy instrument to bring about elimination of any kind of price competition. The use of the multiple basing point delivered price system by the cement producers has been coincident with a situation whereby for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers. Thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny.[15]

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[15] The following is one among many of the Commission's findings as to the identity of sealed bids:

An abstract of the bids for 6,000 barrels of cement to the United States Engineer Office at Tucumcari, New Mexico, opened April 23, 1936, shows the following:

Name of Bidder	*Price per Bbl.*	*Name of Bidder*	*Price per Bbl.*
Monarch	$3.286854	Oklahoma	$3.286854
Ash Grove	3.286854	Consolidated	3.286854
Lehigh	3.286854	Trinity	3.286854
Southwestern	3.286854	Lone Star	3.286854
U. S. Portland Cement Co.	3.286854	Universal	3.286854
		Colorado	3.286854

All bids subject to 10¢ per barrel discount for payment in 15 days. (Com. Ex. 175–A.) See 157 F. 2d at 576.

Occasionally foreign cement has been imported, and cement dealers have sold it below the delivered price of the domestic product. Dealers who persisted in selling foreign cement were boycotted by the domestic producers. Officers of the Institute took the lead in securing pledges by producers not to permit sales f. o. b. mill to purchasers who furnished their own trucks, a practice regarded as seriously disruptive of the entire delivered price structure of the industry.

During the depression in the 1930's, slow business prompted some producers to deviate from the prices fixed by the delivered price system. Meetings were held by other producers; an effective plan was devised to punish the recalcitrants and bring them into line. The plan was simple but successful. Other producers made the recalcitrant's plant an involuntary base point. The base price was driven down with relatively insignificant losses to the producers who imposed the punitive basing point, but with heavy losses to the recalcitrant who had to make all its sales on this basis. In one instance, where a producer had made a low public bid, a punitive base point price was put on its plant and cement was reduced 10¢ per barrel; further reductions quickly followed until the base price at which this recalcitrant had to sell its cement dropped to 75¢ per barrel, scarcely one-half of its former base price of $1.45. Within six weeks after the base price hit 75¢ capitulation occurred and the recalcitrant joined a portland cement association. Cement in that locality then bounced back to $1.15, later to $1.35, and finally to $1.75.

The foregoing are but illustrations of the practices shown to have been utilized to maintain the basing point price system. Respondents offered testimony that cement is a standardized product, that "cement is cement," that no differences existed in quality or usefulness, and that purchasers demanded delivered price quotations be-

cause of the high cost of transportation from mill to dealer. There was evidence, however, that the Institute and its members had, in the interest of eliminating competition, suppressed information as to the variations in quality that sometimes exist in different cements.[16] Respondents introduced the testimony of economists to the effect that competition alone could lead to the evolution of a multiple basing point system of uniform delivered prices and terms of sale for an industry with a standardized product and with relatively high freight costs. These economists testified that for the above reasons no inferences of collusion, agreement, or understanding could be drawn from the admitted fact that cement prices of all United States producers had for many years almost invariably been the same in every given locality in the country. There was also considerable testimony by other economic experts that the multiple basing point system of delivered prices as employed by respondents contravened accepted economic principles and could only have been maintained through collusion.

The Commission did not adopt the views of the economists produced by the respondents. It decided that even though competition might tend to drive the price of standardized products to a uniform level, such a tendency alone could not account for the almost perfect identity in prices, discounts, and cement containers which had prevailed for so long a time in the cement industry. The Commission held that the uniformity and absence of competition in the industry were the results of understandings or agreements entered into or carried out by concert of the Institute and the other respondents. It

[16] See *Sugar Institute* v. *United States*, 297 U. S. 553, 600: "The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."

may possibly be true, as respondents' economists testified, that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times (for such has been substantially the case here) charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed, namely, that without agreement, prices will vary—that the desire to sell will sometimes be so strong that a seller will be willing to lower his prices and take his chances. We therefore hold that the Commission was not compelled to accept the views of respondents' economist-witnesses that active competition was bound to produce uniform cement prices. The Commission was authorized to find understanding, express or implied, from evidence that the industry's Institute actively worked, in cooperation with various of its members, to maintain the multiple basing point delivered price system; that this pricing system is calculated to produce, and has produced, uniform prices and terms of sale throughout the country; and that all of the respondents have sold their cement substantially in accord with the pattern required by the multiple basing point system.[17]

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[17] It is enough to warrant a finding of a "combination" within the meaning of the Sherman Act, if there is evidence that persons, with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme. *Interstate Circuit* v. *United States,* 306 U. S. 208, 226–227; *United States* v. *Masonite Corp.,* 316 U. S. 265, 275; *United States* v. *Bausch & Lomb Co.,* 321 U. S. 707, 722–723; *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 393–394. See *United States Maltsters Assn.* v. *Federal Trade Comm'n,* 152 F. 2d 161, 164: "We are of the view that the Commission's findings that a price fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance

Some of the respondents contend that particularly as to them crucial findings of participation by them in collective action to eliminate price competition and to bring about uniformity of cement prices are without testimonial support. On this ground they seek to have the proceedings dismissed as to them even though there may be adequate evidence to sustain the Commission's findings and order as to other respondents. The Commission rejected their contentions; the Circuit Court of Appeals did not consider them in its opinion. Those respondents whose individual contentions in this respect deserve special mention are central and southern California cement companies; Superior Portland Cement Company and Northwestern Portland Cement Company, both of the State of Washington; Huron Portland Cement Company, which does business in the Great Lakes region; and Marquette Cement Manufacturing Company with plants in Illinois and Missouri.

These companies support their separate contentions for particularized consideration by pointing out among other things that there was record evidence which showed differences between many of their sales methods and those practiced by other respondents. Each says that there was no direct evidence to connect it with all of the practices found to have been used by the Institute and other respondents to achieve delivered price uniformity.

The record does show such differences as those suggested. It is correct to say, therefore, that the sales practices of these particular respondents, and perhaps

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in itself. Especially is this so when it is considered that petitioners' plants are located in four different states and that the barley from which the malt is manufactured is procured from eight or nine different states." See also *Milk & Ice Cream Can Institute* v. *Federal Trade Comm'n*, 152 F. 2d 478, 481; *Fort Howard Paper Co.* v. *Federal Trade Comm'n*, 156 F. 2d 899, 907.

of other respondents as well, were not at all times precisely like the sales practices of all or any of the others. For example, the Commission found that in 1929 all of the central California mills became basing points. There was evidence that the Institute's rate books did not extend to the states in which some of the California companies did business. The Commission found that "In southern California the basing-point system of pricing is modified by an elaborate system of zone prices applicable in certain areas," that the California system does not require separate calculations to determine the delivered price at each destination, but that complete price lists were published by the companies showing delivered prices at substantially all delivery points. Northwestern and Superior assert that among other distinctive practices of theirs, they were willing to and did bid for government contracts on a mill price rather than a delivered price basis. Huron points out that it permitted the use of trucks to deliver cement, which practice, far from being consistent with the plan of others to maintain the basing point delivered price formulas, was frowned on by the Institute and others as endangering the success of the plan. Marquette emphasizes that it did not follow all the practices used to carry out the anti-competition plan, and urges that although the Commission rightly found that it had upon occasion undercut its competitors, it erroneously found that its admitted abandonment of price cutting was due to the combined pressure of other respondents, including the Institute.

What these particular respondents emphasize does serve to underscore certain findings which show that some respondents were more active and influential in the combination than were others,[18] and that some companies

[18] For example, there was evidence which showed that Huron's officials participated in meetings held in connection with another respondent's practices deemed inimical to the policy of non-compe-

probably unwillingly abandoned competitive practices and entered into the combination. But none of the distinctions mentioned, or any other differences relied on by these particular respondents, justifies a holding that there was no substantial evidence to support the Commission's findings that they cooperated with all the others to achieve the ultimate objective of all—the elimination of price competition in the sale of cement. These respondents' special contentions only illustrate that the Commission was called upon to resolve factual issues as to each of them in the light of whatever relevant differences in their practices were shown by the evidence. For aside from the testimony indicating the differences in their individual sales practices, there was abundant evidence as to common practices of these respondents and the others on the basis of which the Commission was justified in finding cooperative conduct among all to achieve delivered price uniformity.

The evidence commonly applicable to these and the other respondents showed that all were members of the Institute and that the officers of some of these particular respondents were or had been officers of the Institute. We have already sustained findings that the Institute was organized to maintain the multiple basing point system as one of the "customs and usages" of the industry and that it participated in numerous activities intended to eliminate price competition through the collective efforts of the respondents. Evidence before the Commission also showed that the delivered prices of these respondents, like those of all the other respondents, were, with rare exceptions, identical with the delivered prices of all their competitors. Furthermore, there was evi-

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tition. As a result of that meeting the offending company agreed that it would "play the game 100%"; that it would not countenance "chiseling"; that it would not knowingly invade territory of its competitors, or "tear down the price structure."

dence that all of these respondents, including those who sold cement on a zone basis in sections of southern California, employed the multiple basing point delivered price system on a portion of their sales.

Our conclusion is that there was evidence to support the Commission's findings that all of the respondents, including the California companies, Northwestern Portland and Superior Portland, Huron and Marquette, cooperated in carrying out the objectives of the basing point delivered price system.

Unfair Methods of Competition.—We sustain the Commission's holding that concerted maintenance of the basing point delivered price system is an unfair method of competition prohibited by the Federal Trade Commission Act. In so doing we give great weight to the Commission's conclusion, as this Court has done in other cases. *Federal Trade Comm'n* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63. In the *Keppel* case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice which, if left alone, "destroys competition and establishes monopoly." *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 647, 650. And see *Federal Trade Comm'n* v. *Raladam Co.*, 316 U. S. 149, 152.

We cannot say that the Commission is wrong in concluding that the delivered-price system as here used pro-

vides an effective instrument which, if left free for use of the respondents, would result in complete destruction of competition and the establishment of monopoly in the cement industry. That the basing point price system may lend itself to industry-wide anti-competitive practices is illustrated in the following among other cases: *United States* v. *United States Gypsum Co.*, 333 U. S. 364, *Sugar Institute* v. *United States*, 297 U. S. 553. We uphold the Commission's conclusion that the basing point delivered price system employed by respondents is an unfair trade practice which the Trade Commission may suppress.[19]

The Price Discrimination Charge in Count Two.—The Commission found that respondents' combination to use the multiple basing point delivered price system had effected systematic price discrimination in violation of § 2 of the Clayton Act as amended by the Robinson-Patman Act. 49 Stat. 1526, 15 U. S. C. § 13. Section 2 (a) of that Act declares it to "be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." Section 2 (b) provides that proof of discrimination in price (selling the same kind of goods cheaper to one purchaser than to another) makes out a prima facie case of violation, but permits the seller to

[19] While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a "combination" is an indispensable ingredient of an "unfair method of competition" under the Trade Commission Act. See *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 455.

rebut "the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ."

The Commission held that the varying mill nets received by respondents on sales between customers in different localities constituted a "discrimination in price between different purchasers" within the prohibition of § 2 (a), and that the effect of this discrimination was the substantial lessening of competition between respondents. The Circuit Court of Appeals reversed the Commission on this count. It agreed that respondents' prices were unlawful insofar as they involved the collection of phantom freight, but it held that prices involving only freight absorption came within the "good faith" proviso of § 2 (b).

The respondents contend that the differences in their net returns from sales in different localities which result from use of the multiple basing point delivered price system are not price discriminations within the meaning of § 2 (a). If held that these net return differences are price discriminations prohibited by § 2 (a), they contend that the discriminations were justified under § 2 (b) because "made in good faith to meet an equally low price of a competitor." Practically all the arguments presented by respondents in support of their contentions were considered by this Court and rejected in 1945 in *Corn Products Co.* v. *Federal Trade Comm'n,* 324 U. S. 726, and in the related case of *Federal Trade Comm'n* v. *Staley Co.,* 324 U. S. 746. As stated in the *Corn Products* opinion at 730, certiorari was granted in those two cases because the "questions involved" were "of importance in the administration of the Clayton Act in view of the widespread use of basing point price systems." For this reason the questions there raised were given thorough consideration. Consequently, we see no reason for again reviewing the questions that were there decided.

In the *Corn Products* case the Court, in holding illegal a single basing point system, specifically reserved decision upon the legality under the Clayton Act of a multiple basing point price system, but only in view of the "good faith" proviso of § 2 (b), and referred at that point to the companion *Staley* opinion. 324 U. S. at 735. The latter case held that a seller could not justify the adoption of a competitor's basing point price system under § 2 (b) as a good faith attempt to meet the latter's equally low price. Thus the combined effect of the two cases was to forbid the adoption for sales purposes of any basing point pricing system. It is true that the Commission's complaint in the *Corn Products* and *Staley* cases simply charged the individual respondents with discrimination in price through use of a basing point price system, and did not, as here, allege a conspiracy or combination to use that system. But the holdings in those two cases that § 2 forbids a basing point price system are equally controlling here, where the use of such a system is found to have been the result of a combination. Respondents deny, however, that the *Corn Products* and *Staley* cases passed on the questions they here urge.

Corn Products Co. was engaged in the manufacture and sale of glucose. It had two plants, one in Chicago, one in Kansas City. Both plants sold "only at delivered prices, computed by adding to a base price at Chicago the published freight tariff from Chicago to the several points of delivery, even though deliveries are in fact made from their factory at Kansas City as well as from their Chicago factory." 324 U. S. at 729. This price system we held resulted in Corn Products Co. receiving from different purchasers different net amounts corresponding to differences in the amounts of phantom freight collected or of actual freight charges absorbed. We further held that "price discriminations are necessarily involved where

the price basing point is distant from the point of production," because in such situations prices "usually include an item of unearned or phantom freight or require the absorption of freight with the consequent variations in the seller's net factory prices. Since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by § 2 (a), whenever they have the defined effect upon competition." *Federal Trade Comm'n* v. *Staley, supra* at 750–751. This was a direct holding that a pricing system involving both phantom freight and freight absorption violates § 2 (a) if under that system prices are computed for products actually shipped from one locality on the fiction that they were shipped from another. This Court made the holding despite arguments, which are now repeated here, that in passing the Robinson-Patman Act, Congress manifested its purpose to sanction such pricing systems; that this Court had approved the system in *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, and in *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588; and that there was no discrimination under this system between buyers at the same point of delivery.

Respondents attempt to distinguish their multiple basing point pricing system from those previously held unlawful by pointing out that in some situations their system involves neither phantom freight nor freight absorption; for example, sales by a base mill at its base price plus actual freight from the mill to the point of delivery involve neither phantom freight nor freight absorption. But the Corn Products pricing system which was condemned by this Court related to a base mill, that at Chicago, as well as to a non-base mill, at Kansas City. The Court did not permit this fact to relieve the pricing system from application of § 2, or to require any modification of the Commission's order. So here, we could

not require the Commission to attempt to distinguish between sales made by a base mill involving actual freight costs and all other sales made by both base and non-base mills, when all mills adhere to a common pricing system.

Section 2 (b) permits a single company to sell one customer at a lower price than it sells to another if the price is "made in good faith to meet an equally low price of a competitor." But this does not mean that § 2 (b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." *Federal Trade Comm'n* v. *Staley, supra* at 753. Each of the respondents, whether all its mills were basing points or not, sold some cement at prices determined by the basing point formula and governed by other base mills. Thus, all respondents to this extent adopted a discriminatory pricing system condemned by § 2. As this in itself was evidence of the employment of the multiple basing point system by the respondents as a practice rather than as a good faith effort to meet "individual competitive situations," we think the Federal Trade Commission correctly concluded that the use of this cement basing point system violated the Act. Nor can we discern under these circumstances any distinction between the "good faith" proviso as applied to a situation involving only phantom freight and one involving only freight absorption. Neither comes within its terms.

We hold that the Commission properly concluded that respondents' pricing system results in price discrimina-

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tions. Its finding that the discriminations substantially lessened competition between respondents and that they were not made in good faith to meet a competitor's price are supported by evidence. Accordingly, the Commission was justified in issuing a cease and desist order against a continuation of the unlawful discriminatory pricing system.

The Order.—There are several objections to the Commission's cease and desist order. We consider the objections, having in mind that the language of its prohibitions should be clear and precise in order that they may be understood by those against whom they are directed. See *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675, 685. But we also have in mind that the Commission has a wide discretion generally in the choice of remedies to cope with trade problems entrusted to it by the Commission Act. *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611–613.

There is a special reason, however, why courts should not lightly modify the Commission's orders made in efforts to safeguard a competitive economy. Congress when it passed the Trade Commission Act felt that courts needed the assistance of men trained to combat monopolistic practices in the framing of judicial decrees in antitrust litigation. Congress envisioned a commission trained in this type of work by experience in carrying out the functions imposed upon it.[20] To this end it provided in § 7 of the Act, 15 U. S. C. § 47, that courts might, if it should be concluded that the Government was entitled to

[20] In speaking of the authority granted the Commission to aid the courts in drafting antitrust decrees, the Senate Committee on Interstate Commerce said:

"These powers, partly administrative and partly quasi judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training

a decree in an antitrust case, refer that case "to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." The Court could then adopt or reject such a report.

In the present proceeding the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience. The order it has prepared is we think clear and comprehensive. At the same time the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices. Nor do we find merit to the charges of surplusage in the order's terms.

Most of the objections to the order appear to rest on the premise that its terms will bar an individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor. The Commission disclaims that the order can possibly be so understood. Nor do we so understand it. As we read the order, all of its separate prohibiting paragraphs and sub-

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in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

"With the exception of the Knight case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law." Sen. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914).

paragraphs, which need not here be set out, are modified and limited by a preamble. This preamble directs that all of the respondents "do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things . . . ." Then follow the prohibitory sentences. It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents.

Respondents have objected to the phrase "planned common course of action" in the preamble. The objection is twofold; first, that it adds nothing to the words that immediately follow it; and second, that if it does add anything, "the Commission should be required to state what this novel phrase means in this order and what it adds to the four words." It seems quite clear to us what the phrase means. It is merely an emphatic statement that the Commission is prohibiting concerted action—planned concerted action. The Commission chose a phrase perhaps more readily understood by businessmen than the accompanying legal words of like import.

Then there is objection to that phrase in the preamble which would prevent respondents, or any of them, from doing the prohibited things with "others not parties hereto." We see no merit in this objection. The Commission has found that the cement producers have from time to time secured the aid of others outside the industry who are not parties to this proceeding in carrying out their program for preserving the basing point pricing system as an instrument to suppress competition. Moreover, there will very likely be changes in the present

ownership of cement mills, and the construction of new mills in the future may be reasonably anticipated. In view of these facts, the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves.

One other specific objection to the order will be noted. Paragraph 1 prohibits respondents from "quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents." This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action. The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices. There is little difference in effect between paragraph 1 to which objection is here raised and paragraph 5 which was sustained as proper in *Federal Trade Comm'n* v. *Beech-Nut Pkg. Co.*, 257 U. S. 441, 456 (1922), one of the first Trade Commission cases to come before this Court. Paragraph 5 in the *Beech-Nut* case read: ". . . by utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company."

Many other arguments have been presented by respondents. All have been examined, but we find them without merit.

The Commission's order should not have been set aside by the Circuit Court of Appeals. Its judgment is reversed and the cause is remanded to that court with directions to enforce the order.

It is so ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE BURTON, dissenting.

While this dissent is written with special reference to case No. 23 against The Cement Institute, et al., its conclusions apply to cases Nos. 23–34, all of which were considered together.

It is important to note that this Court has disagreed with the conclusions of the court below as to the material facts constituting the premise on which that court and this have based their respective conclusions. Accordingly, this Court has neither reversed nor directly passed upon the principal conclusion of law reached by the court below. The court below concluded that there was not sufficient evidence to support a finding by the Federal Trade Commission of the existence of that combination among the respondents to restrain the competition in price that was charged in both counts of the complaint.[1]

[1] ". . . For more than eight years last past, respondents have maintained and now have in effect a combination among themselves to hinder, lessen, restrict and restrain competition in price, among producing respondents in the course of their aforesaid commerce among the states. The said combination is made effective by mutual understanding or agreement to employ, and by the actual employment of, the methods and practices set forth in Paragraphs Five to Seven inclusive, of this Count." Count I, Paragraph Four, of complaint.

". . . As Paragraphs One to Five, inclusive, of Count II of this complaint the Commission hereby incorporates Paragraphs One to Five, inclusive, of Count I to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this Count." Count II, Paragraphs One to Five, inclusive, of complaint. 37 F. T. C. at pp. 102, 117.

The court below even doubted that the Commission had clearly stated that it found such a combination existed. However, rather than send the case back to the Commission for clarification of the Commission's findings of fact, the Court of Appeals assumed that those findings did state that such a combination existed. The court then concluded that, even if the Commission had so found, there was not sufficient evidence to support the finding.[2] Accordingly, the court below applied the law of the case to a set of facts that did not include such a combination. On that basis, it held that the Commission's order to cease and desist should be set aside. I agree with the court below in both of these conclusions.[3] On the other hand, this Court today has held not only

[2] The Court of Appeals considered it a "highly controverted issue" as to whether the findings as made by the Commission, even if supported by sufficient evidence in the record, would "sustain the charge of combination alleged in the complaint." 157 F. 2d 533, 543. That court then said that if—

"this were an ordinary proceeding we would return it to the Commission for the purpose of revising its findings if it could and so desired in the light of what we have said. However, we are confronted with what might be termed an extraordinary situation. As already observed, it will soon be ten years since this proceeding was initiated. . . . We think the case should be on its way up and not down. For this reason we shall not return it to the Commission but shall proceed to decide the legal issues involved." *Id.* at p. 553.

[3] The law of the case represents a development of the law in relation to delivered-price systems. See especially, *Federal Trade Comm'n* v. *Staley Mfg. Co.*, 324 U. S. 746; *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726; *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1; *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588; *Maple Flooring Manufacturers Assn.* v. *United States*, 268 U. S. 563; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371; *Aetna Portland Cement Co.* v. *Federal Trade Comm'n*, 157 F. 2d 533 (C. C. A. 7th) (this case below); *Fort Howard Paper Co.* v. *Federal Trade Comm'n*, 156 F. 2d 899 (C. C. A. 7th); *United States Maltsters Assn.* v. *Federal Trade Comm'n*, 152 F. 2d 161 (C. C. A. 7th).

that the Commission found the existence of the combination as charged, but that such finding is sufficiently supported by evidence in the record. This Court accordingly has applied the law of the case to a set of facts which includes a combination among the respondents to restrain competition in price as alleged in the complaint. The resulting effect is that, while the court below has held that without such a combination there was not the alleged violation either of § 5 of the Federal Trade Commission Act[4] or of § 2 of the amended Clayton Act,[5] yet on the other hand, this Court has held that, in-

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[4] "SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed . . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . ."

. . . . . .

52 Stat. 111–112, 15 U. S. C. § 45.

[5] SEC. 2. (a) . . . it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such dis-

cluding such a combination, there was a violation of each of those Sections to the extent charged in the several cases. This Court, therefore, has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination of the kind charged by the Commission.[6]

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crimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . .

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

. . . . . .

49 Stat. 1526, 15 U. S. C. § 13.

[6] The final section of the opinion of the Court makes appropriate disclaimers as to the breadth of the Commission's order and of its own decision sustaining that order. Among these is the statement that "the order by its terms is directed solely at concerted, not individual activity on the part of the respondents." These disclaimers are further supported by such statements as the following in the brief filed for the Commission in this Court:

"It is plain that under this order there is a violation of its provisions only in the event that there is a 'planned common course of

The Commission based its conclusion upon its finding of the existence of the combination charged in its com-

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action, understanding, agreement, combination, or conspiracy' to which a respondent is a party to do something specified in the numbered paragraphs of the order. This is an essential qualification of the prohibitions of these paragraphs. The order therefore leaves each respondent free—provided he acts individually and with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor and a free market—to absorb freight in order to meet a competitor's low price or to sell at a delivered price.

"What the order does is to bar acting in concert in adopting, continuing, or implementing the multiple basing-point delivered-price system or any similar system which necessarily operates to suppress price competition. The order is aimed at uprooting the pricing system which has flourished by virtue of the agreement among respondents, charged and found, to stifle price competition by selling cement at identical prices.

"The error of the court below is epitomized in its statement that 'this court is now urged to hold that the [multiple basing-point delivered-price] system is illegal *per se*, and to require that cement be sold on an f. o. b. plant basis' . . . . The system as such was not attacked; what was attacked was agreement to maintain and implement the system and to eliminate price competition.

". . . Had the Commission inferred agreement from the system alone, it might loosely be said that the system itself was attacked as illegal *per se*. But this is not what the Commission did. Its searching inquiry disclosed in specific detail the collective action which had been taken to implement and continue the system. And from all these facts, as well as the existence of the system itself, the Commission found combination among respondents to suppress price competition."

The statement by this Court, in its note 19, to the effect that the Court does not hold "that existence of a 'combination' is an indispensable ingredient of an 'unfair method of competition' under the Trade Commission Act" is accompanied by a citation which shows that that statement is one of general application and that it is not intended as a denial that the combination found by the Commission in this case is not a highly material and possibly decisive factor in this particular case.

plaint.[7] The court below was in a position to, and did, judicially examine the record at length, hear extended argument upon it and pass upon the many inferences to be drawn from the evidence it contained. In the light of that court's recent experience with many cases in this particular field of the law, and of what it has described as its "long and careful study of the situation," it concluded that the evidence was not sufficient to support a finding of the combination charged. Its opinion reviewed the evidence and pointed out many weaknesses in the inferences upon which the Commission had based its

[7] See Paragraph Twenty-six of the Commission's "Findings as to Facts and Conclusion":

". . . The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental, of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; . . . ." 37 F. T. C. at p. 257.

The Commission followed this Paragraph Twenty-six immediately with the following conclusion of law:

"The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by respondents, as hereinabove set out, constitute violations of subsection (a) of Section 2 of an act of Congress entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (the Clayton Act), as amended by act approved June 19, 1936 (the Robinson-Patman Act)." *Id.* at p. 258.

finding of the existence of the alleged unlawful combination.[8]

The absence of sufficient evidence to support the conclusions of the Commission was especially impressive in the cases concerning the central California group, the southern California group, the Washington-Oregon group [9] and the Huron Portland Cement Company. The

[8] A further review of the insufficiently supported inferences would be of little value here. By way of illustration, however, it may be noted that the Commission and this Court, in its note 15, have emphasized the fact that secret sealed bids for 6,000 barrels of cement were received by a public agency from ten or more of the respondent companies and that the bid of each company was precisely $3.286854 a barrel. Such a fractional identity of price would, on its face, create an inference of collusion. However, the Commission failed to explain, as has the court below, that the highly fractional figure merely reflected the freight charge. The bid, apart from the freight charge, was $2.10 per barrel while "the land grant freight rate to which the government was entitled from the nearest mill of the eleven bidders was $1.1865854 [$1.186854] per barrel." *Aetna Portland Cement Co.* v. *Federal Trade Comm'n*, 157 F. 2d 533, 567.

[9] The central California group refers to the following respondents:

Calaveras Cement Company,
Pacific Portland Cement Company,
Santa Cruz Portland Cement Company,
Yosemite Portland Cement Corporation.

The southern California group to:

California Portland Cement Company,
Monolith Portland Cement Company,
Riverside Cement Company,
Southwestern Portland Cement Company (Victorville, California, plant).

The Washington-Oregon group to:

Beaver Portland Cement Company,
Lehigh Portland Cement Company (Metaline Falls, Washington, plant),
Northwestern Portland Cement Company,
Oregon Portland Cement Company,
Spokane Portland Cement Company,
Superior Portland Cement, Inc.

decision of the Commission and of this Court even in those cases was made dependent upon the conclusion of the existence of a combination, however attenuated the basis for that conclusion might be.[10] The cease and desist orders in all of these cases are therefore to be regarded as based upon the unique and extended record presented in this case, including what this Court refers to as "abundant evidence as to common practices of these respondents and the others on the basis of which the Commission was justified in finding cooperative conduct among all to achieve delivered price uniformity."

On the view of the evidence taken by the court below and by me, that evidence does not support the Commission's finding of the combination as charged. Unlike the Commission and the majority of this Court, the lower court and I, therefore, have faced the further issue presented by the Commission's charges unsupported by a finding of the alleged combination. This has led us to consider an issue quite different from that decided by this Court today. That issue lies within the long-established and widespread practice by individuals of bona fide competition by freight absorption with which practice Congress has declined to interfere, although asked

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[10] In a general finding the Commission indicated that the evidence concerning certain of the respondent companies was less conclusive than that relating to some of the other respondents.

"Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action." Commission's "Findings as to Facts and Conclusion," Paragraph Six (a). 37 F. T. C. at p. 144.

to do so.[11] This is the field where a producer, for his own purposes and without collusion, often ships his product to a customer who, in terms of freight charges, is

[11] "Furthermore, the basing point price system has been in use by industry for almost a half century. There has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad. Numerous bills have been introduced in Congress seeking to outlaw its use. Countless time has been spent in hearings by Congressional committees, before whom it has been assailed and defended. The pages of the Congressional Record bear mute but indisputable proof of the fact that Congress has repeatedly refused to declare its use illegal. There is no occasion to relate this Congressional history. It is a matter of common and general knowledge. In the Corn Products case, the court in commenting upon some of this legislative history stated (324 U. S. at page 737, 65 S. Ct. at page 967, 89 L. Ed. 1320): 'We think this legislative history indicates only that Congress was unwilling to require f. o. b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.' Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal per se, and to require that cement be sold on an f. o. b. plant basis.

"In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain. We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation." *Aetna Portland Cement Co.* v. *Federal Trade Comm'n, supra, at* p. 573.

See §§ 1 and 2, Sherman Antitrust Act, approved July 2, 1890, 26 Stat. 209, 15 U. S. C. §§ 1 and 2; § 5, Federal Trade Commission Act, approved September 26, 1914, 38 Stat. 719; § 2, Clayton Act, approved October 15, 1914, 38 Stat. 730; § 2, Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13; § 5, Federal Trade Commission Act, as amended, March 21, 1938, 52 Stat. 111, 15 U. S. C. § 45. See Bill "To Prevent Unnecessary and Wasteful Cross-Hauling" introduced by Senator Wheeler in 1936 banning basing-point systems by statute, but not reported out of Committee. Hearings before Senate Committee on

located nearer to one or more of the producer's competitors than to the producer himself. In selling to such a customer, this producer is at an obvious freight disadvantage. To meet the lower delivered-price of his competitor, the producer, therefore, reduces his delivered-price in that area by a sum sufficient to absorb his freight disadvantage. He might do this for many reasons. For example, this customer might be such a large customer that the volume of his orders would yield such a return to the producer that the producer, by distributing his fixed charges over the resultingly increased volume of business, could absorb the freight differential without loss of profit to his business as a whole and without raising any charges to his other customers. The securing of this particular business might even enable the producer to reduce his own basic factory price to all his customers. It might make the difference between a profitable and a losing business, resulting in the producer's solvency or bankruptcy. If the advantage to be derived from this customer's business were not sufficient, in itself, thus completely to absorb the freight differential, the producer might absorb all or part of such differential by a reduction in his net earnings without affecting his other customers. Whether or not he would be justified in absorbing any or all of this freight differential by increasing his charges to other customers, in his own freight-advantage area, raises a separate question as to the validity of such an increase. The Commission and the majority of this Court did not reach the question of individual and independent absorptions of freight charges by one or more producers to meet lower prices of competitors in such competitors' respective areas of freight advantage.

Interstate Commerce on S. 4055, 74th Cong., 2d Sess. (1936), and see p. 325. See also, H. R. Rep. No. 2287, 74th Cong., 2d Sess. 14 (1936), and debates upon the Robinson-Patman Bill, 80 Cong. Rec. 8102, 8118, 8140, 8223–8224 (1936).

I conclude, therefore, that the judgment of the Court of Appeals setting aside the order of the Federal Trade Commission should have been affirmed, but I emphasize what I regard as equally important—that this Court, in sustaining the order of the Commission, has done so on such a different premise that it has not passed upon the validity of freight absorptions made in sales by one or more producers in the course of bona fide competition, where such producers have not acted as part of a combination to hinder, lessen, restrain or suppress competition in the sale or distribution of the products so sold.

ANDRES *v.* UNITED STATES.

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

No. 431. Argued February 5, 1948.—Decided April 26, 1948.

1. Whether a verdict of guilty in a prosecution in a federal court for murder in the first degree should be qualified by adding thereto "without capital punishment," as authorized by 18 U. S. C. § 567, is entirely within the discretion of the jury; and the instructions of the trial court on this point in the instant case were adequate. Pp. 742–744.
2. There was no material error in the trial court's use, in its instructions in this case, of certain language objected to by the petitioner as indicating to the jury that the grand jury had found that he was probably guilty of murder in the first degree—although the language was misleading when read out of context and could well have been omitted. Pp. 744–745.
3. In the provision of 18 U. S. C. § 542 that "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed," the word "State" includes the Territory of Hawaii. P. 745.
4. Where an accused in a prosecution in a federal court for murder in the first degree is found guilty, the verdict of the jury, under 18 U. S. C. § 567, must be unanimous both as to guilt and as to whether the death penalty should be imposed. Pp. 746–749.

5. In a trial in a federal court for murder in the first degree, the instructions to the jury were such that the jury might reasonably conclude that, if they agreed unanimously upon a verdict of guilty but could not agree unanimously as to whether "without capital punishment" should be added, the verdict of guilty must stand unqualified. The jury returned an unqualified verdict of guilty. *Held:* These instructions did not fully protect the accused, the judgment is reversed and the case is remanded for a new trial. Pp. 749–752.

163 F. 2d 468, reversed.

Petitioner was convicted in the United States District Court for the Territory of Hawaii of murder in the first degree and was sentenced to death by hanging. The Circuit Court of Appeals affirmed. 163 F. 2d 468. This Court granted certiorari. 332 U. S. 843. *Reversed and remanded for a new trial,* p. 752.

O. P. Soares argued the cause and filed a brief for petitioner.

Vincent A. Kleinfeld argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan.*

MR. JUSTICE REED delivered the opinion of the Court.

On December 17, 1943, the petitioner, Timoteo Mariano Andres, was indicted in the United States District Court for the Territory of Hawaii for murder in the first degree. 18 U. S. C. §§ 451, 452. The indictment recited that Andres "on or about the 23rd day of November, 1943, at Civilian Housing Area No. 3, Pearl Harbor, Island of Oahu, said Civilian Housing Area No. 3 being on lands reserved or acquired for the use of the United States of America . . . did . . . kill . . . Carmen Gami Saguid . . . ."

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Andres was tried before a jury which returned this verdict:

> "We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, Timoteo Mariano Andres, guilty of murder in the first degree."

He was sentenced to death by hanging. He appealed his conviction to the Circuit Court of Appeals for the Ninth Circuit. That court affirmed the judgment of the lower court, unanimously. 163 F. 2d 468. A petition for a writ of certiorari was filed in this Court and that petition was granted. 332 U. S. 843.

Four questions were presented in the petition for certiorari. Three of these we do not consider of sufficient doubt or importance to justify an extended discussion. We shall dispose of them before we reach what is, for us, the decisive issue of this case.

Andres contends that 18 U. S. C. § 567,[1] as interpreted by *Winston* v. *United States,* 172 U. S. 303,[2] requires that the trial court explain to the jury the scope of their discretion in granting mercy to a defendant. In the *Winston* case, the judge had charged the jury that they could not qualify their verdict except ". . . in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it." 172 U. S. at 306. This Court held that instruction erroneous. The Court read the

[1] "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

[2] In *Winston* v. *United States, supra,* the question presented was the proper construction of § 1 of the Act of January 15, 1897. 29 Stat. 487. 18 U. S. C. § 567, in its relevant part, has language identical to that of the earlier statute.

statute to place the question whether the accused should or should not be capitally punished entirely within the discretion of the jury; an exercise of that discretion could be based upon any consideration which appealed to the jury.[3] In the case now before us, the trial judge gave the instructions set forth in the margin.[4] It is clear that he

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[3] 172 U. S. at 312–13:

"The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

[4] "I instruct you that you may return a qualified verdict in this case by adding the words 'without capital punishment' to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

"I instruct you, gentlemen of the jury that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto 'without capital punishment' in which case the defendant shall not suffer the death penalty.

"In this connection, I further instruct you that you are authorized to add to your verdict the words 'without capital punishment,' and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances."

left the question of the punishment to be imposed—death or life imprisonment—to the discretion of the jury. We hold that the trial judge's instructions on this issue satisfied the requirements of the statute.

It is next contended that the trial was unfair because the instructions quoted below [5] indicated to the jury that the indictment against the petitioner reflected a finding by the Grand Jury that he was probably guilty of the crime of murder in the first degree. Perhaps the italicized language in the charge, read out of context, is mis-

[5] "To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. The presumption of innocence in favor of the defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. The presumption of innocence continues with the defendant throughout the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

"When the indictment was returned by the grand jury against this defendant, the defendant had had no opportunity to present his side of the case. *The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.*

"*Upon the evidence* [*which*] *it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.*

"I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case."

Petitioner complains of the italicized language.

leading and it might have been better to omit it completely. However, when the language complained of is read in context, it seems to us that the petitioner had no real ground for complaint. No material error resulted from the words.

The petitioner also argues that the District Court for the Territory of Hawaii did not have the power to sentence him to death by hanging. 18 U. S. C. § 542 provides: "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. . . . If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." The petitioner contends that the phrase "laws of the State" limits the statute to the forty-eight states and, consequently, provides for no method of inflicting the death penalty where that sentence is imposed by a district court sitting in a Territory.[6] We reject that contention as being without merit. In many contexts "state" may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii.

[6] Section 542, before its amendment in 1937, read: "The manner of inflicting the punishment of death shall be by hanging." 35 Stat. 1151. The changes in the statute from that language to the present language were prompted by the fact that "Many States . . . use[d] more humane methods of execution, such as electrocution, or gas. . . . [Therefore,] it appear[ed] desirable for the Federal Government likewise to change its law in this respect . . . ." H. R. Rep. No. 164, 75th Cong., 1st Sess., 1. Since Congress was well aware that federal courts had jurisdiction in territories and possessions, it would be incongruous to hold that they did not use the word "state" to cover such areas. The purpose of this legislation was remedial: the adoption of the local mode of execution. The intent of Congress would be frustrated by construing the statute to create that hiatus for which the petitioner contends.

The last and most difficult issue raised by Andres is the question of the propriety of those instructions by which the trial judge attempted to explain to the jury the requirements of unanimity in their verdict. This issue is a composite of two problems: (1) The proper construction of 18 U. S. C. § 567; and (2) the consideration of whether the instruction given clearly conveyed to the jury the correct statutory meaning.

Section 567 of 18 U. S. C. reads as follows: "In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." If a qualified verdict is not returned, the death penalty is mandatory.[7] The Government argues that § 567 properly construed requires that the jury first unanimously decide the guilt of the accused and, then, with the same unanimity decide whether a qualified verdict shall be returned. As the statute requires the death penalty on a verdict of guilty, the contention is that the jury acts unanimously in finding guilt and the law exacts the penalty. It follows, that if all twelve of the jurors cannot agree to add the words "without capital punishment," the original verdict of guilt stands and the punishment of death must be imposed. The petitioner contends that § 567 must be construed to require unanimity in respect to both guilt and punishment before a verdict can be returned. It follows that one juror can prevent a verdict which requires the death penalty, although there is unanimity in finding the accused guilty of murder in the first degree. The Circuit Court of Appeals held that unanimity of the jury was required both as to guilt

[7] 18 U. S. C. § 454: "Every person guilty of murder in the first degree shall suffer death. . . ."

and the refusal to qualify the verdict by the words "without capital punishment." It interpreted the instructions, however, as requiring this unanimity.

The First Congress of the United States provided in an Act of April 30, 1790: "That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death." [8] This was the federal law, in the respects here relevant, until 1897. In that year Congress passed and the President signed the Act of January 15, 1897.[9] That statute provided:

> "That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

It is this language, substantially unchanged, which we must construe in this case.[10]

The reports of the Congressional Committees and the debates on the floor of Congress do not discuss the particular problem with which we are now concerned.[11]

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[8] 1 Stat. 113.

[9] 29 Stat. 487.

[10] The Act of January 15, 1897, was incorporated into the Criminal Code of 1909 as § 330 with changes that are here unimportant. 35 Stat. 1152. Section 330 of the Criminal Code is now 18 U. S. C. § 567.

[11] Dissatisfaction over the harshness and antiquity of the federal criminal laws led in 1894 to the introduction by N. M. Curtis of New York of a bill to reduce the number of crimes for which the

There are, however, many expressions which indicate that the general purpose of the statute was to limit the severity of the old law.[12]

Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.[13] In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it. We do not think that the grant of authority to the jury by § 567 to qualify their verdict permits a procedure whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor. Therefore, although the interpretation of § 567 urged by the Government cannot be proven erroneous with certainty, since the statute contains no language specifically requiring una-

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penalty of death could be imposed and to give the jury the right to "qualify their verdict [in death cases] by adding thereto 'without capital punishment.'" See H. R. Rep. No. 545, 53d Cong., 2d Sess. The bill as introduced divided murder into degrees, §§ 1, 2 of H. R. 5836, 53d Cong., 2d Sess.; it was passed by the House without any substantial changes. 27 Cong. Rec. 823. After severe amendment it was favorably reported to the Senate by the Committee on the Judiciary. See S. Rep. No. 846, 53d Cong., 3d Sess. These amendments, however, did not affect § 5 of the original bill, the section which provided for qualified verdicts; that section was retained and became § 1 of the new bill. *Id.* at p. 2. The committee, however, "thought it inadvisable to make degrees in the crime of murder, or attempt new definitions." *Ibid.* Consequently, it struck out the sections of the original bill which concerned themselves with these matters. The Committee Report stated that "The leading object of this bill is to diminish the infliction of the death penalty by limiting the offenses upon which it is denounced, and by providing in all cases a latitude in the tribunal which shall try them to withhold the extremest punishment when deemed too severe." *Id.* at p. 1. The bill as amended was passed by the Senate and later by the House.

[12] See note 11, *supra;* 28 Cong. Rec. 2649–2650, 3098–3111, 3651.

[13] See *American Publishing Co.* v. *Fisher,* 166 U. S. 464.

nimity on both guilt and punishment before a verdict can be brought in, we conclude that the construction placed upon the statute by the lower court is correct—that the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government.[14]

The only question remaining for decision is whether the instructions given by the trial judge clearly conveyed to the jury a correct understanding of the statute. There was a general charge that "the unanimous agreement of the jury is necessary to a verdict." Later, and the instructions on the specific issue under consideration can best be understood by the colloquy, the following took place:

> "(At 3:45 o'clock, p. m., the jury returned to the courtroom, and the following occurred:)
>
> "The Court: Note the presence of the jury and the defendant together with his attorney. I am advised by the bailiff that the jury wishes to ask the Court a question. Which gentlemen [sic] is the foreman—you, Mr. Ham? You are Mr. Ham?
>
> "The Foreman: . . . The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging, or use his own discretion.
>
> "The Court: Just a minute. I want to be right in my answer. You may sit down. Will the counsel come to the bench, please? (Discussion off the record.)

[14] This conclusion is supported by *Smith* v. *United States,* 47 F. 2d 518, which, with the exception of the present case, appears to be the only federal decision on this question.

"The Court: Gentlemen of the Jury, the statute, as I recall, answers that question, but I wanted to look at it once again before I gave you a positive answer. The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death. As I told you in your instructions, there is another Federal statute which enables you gentlemen to qualify your verdict and to add, in the event you should find the person guilty of murder in the first degree, to add to that verdict, I repeat, the phrase 'without capital punishment.' In that event the man, of course, under the statute so convicted would not suffer the punishment of death but it would life imprisonment, as I recall it under the statute.

"Does that answer your question?

"The Foreman: Yes.

"The Court: Don't discuss your problems here, but if it is an answer to your question, you gentlemen can retire to your jury room if there are no other questions.

"The Foreman: No other.

"The Court: Counsel have asked me to reread the instructions to you on that particular point as an amplification of my answer to your question. Will you bear with me just a moment until I find that instruction? I will reread one or two instructions to you which bear on the question which you have asked:

" 'You may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon

you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.'

" 'Even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may, as I have said, qualify your verdict by adding thereto "without capital punishment," in which case the defendant shall not suffer the death penalty.'

" 'In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment," and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.'

"And, finally, you will recall I said that you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous."

The Government concedes that, if the petitioner's interpretation of § 567 is accepted, these instructions were inadequate; and we find ourselves in agreement with this concession. The court below concluded that the instructions were proper and that they did not mislead the jury.[15] It based its conclusion upon two factors: (1) the common understanding of jurors that "they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part . . ."; [16] and (2) the general admonition of the trial judge that "the unanimous agreement of the jury is necessary to a verdict." [17]

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[15] *Andres* v. *United States,* 163 F. 2d 468, 471.

[16] *Id.* at p. 471.

[17] *Ibid.*

It seems to us, however, that where a jury is told first that their verdict must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified. That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused. The context of § 567 does not defy accurate and precise expression. For example: An instruction that a juror should not join a verdict of guilty, without qualification, if he is convinced that capital punishment should not be inflicted, would have satisfied the statute and protected the defendant. Or the jury might have been instructed that its conclusion on both guilt and punishment must be unanimous before any verdict could be found.

As we are of the opinion that the instructions given on this issue did not fully protect the petitioner, the judgment of the lower court is reversed and the case is remanded for a new trial.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

Having had more difficulty than did my brethren in reaching their result, I deem it necessary to state more at length than does the Court's opinion the reasons that outweigh my doubts, which have not been wholly dissipated.

This case affords a striking illustration of the task cast upon courts when legislation is more ambiguous than the limits of reasonable foresight in draftsmanship justify. It also proves that when the legislative will is clouded,

what is called judicial construction has an inevitable element of judicial creation. Construction must make a choice between two meanings, equally sustainable as a matter of rational analysis, on considerations not derived from a mere reading of the text.

For the first hundred years of the establishment of this Government one guilty of murder in the first degree, under federal law, was sentenced to death. Since 1897 a jury, after it found an accused "guilty of the crime of murder in the first degree . . . may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." Act of January 15, 1897, 29 Stat. 487, as amended, 35 Stat. 1151, 1152, § 330 Criminal Code, 18 U. S. C. § 567.

The statute reflects the movement, active during the nineteenth century, against the death sentence. The movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction. Almost every State passed mitigating legislation.[1] Only five States met the doubts and disquietudes about capital punishment by its abolition. Most of the other States placed in the jury's hands some power to relieve from a death sentence. But the scope of a jury's power to save one found guilty of murder in the first degree from a death sentence is bound to give rise to a problem of statutory construction when the legislation does not define the power with explicitness.

A legislature which seeks to retain capital punishment as a policy but does not make its imposition after a find-

[1] For references to the State legislation see Appendix, pp. 767–770.

ing of guilty imperative has these main choices that leave little room for construction:

(1) Legislation may leave with the jury the duty of finding an accused guilty of murder in the first degree but give them the right of remission of the death sentence, provided there is unanimous agreement on such remission. Any juror, of course, has it in his power to deadlock a jury out of sheer wilfulness or unreasonable obstinacy. But under such a statute the duty laid upon his conscience is to find guilt if there is guilt. The jury can save an accused from death only if they can reach a unanimous agreement to relieve from the doom.

(2) The legislature may not require unanimous agreement on remission of the death sentence, but may make such remission effective by a majority vote of the jury, or, as in the case of the Mississippi statute, it may expressly provide that

> "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment . . . in which case the court shall fix the punishment at imprisonment for life." (Miss. Code Ann. § 2217 (1942).)

(3) The legislature may require the jury to specify the punishment in their verdict. Under such legislation it is necessary for the jury's verdict not only to pronounce guilt but also to prescribe the sentence.

(4) The jury may be authorized to qualify the traditional verdict of guilty so as to enable the court to impose a sentence other than death. This may be accomplished by giving such discretionary power to the court *simpliciter,* or upon recommendation of mercy by the jury.

None of these types of legislation would leave any reasonable doubt as to the power and duty of a jury. Unfortunately, the alleviating federal legislation of 1897, to which the Court must now give authoritative meaning, was not cast in any one of the foregoing forms. Congress expressed itself as follows:

> "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." (29 Stat. 487, as amended, 35 Stat. 1151, 1152, § 330 Criminal Code, 18 U. S. C. § 567.)

The fair spontaneous reading of this provision, in connection with § 275 of the Criminal Code—"Every person guilty of murder in the first degree shall suffer death." (35 Stat. 1143, 18 U. S. C. § 454)—would be that Congress has continued capital punishment as its policy; that one found guilty of murder in the first degree must suffer death if the jury reaches such a verdict but that "the jury may qualify their verdict by adding thereto 'without capital punishment;' " that, since federal jury action requires unanimity, when unanimity is not attained by the jury in order to "qualify their verdict" by "adding" the phrase of alleviation, the verdict of murder in the first degree already reached must stand. Certainly, if construction called for no more than reading the legislation of Congress as written by Congress, to interpret it as just indicated would not be blindly literal reading of legislation in defiance of the injunction that the letter killeth. On the contrary, it would heed the dominant policy of Congress that "every person guilty of murder in the first degree shall suffer death" unless the jury "qualify their verdict by adding thereto" the terms of remission.

But in a matter of this sort judges do not read what Congress wrote as though it were merely a literary composition. Such legislation is an agency of criminal justice and not a mere document. While the proper construction of the power of qualification entrusted to the jury by the Act of 1897 is before us for the first time upon full consideration, the issue was adjudicated more than seventeen years ago by one of the Circuit Courts of Appeals. It rejected the construction for which the Government now contends. *Smith* v. *United States,* 47 F. 2d 518. While a failure of the Government to seek a review of that decision by this Court has no legal significance, acquiescence by the Government in an important ruling in the administration of the criminal law, particularly one affecting the crime of murder, carries intrinsic importance where the construction in which the Government acquiesced is not one that obviously is repelled by the policy which presumably Congress commanded.

Moreover, we are dealing with a field much closer to the experience of the State courts, as the guardians of those deep interests of society which are reflected in legislation dealing with the punishment for murder and which are predominantly the concern of the States.[2] If the

[2] There were only twenty-three convictions of first-degree murder in the federal district courts in continental United States, the territories, and the possessions, exclusive of the District of Columbia, during the six-year period beginning July 1, 1941, and ending June 30, 1947. Eight of the defendants convicted were sentenced to death, and fifteen were given life imprisonment. Of the eight sentenced to death, three were executed (see *Arwood* v. *United States,* 134 F. 2d 1007; *Ruhl* v. *United States,* 148 F. 2d 173; *United States* v. *Austin Nelson,* District Court for the Territory of Alaska, First Division, April 18, 1947 (unreported)); the sentence of one was commuted to life imprisonment (see *Paddy* v. *United States,* 143 F. 2d 847); and the sentences of four (including the petitioner here) have been stayed pending their appeals (see *United States* v. *Sam*

strongest current of opinion in State courts dealing with legislation substantially as ambiguous as that before us has resolved the ambiguity in the way in which the Circuit Court of Appeals for the Ninth Circuit resolved it in the *Smith* case, the momentum of such a current should properly carry us to the same conclusion. History and experience outweigh claims of virgin analysis of a statute which has such wide scope throughout the country and the incidence of which is far greater in the State courts than in the federal courts. This was the approach of the Court in *Winston* v. *United States,* 172 U. S. 303, where we held, after reviewing the State legislation and adjudication, that the statute did not limit the jury's discretion to cases where there were palliating or mitigating circumstances.

And so we turn to State law.

A. In only four States is death the inevitable penalty for murder in the first degree: Connecticut, Massachusetts, North Carolina, and Vermont. Such has been, until the other day, the law of England despite persistent and impressive efforts to modify it. See, *e. g.,* Minutes of Evidence and Report of the Select Committee on Capital Punishment (1930). It is worthy of note that this effort has just prevailed by the passage, on a free vote, of a provision abolishing the death penalty for an experimental period of five years. See 449 H. C. Deb. (Hansard) cls. 981 *et seq.* (April 14, 1948), and statement of the Home Secretary that death sentences will be suspended on the basis of this vote, even before the measure

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Richard Shockley and *United States* v. *Miran Edgar Thompson,* District Court for the Northern District of California, Dec. 21, 1946 (unreported); *United States* v. *Carlos Romero Ochoa,* District Court for the Southern District of California, May 19, 1947 (unreported)).

I am indebted for these statistics to the Administrative Office of the United States Courts.

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gets on the Statute Books. *Id.*, cls. 1307 *et seq.* (April 16, 1948).

B. In five States the death sentence has been abolished for murder in the first degree: Maine, Michigan, Minnesota, Rhode Island, and Wisconsin.

C. Most of the States—39 of them—leave scope for withholding the death sentence. The State enactments greatly vary as to the extent of this power of alleviation and in the manner of its exercise, as between court and jury.

I. In three States a jury's recommendation of life imprisonment is not binding on the trial court: Delaware, New Mexico, and Utah.

II. In fifteen States the jury's verdict must specify whether the sentence is to be death or life imprisonment: Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, and Virginia.

III. In eight other States the same result is reached, although the legislation is phrased that one found guilty of murder in the first degree suffers death or life imprisonment "at the discretion of the jury": Alabama, Arizona, California, Georgia, Idaho, Montana, Nebraska, and Nevada.

IV. In two States the punishment is life imprisonment unless the jury specifies the death penalty: New Hampshire and Washington.

V. Nine States have statutes more or less like the federal provision here under consideration: Louisiana, Maryland, New Jersey, New York, Ohio, Oregon, South Carolina, West Virginia, and Wyoming.

VI. Two States frankly recognize that differences of opinion are likely to occur when the jury has power to mitigate the death sentence and provide for life imprisonment even when the jury is not unanimous: Florida and Mississippi.

An examination of State law shows that all but four States have abandoned the death sentence as a necessary consequence of the finding of guilt of murder in the first degree; that most of the States which have retained the death sentence have entrusted the jury with remission of the death sentence, although sentencing is traditionally the court's function, and this is true even in those States where the legislature has not in so many words put this power in the jury's keeping; that even where the jury is not required to designate the punishment but merely has the power of recommending or "adding" to the verdict the lighter punishment, the most thoroughly canvassed judicial consideration of such power has concluded that the death sentence does not, as a matter of jury duty, automatically follow a finding by them of guilt of murder in the first degree, when the jury cannot unanimously agree that life imprisonment should be imposed.

Of the nine States that have enacted legislation more or less like the federal provision under consideration, the statutes of four—Louisiana, Maryland, West Virginia, and Wyoming—are virtually in the identical form. While the highest courts of these States have not passed upon the precise question before us, they have all construed their respective statutes as giving the jury a free choice as to which of the two alternative punishments are to be imposed, although it can fairly be said that such construction runs counter to the obvious reading that the sentence is death unless all of the jurors are agreed as to adding "without capital punishment."[3] Three of the nine

[3] The Supreme Court of Louisiana noted that "in capital cases, it is entirely left to the jury to determine the extent of the punishment in the event of conviction. The jurors, in such cases, are entirely free to choose between a qualified and an unqualified verdict, because the law gives them the unquestioned discretion to return either one or the other." *State* v. *Henry*, 196 La. 217, 233. The Court of Appeals of Maryland held that "In our opinion, it was the

States—Ohio, Oregon, and South Carolina—have statutes providing that the penalty is death unless the jury recommends "mercy" or "life imprisonment" in which case the punishment shall be life imprisonment. These have all been construed as providing for alternative punishment in the discretion of the jury.[4] While a similar New Jersey statute has been given the literal construction here

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purpose of the act to empower juries to unite in a choice of punishments; that is, a choice between limiting punishment to life imprisonment and leaving the court unrestricted in fixing the punishment; and it was intended that all jurors should exercise a discretion in making that choice." *Price* v. *State,* 159 Md. 491, 494. The Supreme Court of West Virginia has held that under that State's statute the jury fixes the sentence and that, therefore, it was reversible error for the trial court to fail to "instruct the jury that it was its duty to find, in the event of a verdict of guilty of murder in the first degree, whether the accused should be hanged or sentenced to the penitentiary for life." *State* v. *Goins,* 120 W. Va. 605, 609. And the Supreme Court of Wyoming in a case where the defendant had entered a plea of guilty of murder in the first degree, held that "A defendant has the right to have a jury not only to try the issue of guilt or innocence, but also to decide what the punishment shall be. The right to a trial on the issue of guilt or innocence may be waived by a plea of guilty, which leaves only the question of punishment to be decided by the jury." *State* v. *Best,* 44 Wyo. 383, 389–90; see also *State* v. *Brown,* 60 Wyo. 379, 403 (where an instruction to the jury that "a person who is found guilty of murder in the first degree shall suffer death or be imprisoned in the penitentiary at hard labor for life, in the discretion of the jury trying the case" was upheld).

[4] While the judges of the Supreme Court of Ohio differed in their views as to whether the jury in making the recommendation were restricted to considerations based upon the evidence, they were in agreement that the statute gave the jury full and exclusive discretion as to whether or not to make the recommendation. *Howell* v. *State,* 102 Ohio St. 411. In Oregon and South Carolina it is sufficient to charge the jury that they may bring in either verdict. *State* v. *Hecker,* 109 Ore. 520, 559–60; *State* v. *McLaughlin,* 208 S. C. 462, 468.

espoused by the Government, the history of that State's legislation only serves to underscore the force of the decisions in the other States.[5] The ninth State, New York, in 1937, amended its legislation, which had made the death penalty mandatory upon all convictions for first-degree murder, by providing that in felony murder cases the jury "may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." N. Y. Crim. Code and Pen. Law § 1045–a. In *People* v. *Hicks,* 287 N. Y. 165, the Court of Appeals found the following instruction erroneous:

> "There cannot be any recommendation unless the twelve of you agree. But if you have all agreed that the defendant is guilty, it is nevertheless your duty to report that verdict to the Court. Is that clear? Even though you cannot agree on the recommendation. In other words, you cannot use the

[5] Prior to 1916 the death penalty was mandatory in New Jersey. In that year the State legislature amended the law by the enactment of the jury recommendation form of statute. In 1919 the New Jersey Court of Errors and Appeals construed the statute to give the jury absolute discretion to bring in either verdict, and, by a close decision, held that the jury was not confined to the evidence in determining whether or not to make the recommendation. *State* v. *Martin,* 92 N. J. L. 436. That same year the legislature enacted into law the views of the dissenting judges requiring that the jury must make the recommendation "by its verdict, and as a part thereof, upon and after the consideration of all the evidence." N. J. Stat. Ann. § 2:138–4 (1939). In *State* v. *Molnar,* 133 N. J. L. 327, 335, the court construed the amended statute to mean that ". . . the penalty is death, determined not by the jury, but by the statute, and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

> recommendation as bait, in determining the guilt or innocence of the defendant. . . . if you are all unanimous that there should be a recommendation, it is your duty to bring in the recommendation; but if you are not unanimous on that proposition it is nevertheless your duty to bring in the verdict of guilty of murder in the first degree, even though you cannot agree on the other. Is that plain?" (287 N. Y. at 167–68.)

The Court of Appeals held that the statute expressly empowered the jury to make a life-imprisonment recommendation a part of their verdict; that it did not expressly, or by implication, require the jury to render a verdict of guilty without the recommendation where they were not all agreed upon so doing; that, until the jury reached agreement on every part of their verdict, they had not agreed upon the verdict; that in such cases the legislature required the jury to determine

> "*First,* whether the accused is guilty of the crime charged; *second,* whether the sentence shall be death or whether the trial judge may pronounce a sentence of life imprisonment. Both questions must be determined *by the jury,* and the jury's answer to both questions must be embodied in its verdict. A juror considering the question of whether an accused is guilty of the crime charged can no longer be influenced consciously or unconsciously by knowledge that the finding of guilt of the crime charged will entail a mandatory penalty which in his opinion is not justified by the degree of moral guilt of the accused. Each juror should now know that the finding of guilt does not carry that mandatory penalty unless the jury fails to make a recommendation of life imprisonment a part of the verdict and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all its parts.

> Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict." (*Id.* at 171.)

And so we reach the real question of this case. Should a federal jury report as their verdict that part of their deliberations which resulted in the finding of guilt of first degree murder if they cannot agree on the alleviating qualification, or should they be advised that their disagreement on the question of appropriate punishment may conscientiously be adhered to so that, if there be no likelihood of an agreement after making such an effort as is due from a conscientious jury, there would be no escape from reporting disagreement. After considerable doubt, as I have indicated, I find that the weight of considerations lies with giving the jury the wider power which the Court's construction affords.

"The decisions in the highest courts of the several States under similar statutes are not entirely harmonious, but the general current of opinion appears to be in accord with our conclusion." *Winston* v. *United States, supra,* at p. 313. The fair significance to be drawn from State legislation and the practical construction given to it is that it places into the jury's hands the determination whether the sentence is to be death or life imprisonment,[6] and, since that is the jury's responsibility, it is for them to decide whether death should or should not be the consequence of their finding that the accused is guilty of murder in the first degree. Since the determination of the sentence is thus, in effect, a part of their verdict, there must be accord by the entire jury in reaching the full content of the verdict.

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[6] Indeed, we said in the *Winston* case that Congress by the Act of 1897 established the "simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment." 172 U. S. at 312.

The Government contends that because of its "clear terms" little weight should be accorded the failure of Congress to repudiate the interpretation placed upon § 330 of the Criminal Code by the *Smith* case in 1931. That decision and acquiescence in it answer the claim that the section precludes a reading of it opposed to that which the Government offers. Moreover, it is significant that the proposed revision of the Criminal Code [7] leaves the form of this provision unchanged. This revision doubtless had the expert scrutiny of the Department of Justice,[8] and that Department must have had knowledge of the judicial gloss put upon the retained provision by the *Smith* case.[9]

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[7] H. R. 3190, 80th Cong., 1st Sess., § 1111 (b), as passed by the House on May 12, 1947, 93 Cong. Rec. 5049.

[8] See *id.* at 5048; Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., pp. 33–35. It is interesting to note that the proposed revision itself contains most of the different forms by which legislatures have retained capital punishment as a penalty for the commission of certain crimes but have not made its imposition mandatory upon a finding of guilty. *E. g.*, § 2113 (e) (murder in commission of bank robbery—"not less than ten years, or punished by death if the verdict of the jury shall so direct"); § 1992 (wrecking train which results in death of any person—"death penalty or to imprisonment for life, if the jury shall in its discretion so direct"); § 1201 (a) (kidnapping—"(1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed"); § 2031 (rape—"death, or imprisonment for any term of years or for life"). There is nothing in either the committee's report or the reviser's notes on these sections to indicate whether these are differences in form or in substance. See H. R. Rep. No. 304, 80th Cong., 1st Sess.

[9] The various Governmental agencies are apt to see decisions adverse to them from the point of view of their limited preoccupation and too often are eager to seek review from adverse decisions which should stop with the lower courts. The Solicitor General,

The care that trial judges should exercise in making clear to juries their power and responsibility in trials for murder is emphasized by the uncertainties regarding the construction appropriate to the jury's power to affect the punishment on a finding of guilt of murder in the first degree, now resolved by this decision. It fell upon the trial judge here to instruct the jury as to this power. Was his charge in accord with the statute as construed by us? The court below held that it was; the Government concedes that it was not. The charge and the instructions given were such as to permit reasonable minds to differ on this issue, and therein lies the error.[10] Charging a jury is not a matter of abracadabra. No part of the conduct of a criminal trial lays a heavier task upon the presiding judge. The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors. It should guide their understanding after

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however, must take a comprehensive view in determining when certiorari should be sought. He is therefore under special responsibility, as occupants of the Solicitor General's office have recognized, to resist importunities for review by the agencies, when for divers reasons unrelated to the merits of a decision, review ought not to be sought. The circumstances of the *Smith* case present a special situation, and the intention to carry the implication of "acquiescence" beyond such special circumstances is emphatically disavowed.

[10] The jury was instructed that "before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous." By and of itself this instruction was consonant with either construction of the statute. If the jury had also been instructed either that "before you may return a verdict of murder in the first degree your decision not to add the qualification 'without capital punishment' must be unanimous" or that "if you are all agreed that the defendant is guilty but you are not all agreed to add 'without capital punishment' you must return a verdict of murder in the first degree without the qualification," they would have known which construction of the statute the trial judge adopted, and so would we.

jurors have been subjected to confusion and deflection from the relevant by the stiff partisanship of counsel.

To avoid reversal on appeal, trial judges err, as they should, on the side of caution. But caution often seeks shelter in meaningless abstractions devoid of guiding concreteness. Clarity certainly does not require a broad hint to a juror that he can hang the jury if he cannot have his way in regard to the power given to him by Congress in determining the sentence of one guilty of first-degree murder. On the other hand, conscientious jurors are not likely to derive clear guidance if told that "on both guilt and punishment [they] must be unanimous before any verdict can be found." They should be told in simple, colloquial English that they are under duty to come to an agreement if at all possible within conscience, for a verdict must be unanimous; that a verdict involves a determination not only of guilt but also of the punishment that is to follow upon a finding of guilt; that the verdict as to both guilt and punishment is single and indivisible; that if they cannot reach agreement regarding the sentence that should follow a finding of guilt, they cannot render a verdict; and this means that they must be unanimous in determining whether the sentence should be death, which would follow as a matter of course if they bring in a verdict that "the accused is found guilty of the crime of murder in the first degree," and they must be equally unanimous if they do not wish a finding of guilt to be followed by a death sentence, which they must express by a finding of guilt "without capital punishment."

MR. JUSTICE BURTON concurs in this opinion.

APPENDIX.

*State legislation concerning the punishment for first degree murder.**

A. Death penalty mandatory:

(1) Conn. Gen. Stat. § 6044 (1930).
(2) Mass. Gen. Laws c. 265, § 2 (1932).
(3) N. C. Code Ann. § 4200 (1939).
(4) Vt. Pub. Laws § 8376 (1933).

B. Death penalty abolished:

(5) Me. Rev. Stat. c. 117, § 1 (1944).
(6) Mich. Stat. Ann. § 28.548 (1938).
(7) Minn. Stat. § 619.07 (1945).
(8) R. I. Gen. Laws c. 606, § 2 (1938) (penalty for murder in first degree is life imprisonment unless person is under life imprisonment sentence at time of conviction).
(9) Wis. Stat. § 340.02 (1945).

C. Death penalty not mandatory:

I. States where jury recommendation of life imprisonment is not binding on trial court:

(10) Del. Rev. Code § 5330 (1935).
(11) N. M. Stat. Ann. § 105–2226 (1929).
(12) Utah Rev. Stat. Ann. § 103–28–4 (1933).

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*It is appropriate to give warning that the meaning attributed to some of the statutes by this classification does not have the benefit of guiding State adjudication. The ascertainment of the proper construction of a State statute when there is not a clear ruling by the highest court of that State is treacherous business. Nor can one be wholly confident that he has found the latest form of State legislation.

C. Death penalty not mandatory—Continued.

II. States where jury's verdict must specify whether the sentence is to be death or life imprisonment:

(13) Ark. Dig. Stat. § 4042 (1937) (as interpreted by the courts).

(14) Colo. Stat. Ann. c. 48, § 32 (1935).

(15) Ill. Ann. Stat. c. 38, § 360 (1935).

(16) Ind. Ann. Stat. §§ 10–3401 and 9–1819 (Burns 1942).

(17) Iowa Code § 12911 (1939).

(18) Kan. Gen. Stat. Ann. § 21–403 (1935).

(19) Ky. Rev. Stat. Ann. §§ 435.010 and 431.130.

(20) Mo. Rev. Stat. Ann. § 4378 (1939) (as interpreted by the courts).

(21) N. D. Comp. Laws Ann. § 9477 (1913).

(22) Okla. Stat. Ann. tit. 21, § 707 (1937).

(23) Pa. Stat. Ann. tit. 18, § 4701 (1945).

(24) S. D. Sess. Laws 1939, c. 30, amending S. D. Code § 13.2012 (1939) (but even if jury specifies death sentence, court "may nevertheless pronounce judgment of life imprisonment").

(25) Tenn. Code Ann. § 10772 (Williams 1934).

(26) Tex. Pen. Code Ann. art. 1257 (1936). ("The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two."—Courts have interpreted statute as requiring jury to specify penalty.)

(27) Va. Code Ann. § 4394 (1936) (as interpreted by the courts).

C. Death penalty not mandatory—Continued.

III. States where sentence of death *or* life imprisonment is at the discretion of the jury:

(28) Ala. Code Ann. tit. 14, § 318 (1940).
(29) Ariz. Code Ann. § 43–2903 (1939).
(30) Cal. Pen. Code § 190 (1941).
(31) Ga. Code Ann. § 26–1005 (1936).
(32) Idaho Code Ann. § 17–1104 (1932).
(33) Mont. Rev. Code Ann. § 10957 (1935).
(34) Neb. Rev. Stat. § 28–401 (1943).
(35) Nev. Comp. Laws Ann. § 10068 (1929).

IV. States where the punishment is life imprisonment unless the jury specifies the death penalty:

(36) N. H. Rev. Laws c. 455, § 4 (1942).
(37) Wash. Rev. Stat. Ann. § 2392 (1932).

V. States that have statutes more or less like the federal provision under consideration:

(38) La. Code Crim. Law & Proc. Ann. art. 409 (1943).
(39) Md. Ann. Code Gen. Laws art. 27, § 481 (1939).
(40) N. J. Stat. Ann. § 2:138–4 (1939).
(41) N. Y. Crim. Code and Pen. Law § 1045–a.
(42) Ohio Gen. Code Ann. § 12400 (1939).
(43) Ore. Comp. Laws Ann. § 23–411 (1940).
(44) S. C. Code Ann. § 1102 (1942).
(45) W. Va. Code Ann. § 6204 (1943).
(46) Wyo. Comp. Stat. Ann. § 9–201 (1945).

C. Death penalty not mandatory—Continued.

VI. States that give effect to jury recommendation for life imprisonment even when jury is not unanimous in making that recommendation:

(47) Fla. Stat. Ann. § 919.23 (1944). ("Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life.")

(48) Miss. Code Ann. § 2217 (1942). ("Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment . . . in which case the court shall fix the punishment at imprisonment for life.")

Syllabus.

UNITED STATES *v.* SOUTH BUFFALO RAILWAY CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 198. Argued February 2, 1948.—Decided April 26, 1948.

1. The commodities clause of the Interstate Commerce Act does not prevent a railroad from transporting commodities of a corporation substantially all of whose stock is owned by a holding company which also owns substantially all of the stock of the railroad, unless the control of the railroad is so exercised as to make it the *alter ego* of the holding company. *United States* v. *Elgin, J. & E. R. Co.*, 298 U. S. 492. Pp. 772–785.
2. In the light of the equitable considerations involved in this case and the fact that Congress rejected as too drastic an amendment proposed for the specific purpose, *inter alia*, of setting aside the decision of this Court in *United States* v. *Elgin, J. & E. R. Co.*, *supra*, this Court declines to overrule that interpretation. Pp. 773–784.
3. The evidence in this case does not prove that the holding company, in either the legal or economic sense, disregarded the separate entity of its subsidiary railroad or treated it as its *alter ego*. Pp. 784–785.
4. Voluntarily abandoned courses of conduct are not grounds for injunction, though they may sometimes be relevant evidence of intent or similar issues. P. 774.

69 F. Supp. 456, affirmed.

A District Court denied an injunction against alleged violations of the commodities clause of the Interstate Commerce Act, 49 U. S. C. § 1 (8). 69 F. Supp. 456. On direct appeal to this Court, *affirmed*, p. 785.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Sonnett, Robert G. Seaks* and *Robert W. Ginnane.*

Bruce Bromley argued the cause and filed a brief for appellees.

C. A. Miller and *Wm. J. Kane* filed a brief for the American Short Line Railroad Association, as *amicus curiae*, urging affirmance.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The Government, by direct appeal from the District Court,[1] invites us to reconsider and overrule the interpretation of the commodities clause of the Interstate Commerce Act [2] promulgated in *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492. That holding, in substance, is that the prohibition [3] against a railroad company transporting any commodity which it owns or in which it has an interest, except for its own use, does not prevent it from transporting commodities of a corporation whose stock is wholly owned by a holding company which also owns all of the stock of the railway, unless the control of the railway is so exercised as to make it the *alter ego* of the holding company.

The present challenge to that doctrine is predicated on the following facts: Bethlehem Steel Corporation (the

[1] 49 U. S. C. § 45; 28 U. S. C. § 345.

[2] 49 U. S. C. § 1 (8).

[3] The complete text of the commodities clause provides: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

holding company) owns substantially all of the stocks of South Buffalo Railway Company (South Buffalo) and of Bethlehem Steel Company (the Steel Company). At its Lackawanna plant, near Buffalo, N. Y., the Steel Company produces steel and from it fabricates various products. These commodities are transported by the South Buffalo from the plant to the rails of trunk-line carriers. In fact, South Buffalo provides the sole terminal connection between this industry and the trunk-line railroads. It operates about 6 miles of main-line track and 81 miles of spur track, 58 miles of its trackage being on leased right-of-way within the steel plant where it connects with other trackage owned by the Steel Company itself.

While about 70% of South Buffalo revenues have been derived from the Steel Company traffic, it also renders terminal switching for 27 unrelated industries, some of considerable size. It enables all of them to ship, by direct connection, over five trunk-line systems and through interchange over seven more.

South Buffalo performs no transportation service and owns no facilities outside of the State of New York, where it operates only within the Buffalo switching district. It is classified by the Interstate Commerce Commission as an "S–1" carrier, which is defined as one engaged in "performing switching services only." It files tariffs covering switching service, both with the Interstate Commerce Commission and with the New York Public Service Commission. It does not appear to participate with any line-haul railroad in a through interstate route or to receive a division of any joint or through rate.

In 1936 this Court decided *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492, and held that the production and transportation set-up of the United States Steel Corporation, one of Bethlehem's competitors, did not violate the commodities clause. Thereupon, Beth-

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lehem made a study of the relations between itself, South Buffalo and the Steel Company in the light of this decision. It revised its intercorporate relationship in the next few years to comply, as it was advised, with the conditions under which this Court had found the statute inapplicable to United States Steel. It does not seem necessary to recite the complex details of intercorporate dealings before the reorganization about 1940 as this action for injunction was not begun until 1943 and the crucial question is whether there was a contemporaneous violation or a threat of violation against which the writ of the Court should be directed. Voluntarily abandoned courses of conduct are not grounds for injunction, though they may sometimes be relevant evidence of intent or similar issues.

At all times crucial to the Government's case, Bethlehem controlled the stock of both the shipper and the carrier corporations. It unquestionably had power to favor its shipping subsidiary at the expense of its carrying subsidiary, or vice versa. The first question is whether we will now hold that mere possession of the power, regardless of whether it is exercised or remains dormant, makes out a violation of the statute. This Court said in the *Elgin* case that it does not.

It is the Government's contention that the *Elgin* decision misconstrued the Act, misunderstood its legislative history and misapplied the Court's own prior decisions. It is not necessary in the view we take of the case to decide to what extent, if any, these contentions are correct. It is enough to say that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved. But we do not write on a clean slate. What the Court has written before is but one of a series of events, which convinces us that its overruling or modification should be left to Congress. As the Court held on our last decision day, when the questions are

of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. *Massachusetts* v. *United States,* 333 U. S. 611, decided April 19, 1948. Moreover, in this case, unlike the cited one, Congress has considered the alleged mistake and decided not to change it.

The Interstate Commerce Commission, after repeatedly calling the attention of Congress to the *Elgin* case during its pendency, in 1936 reported its defeat in the litigation. Referring to commodities clause cases it said, "We recommend that Congress, in the light of facts already made available in our reports and in reports of investigations conducted by congressional committees, shall determine the appropriate limit of our jurisdiction in such cases and whether further legislation to extend that jurisdiction is necessary." [4] Congress took no action.

But its inaction has not been from inadvertence or failure to appreciate the effect of the Court's interpretation. A bill was introduced in the Senate containing language relating to affiliates and subsidiaries calculated in effect to set aside the *Elgin* decision.[5] Section 12 of the bill as introduced read as follows:

> "It shall be unlawful for any carrier by railroad *and, on and after January 1, 1941, it shall be unlawful for any carrier, other than a carrier by air,* to transport, in commerce subject to this Act, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by or under the authority of such carrier *or any subsidiary, affiliate, or controlling person of such carrier,* or any such article or commodity in

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[4] 50th Annual Report I. C. C. 30 (1936).

[5] S. 2009, 76th Cong., 1st Sess., March 30 (legislative day March 28) 1939.

> which such carrier, *subsidiary, affiliate, or controlling person* has any interest, direct or indirect, *legal or equitable,* except such articles or commodities as may be necessary or intended for use in the conduct of the carrier business of such carrier."

The italicized portions indicate the proposed additions which would have extended the clause to cover (1) carriers other than railroads, and (2) subsidiaries, affiliates and controlling persons.

At the beginning of hearings thereon by the Senate Committee on Interstate Commerce its chairman said that, with respect to the commodities clause, the purpose of the Bill was "To make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect." [6] A week later, in the course of the hearings when evidence began to be offered showing the effect the proposed clause might have on various industries, the chairman made this statement:

> "Let me say this to you with reference to the commodities clause, so that there will not be a lot of time wasted on it. I am speaking for myself and not for the committee. I think the commodities clause will have to be changed; and if we are going to make such drastic changes in the commodity clause as this bill would suggest, I think it ought not to be incorporated in this particular piece of legislation, but should come up as a separate piece of legislation so that we can devote considerable time and thought to that particular subject. This would so change the economic structure of a lot of industries that I

[6] Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess., 3 (April 3, 1939).

think it is something that would have to have particular consideration in a separate piece of legislation." [7]

In a further discussion the Chairman added: "I might say, also, that if the commodities clause should stay in as it is at the present time it would disrupt a great many industries, and I would seriously question as to whether or not I wanted to attempt anything of that kind at this time, particularly in this specific piece of legislation." [8]

When the bill was reported to the Senate, the proposed change had been eliminated and the original language of the Act retained. The Committee, in reporting the bill, said, "The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein." [9]

The Government argues that the characterization of the rejected revised commodities clause as "too drastic" was based on the proposed extension of its terms to all common carriers and not on the proposal to include a "subsidiary, affiliate, or controlling person" of a carrier. We believe, however, that a fair reading of the legislative history leads to the conclusion that the "drastic readjustment" feared by the Committee was that expected from the application sought here by the Government, at least as much as that feared from extension of the clause to cover carriers other than railroads. If the Committee objected only to extending the clause to other carriers, it would have been a simple matter to delete the short series of words which would have accomplished that change, and still leave undisturbed the more complicated provision concerning subsidiaries and affiliates, since the text of each provision is wholly disconnected from the other.

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[7] *Id.*, at 427 (April 10, 1939).

[8] *Ibid.*

[9] Senate Report No. 433, 76th Cong., 1st Sess., 15 (May 16, legislative day May 8, 1939).

In view of the foregoing, it seems clear that when, in discussing whether or not this revised clause would have "prevented the steel company, or somebody in that position, from operating their own railroad," the Committee Chairman said "I did not intend such a result," he expressed the view which prevailed in the Committee and in the Congress.

The Government now asks us to apply the unchanged language as if Congress had adopted the proposal which it rejected as "far too drastic." The considerations which led to the suggestion that the problem presented by the Government's position would require separate legislation and particular consideration seems to us to require that the problem be left to legislation rather than to the judicial process. And the pertinent portions of the legislative history which are set out at length in the margin [10] indi-

[10] The extent of the consideration which the Senate Interstate Commerce Committee gave to the proposed revision of the commodities clause is indicated by the following excerpts from Hearings on S. 2009, held from April 3 to April 14, 1939:

In opening the hearing, Senator Wheeler, Chairman, stated that, with respect to the commodities clause, the purpose of the bill was "to make effective the intent of Congress in prohibiting railroads, or other carriers after January 1, 1941, from transporting products not utilized in the conduct of their transportation business but in which they have an interest, direct or indirect."

During the testimony of the General Counsel, Association of American Railroads, the following colloquies took place:

"Senator Reed. Judge, in section 12 there is some new language. I have marked it 'O. K.' here. That is to cover the decisions of the Supreme Court in the *E. J. & E. case?*

Mr. Fletcher. I will get to that in just a moment. There is new language in there. . . .

. . . . . .

Mr. Fletcher. I come to section 12, the commodities clause, about which I would like to say a word.

It was the thought of those who drew the bill, H. R. 4862, to undertake to put into statutory form the recommendation of the Committee of Six that they ought to extend the commodities clause,

cate clearly, we think, that this Senate Committee responsible for S. 2009, which became the Transportation Act of 1940, deliberately refused to recommend and the Con-

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which now applies only to railroads, to water carriers and motor carriers as well.

Now, I think the water carrier people will object to that . . . .

. . . I think some of the steel companies have water operations of that kind. I mention that as a change in the law suggested by the draftsmen who prepared the bill, reflecting the views of the Committee of Six.

The Chairman. Judge, somebody called me on the phone the other day . . . and asked me as to whether or not in my opinion this prevented the steel company, or somebody in that position, from operating their own railroad, where they have a small railroad that they are operating. *I did not intend such a result.* [Emphasis supplied.]

Mr. Fletcher. This bill has no relation to that. One of my associates suggests, Senator, that possibly this language, which I was just about to mention and which was called to my attention a few minutes ago by Senator Reed, might possibly have that effect.

Senator Reed. *I would disagree with the chairman,* if I may be so bold. *I think the commodities clause would have that effect in the bill that we are currently discussing.* [Emphasis supplied.]

Mr. Fletcher. When I said so promptly and perhaps rashly that I did not think it did, I did not have in mind this particular amendment, which I will now mention.

Senator Reed. *I am perfectly willing that it should have that effect.*

The Chairman. *Well, I doubt that it should.* For instance, a lumber company may own some railroad.

Senator Reed. You exempt that?

Mr. Fletcher. You exempt the lumber company?

The Chairman. Yes.

Mr. Fletcher. It might not be altogether lumber.

The Chairman. *I was speaking, for instance, of some steel company or some other industrial company which might own a short railroad.* [Emphasis supplied.]

Senator Reed. The United States Steel Co. owns the Union Railroad Co.

The Chairman. I do not know what the Union Railroad Co. is.

Senator Reed. It is a short road.

Mr. Fletcher. I think the E. J. & E. started all this shouting.

Senator Reed. In section 12, on page 44, beginning at line 22, it

gress refused to legislate into the law the change we are now asked to make by judicial decision.

We could, of course, refuse to follow the *Elgin* precedent, and apply a different and more drastic rule to Bethlehem than applies to its competitor. Congress,

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reads: 'or produced by or under the authority of such carrier or any subsidiary, affiliate'—and this is the language—'or controlling person of such carrier.'

Mr. Fletcher. That is new, you see.

Senator Reed. That is new. I am in accord with the chairman on that language.

Mr. Fletcher. I do not know, Mr. Chairman, but I do think it is a trifle unfortunate to try to accomplish so drastic a thing in a bill of this kind, the thought of which was to reproduce existing law.

The Chairman. *I am very doubtful about it. I am afraid that it will cause such a drastic readjustment.* [Emphasis supplied.]

Mr. Fletcher. The E. J. & E. Co. [case]——

The Chairman (interposing). I am not familiar with the E. J. & E. case.

Mr. Fletcher (continuing).—brought about this suggestion here. There the United States Steel Corporation does not own the E. J. & E. directly, but through the medium of the Illinois Steel Corporation, a subsidiary of the United States Steel Co.—and I may get that a little confused——

Senator Reed (interposing). You have.

Mr. Fletcher. My recollection is that the United States Steel Corporation owns a company—you might call it a holding company—which holding company owns both the E. J. & E. and the steel corporation.

It was contended by the Government that when the E. J. & E. transported freight for the Illinois Steel Corporation they were violating the commodities clause, because either directly or indirectly the railroad owned this traffic that was being transported, but the Supreme Court of the United States held not, but where you had one company or person who owned both the railroad and the commercial enterprises that produced the tonnage, the transportation by the railroad of that tonnage was not equivalent to the transportation by the railroad of tonnage which it owned.

Senator Reed. Judge, you remember that Justice Stone, Justice

however, in making a rule for the future, can make one of impartial application to all like situations. Limitations that are traditional upon our powers do seem not to permit us to do so.

Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E. case*.

Mr. Fletcher. That is right.

Senator Reed. And Justice Stone wrote the dissenting opinion.

Mr. Fletcher. Yes.

Senator Reed. I am inclined to think that the Supreme [*sic*], as presently constituted, would hold with what was the minority view.

Mr. Fletcher. I would not express any opinion on that.

Senator Reed. I speak frankly, being no lawyer myself.

Mr. Fletcher. Whether that is wise or unwise, I doubt if it ought to be done in this legislation and in this bill.

Senator Reed. I thought Justice Stone wrote a more logical opinion that Justice Butler did. I think it was Justice Butler who wrote the majority opinion in that *E. J. & E. case*.

Mr. Fletcher. I think it was." [Justice McReynolds wrote the opinion of the Court.]

Later, during the testimony of counsel for Mississippi River System Carriers' Association, the following statements concerning the commodities clause were made:

"Senator Reed. . . . and I think we might give further consideration to that commodities clause.

Mr. Bayless. It is too drastic, also.

Senator Reed. It was probably tightened up when, which I say as a layman and therefore not in fear of being criticized, the Supreme Court of the United States made a strange decision in the *E. J. & E. case*. This was tightened to meet that E. J. & E. decision, because I think that was a strange construction of the law on the part of the Supreme Court of the United States."

Testimony by counsel for coal operators led to the following:

"Senator White. What changes have been made in the commodities clause?

Mr. Norman. Very substantial ones.

The Chairman. Very substantial.

Mr. Norman. That is on page 44.

The Chairman. What we tried to do, to be frank with you, was

Whatever may be said of the *Elgin* decision, when the Committee of Congress faced the readjustments its overruling would force, and with special reference to the steel

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to try to adapt it to meet the decision of the Supreme Court in the *E. J. & E. case*.

Senator Reed. I think, of course, what Mr. Norman has in mind is that it goes further than that, in that for the first time we are applying the commodities clause to water carriers.

Senator White. I understood that, but in what other respects?

Senator Reed. I think that is the only respect.

Mr. Norman. Well, no; as the Senator says, it probably would get around the Supreme Court decision in the *E. J. & E. case*, because it puts in there the words 'subsidiary, affiliate, or controlling person of such carrier.'

The Chairman. That is right."

A discussion of the effect on coal-industry contract carriers followed. Then:

"Mr. Norman. So that commodities clause, again, is a big one and certainly ought to be studied before there are any changes made in it. It is loaded with dynamite so far as business is concerned.

Senator Reed. You may have one kind in mind, but there are many of them.

The Chairman. There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, 'In reenacting the law you approved the decision of the Supreme Court.' "

On April 10, 1939, the Chairman, in addition to the statements quoted in the body of this opinion also said:

". . . I want to say that I think it is foolish for a lot of people to come in here and waste our time and their own time in talking about that [the commodities clause], and for that reason I wanted to make it clear by that statement. . . .

"As I said before, this is such a broad subject and it would undoubtedly cause a tremendous upset in many lines of business, that it is questionable whether we would want to make such a radical departure from the present system."

As pointed out in the text, when the Bill was reported to the Senate, the proposed changes in the commodities clause had been abandoned. The Committee report stated:

". . . The commodities clause, forbidding a carrier by railroad to transport any article or commodity in which it has an interest

industry,[11] it concluded the decision should be allowed, at least for the present, to stand. We cannot ignore the considerations they found to be so persuasive, and which are equally involved in the request that we do what Congress considered and abandoned.

The relief asked of us as a court of equity is so drastic in nature as to afford an example of an "upset" in an industry owning a short line of railroad of the type referred to by the Chairman of the Interstate Commerce Committee of the Senate, who said "it is questionable whether we would want to make such a radical departure from the present system." The demand is for an injunction perpetually to enjoin and restrain South Buffalo from transporting commodities in which the Steel Company or the holding company owns an interest. There is no other rail route by which inbound raw materials or outbound products of this huge industry can reach trunk-line railroads. And the traffic that we are asked thus to prohibit yields 70% of the railroad's revenues, and if taken away would doubtless substantially increase the cost of service to the unaffiliated industries that would remain to be served. Of course, what is literally asked is probably not what is ultimately desired. To forbid the physical operation as now conducted would be needlessly damaging to both shipper and carrier. What is aimed at, we suppose, is to force such a change of financial structure as will divorce shipper interest from all transportation interest. It seems clear, however, in the light of the legislative his-

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direct or indirect, with certain exceptions not very material [timber and timber products], has been retained. . . ."

"Section 12. Commodities Clause. This provision retains the 'commodities clause' (sec. 1 (8) of Interstate Commerce Act), now applicable only to railroads, in its present form. The rewritten commodities clause was considered far too drastic and the subcommittee early decided against any change therein."

[11] See note 10.

tory, that this is the kind of operation that Congress did not want to prohibit because the prohibition was thought too drastic. If an independent ownership could be found for South Buffalo, it might be desirable. But independent ownership of a dependent facility wedged in between shippers, one of whom controls 70% of its revenues, and the trunk-line railroads, is not shown to be likely. Under the Government's theory, no other shipper or group of shippers any more than Bethlehem could own the road. Nor is it clear that any evils exist or are threatened which would be eliminated if this operation were transferred to control of one of the trunk-line railroads or to a pool of them. This road, despite its shipper ownership, is bound by both federal and state law to serve all shippers without discriminations or unreasonable charges. The Commission has power to exact compliance with these duties. The argument, however, is that a situation exists which presents opportunity and temptation for abuse and for concealed evasions of duty. But to forestall possible abuses we are asked to apply a remedy which there is indication failed of congressional approval because its application to many situations would be too drastic and would do greater injury to shipper and transportation interests than could result from its withholding. In the light of the history of this clause since the *Elgin* decision and the equitable considerations involved in this case, we decline to overrule the interpretation Congress has not seen fit to set aside.

The argument is made that even accepting the *Elgin* decision the evidence here establishes that Bethlehem has so exercised its power over South Buffalo as to reduce the railroad to a mere department of Bethlehem. The trial court found against the Government and considered that on this subject this case contains much less proof to sustain an injunction than did the *Elgin* case. Without reciting the voluminous evidence in detail, we agree.

Bethlehem, as a stockholder, of course controlled South Buffalo. It did not, however, disregard in either the legal or economic sense, the separate entity of its subsidiary or treat it as its own *alter ego*. On the contrary, it rather ostentatiously maintained the formalities of separate existence, choosing as directors several Buffalo citizens who were not interested in Bethlehem. We are not naive enough to believe that Bethlehem chose men for the posts whose interests or records left any fair probability that they would act adversely to Bethlehem in representing its interest as chief stockholder of the railroad. Nor has any instance been cited in which the best interests of the railroad would require them to do so. So long as Congress considers it inadvisable to extend the prohibition of the commodities clause to subsidiaries and affiliates, we see nothing that Bethlehem has done to incur liability for its violation. Of course, it could not expect the Commission or the courts to respect a corporate entity which Bethlehem itself disregarded; but that it has not done. The subsidiary would not have to establish its separate identity by a course of hostility to its sole stockholder or its chief customer. Its identity has been preserved in form and in substance—the substance of separate corporate existence being itself largely a matter of form. Under the *Elgin* case and until Congress shall otherwise decide, this is sufficient.

Judgment affirmed.

MR. JUSTICE RUTLEDGE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY join, dissenting.

This is another case where the Court saddles Congress with the load of correcting its own emasculation of a statute, by drawing from Congress' failure explicitly to overrule it the unjustified inference that Congress ap-

proves the mistake. I think that *United States* v. *Elgin, Joliet and Eastern R. Co.*, 298 U. S. 492, was decided in the teeth of the commodities clause, 49 U. S. C. § 1 (8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one.

The commodities clause forbids "any railroad company to transport . . . any article or commodity . . . in which it may have any interest, direct or indirect . . . ." The *Elgin* decision made the clause "in which it may have any interest, direct or indirect" read, in effect, "in which it may have any interest, direct or indirect, unless the interest is indirectly held through 100 per cent stock ownership of another corporation and hence 100 per cent interest in that company's profits, or through some other corporate arrangement having like effects."

The simple question for decision under the statute is whether the South Buffalo Railway has an interest, "direct or indirect," in the commodities which it hauls for the affiliated Bethlehem Steel Company. Any attempt to answer by a factual inquiry into the degree of control which the Holding Company or the Steel Company has actually exercised over the railroad can only complicate a simple problem.[1] Only by the most sophisticated, or unsophisticated, process of reasoning can it be concluded that any one of the many subsidiary members of this integrated steel-producing empire [2] has no interest in the

[1] See Comment, The Commodities Clause and the Regulation of Industrial Railroads, 46 Yale L. J. 299; 36 Col. L. Rev. 1175.

[2] The Holding Company owns substantially all the stock in approximately 57 subsidiaries, including the Steel Company and the South Buffalo Railway Company. Some of these produce ore in Chile, Venezuela, Cuba and in the Upper Great Lakes regions; others control coal mines in West Virginia and Pennsylvania. Two subsidiaries operate ocean-going steamship lines, hauling raw materials

operations of every other member. Particularly, the railroad has an interest in the production of the Steel Company, "for all of the profits realized from the operations of the two must find their way ultimately into its [the Holding Company] treasury,—any discriminating practice which would harm the general shipper [3] would profit the Holding Company." *United States* v. *Reading Co.*, 253 U. S. 26, 61. Here a railroad and one of its customers are both wholly owned subsidiaries of the same holding company. It is clear to me, and the Court does not deny, that the railroad in fact is occupying the inconsistent positions of carrier and shipper which the commodities clause was designed to prevent. *United States* v. *Reading Co., supra.*[4]

The Court does not dispute that it would so hold if the clause had not been construed differently in the *Elgin* case. But even on the assumption that the statute was then misconstrued, the Court is unwilling to correct its own error because it concludes that Congress has subsequently indicated approval of the *Elgin* decision. This

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to steel plants controlled by other subsidiaries. A Great Lakes shipping company owned by the Holding Company carries ore from a mining subsidiary to a producing subsidiary. Seven short-line railroads including South Buffalo, each wholly owned by the Holding Company and having common officers and directors, transport products for the various Bethlehem steel plants.

[3] The opinion of the Court seems to assume that the purpose of the commodities clause was to prevent the holding company from favoring "its shipping subsidiary at the expense of its carrying subsidiary, or vice versa."

[4] Moreover, the conclusion is factually justified by the history of complete domination prior to 1940 plus the fact that former employees of the Steel Company continue to be the principal officers of South Buffalo as well as the other Bethlehem short-line railroads. "Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control." *North American Co.* v. *S. E. C.*, 327 U. S. 686, 693.

conclusion is based on a distorted view of the legislative history of the Transportation Act of 1940, particularly of § 12 of S. 2009, which would have amended the commodities clause if adopted. Since the proposed § 12 would have overruled the *Elgin* case, and since it was rejected in committee as "far too drastic,"[5] it is inferred that Congress has expressed approval of that case.

The conclusion does not follow because the premise is wrong. The argument overlooks the crucial inquiry, namely, the reason for which Congress considered the proposed § 12 "far too drastic." If this reason had been an objection to applying the commodities clause to the wholly owned subsidiary relationships present in this and the *Elgin* cases, the argument might have some pertinence. But that was not the reason. On the contrary, the two Senators who were most active in sponsoring the bill and in the conduct of the hearings on it felt that no legislation would be necessary if no more were intended than a reversal of the *Elgin* case.[6] That was only one of several

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[5] Sen. Rep. No. 433, 76th Cong., 1st Sess. 15; Hearings before Senate Committee on Interstate Commerce on S. 2009, 76th Cong., 1st Sess. 427, 590, 772.

[6] Senator Reed expressly so stated: "Judge, you remember that Justice Stone, Justice Brandeis, and Justice Cardozo dissented from that majority opinion of the Supreme Court in the *E. J. & E. case*. . . . I am inclined to think that the Supreme [*sic*], as presently constituted, would hold with what was the minority view." Hearings before Senate Committee on S. 2009, 76th Cong., 1st Sess. 68. He later said that he thought the *Elgin* decision "was a strange construction of the law on the part of the Supreme Court of the United States." *Id.* at 309.

The views of Senator Wheeler seem clearly to the same effect. When it was first suggested that the proposed commodities clause would overrule the *Elgin* case, he stated (apparently because he was interested primarily in extending the clause to apply to other types of carriers): "I did not intend such a result." When the effect of the clause was pointed out to him, he expressed doubt whether that

broad purposes of the bill, others being much more sweeping. The new commodities clause, instead of applying only to railroads, would have applied to all types of carriers except air carriers. It is perfectly clear from a reading of the hearings that this proposed application to carriers of all types was what was considered "far too drastic" a change to be included in the Transportation Act of 1940.

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case should be overruled, not because he approved it, but as he explained because "I am not familiar with the E. J. & E. case." *Id.* 67–68.

Three days later, when the point was again under discussion, Senator Wheeler, at this time apparently refreshed in recollection of the *Elgin* case, frankly stated that one of the purposes of the revised clause was to meet the Supreme Court decision in it. The witness then expressed the view that the revised clause went considerably beyond the decision because it applied to other types of carriers, and to situations where the shipper owned only ten per cent of the carrier's stock. The witness suggested that, if the intent was merely to reverse the *Elgin* case, it would be better to leave the clause in its present form, because "I do not believe the decision in the *E. J. & E. case* is going to prove to be one of the laws of the Medes and the Persians." *Id.* 385.

After more discussion of the effect of the amended version on water carriers and pipe lines, Senator Wheeler remarked: "There are difficulties on that question, in my mind. Suppose we reenacted the law as it is. The question is whether the courts might say, in view of the Supreme Court's decision, 'In reenacting the law, you approved the decision of the Supreme Court.'" *Id.* 386.

The Senator thus was faced with a dilemma. At this point he was apparently persuaded that the extension of the commodities clause to all carriers was a more drastic change than he had originally realized, but hesitated to reenact the old version lest the reenactment be construed as legislative approval of the *Elgin* case. His fear has now been justified by today's decision. It was not until the following week that he reached the conclusion that the drastic nature of the proposed change outweighed the risk that reenactment would be construed as approval of that case. *Id.* 427; and see statements quoted in note 12 *infra*. Such a choice hardly can be construed into "approval" of the decision.

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The crucial importance of this extension is abundantly shown from the vigorous objections on behalf of parties that would have been affected by extending the commodities clause to water carriers,[7] to pipe lines,[8] and to motor carriers.[9] It was argued repeatedly that it was proper for shippers to control interests in these carriers for reasons not applicable to carriers by rail. These arguments cannot be read without concluding that the change, whether desirable or not, would have been drastic indeed and would have gone far beyond the intended coverage of the Transportation Act of 1940.[10] Rather than jeopardize the entire legislative program comprehended by the Act,[11] the committee naturally decided that sound strategy required separate consideration of this narrower, but still broad and highly controversial problem.

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[7] *Id.* 236, 284–286, 308–310, 385–387, 427–432, 492, 623, 632–633, 692, 753–754, 926–928.

[8] *Id.* 386, 589–597, 606–610, 611–612, 654–660, 736–742.

[9] *Id.* 127, 432–433.

[10] For example, the petroleum industry strenuously opposed the provision because it would have effected the divorcement of pipeline companies from producers. See note 8 *supra*; cf. *id.* at 935. Opposition by farm lobbies was directed particularly at the new commodities clause: "Section 12 appears to endanger the activities of more than 100,000 farmers of our area who have cooperatively associated themselves together and who, because of exorbitant rail rates, are transporting increasing tonnage of grain, livestock, and petroleum products both through cooperative trucking associations and by trucks owned by local or regional cooperatives." *Id.* 432–433. See also *id.* 311. The most vigorous opposition, however, came from parties who would be adversely affected by the applicability of the clause to water carriers. See note 7 *supra*. They pointed out, as an instance of the far-reaching effect of the amendment, that 65 per cent of the privately owned American merchant marine would be affected by the change.

[11] See Hearings 772; cf. note 10 *supra*.

Statements of the committee chairman show that this was the real basis for the conclusion that the amendment would have been "far too drastic." [12] Indeed they show, together with other statements before the committee, that the *Elgin* decision was regarded as unfortunate and likely to be overruled when another case should arise.[13] Even the opposition by the short-line railroads was based not on the argument that an overruling of the *Elgin* case would have been too drastic, but rather on the fact that the amended § 12, in conjunction with other proposed legislation, would have prohibited the transportation of commodities for anyone who owned, even as an investment, as much as ten per cent of the stock of the railroad.[14] And other groups argued that the amendment was too drastic because it was not limited to common carriers.[15] In sum, the proposed amendment was indeed

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[12] Senator Wheeler explained the basis for the decision to abandon the proposed amendment more than once. To shorten testimony by witnesses interested in the effect of the clause on pipe lines and water carriers he stated: "You might as well quit wasting your time, because I made an announcement yesterday with reference to that, and I hope you people will not come here with the idea of taking up a lot of time on that. I have said that pipe lines are a subject that ought to be given independent consideration, and we cannot take it up and give it the necessary time and study in this bill. That may be modified or eliminated, so far as pipe lines and water carriers are concerned." *Id.* 590. Later he said: "I have felt, frankly, that in this particular legislation, which does divorce, ships from industry, that it was such a broad subject, and one which required so much independent study, that it ought to be handled by separate legislation. No one in the Government service seems to have made a study of the question. I felt that it ought to be eliminated from the provisions of this bill at this time, and be introduced as separate, independent legislation, as has been done in the past." *Id.* 772.

[13] See note 6.

[14] Hearings 541; and see *id.* 285, 385–386.

[15] *Id.* 421, 435, 841.

drastic, but not because it would have accomplished what the committee members assumed this Court would and should do without legislative aid.[16] It is therefore most unreasonable to conclude that the considerations which prompted the Senate Committee to reject a proposed extension of the commodities clause to all types of carrier compel this Court to deny a request to overrule an interpretation of the impact of the clause on railroads which the most active sponsors regarded as erroneous.

The host of reasons which may have induced the various members of the committee to forego the extremely controversial and drastic extensions forbids any inference that the committee action was the equivalent of approval of the *Elgin* case by the entire Congress. In fact, the difficulty of interpreting the views of even one legislator without taking account of all he has had to say, as exemplified by the discussion in note 6, should serve as a warning that the will of Congress seldom is to be determined from its wholly negative actions subsequent to the enactment of the statute construed. In this case the rejection of the proposed amendment is not more, indeed I think it is less, indicative of congressional acquiescence than complete inactivity would have been. Even if there may be cases where the "silence of Congress" may have some weight, that ambiguous doctrine does not require or support the result which the Court reaches today. *Girouard* v. *United States,* 328 U. S. 61; cf. *Cleveland* v. *United States,* 329 U. S. 14, concurring opinion at 21.

Nor is that result justified by the "equitable" considerations which the Court's opinion somewhat obliquely advances. It is suggested that a refusal to follow the *Elgin* precedent would be to apply a different and more drastic rule to Bethlehem than applies to its competitor,

[16] See note 6.

the United States Steel Corporation. But, aside from the specious character of an argument that permits X to violate the law on the ground that Y also violates it, there is no explanation offered for the assumption that the overruling of the *Elgin* case would have no effect on United States Steel. The policy of *res judicata* would not apply, cf. *Commissioner* v. *Sunnen,* 333 U. S. 591, and United States Steel, instead of being prejudiced by the course of decision, actually has been benefited by more than a decade of ownership of the Elgin road, contrary to the statute's plain terms and policy.

The Court also feels that the relief requested is too drastic because Bethlehem would be compelled to sell its short-line railroads, the Government has not shown that independent ownership of these railroads is likely, nor has it shown that evils exist which would be remedied by this relief. These are considerations which undoubtedly influenced the majority in the *Elgin* case, somewhat differently it would seem from the majority in this one, but which the dissenting justices felt had been foreclosed by the legislative determination of policy. Reliance on such arguments today seems inconsistent with the statement "that if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." Moreover, it does not follow that this Court in the exercise of its equity jurisdiction could not adapt the relief afforded so as to give time and opportunity for making the adjustments necessary to secure conformity with the statute in an orderly and inoppressive manner. Indeed it would be the Court's duty to do this.

The arguments on this level are most effectively answered by the dissenting opinion of Mr. Justice Stone, who was joined by Mr. Justice Brandeis and Mr. Justice Cardozo, in the *Elgin* case: "The language of the commodities clause, read in the light of its legislative history,

can leave no doubt that its purpose was to withhold from every interstate rail carrier the inducement and facility for favoritism and abuse of its powers as a common carrier, which experience had shown are likely to occur when a single business interest occupies the inconsistent position of carrier and shipper. See *United States* v. *Reading Co.*, 253 U. S. 26, 60, 61. Before the enactment of the commodities clause, Congress, by sweeping prohibitions, had made unlawful every form of rebate to shippers and every form of discrimination in carrier rates, service and facilities, injurious to shippers or the public. By the Sherman Act it had forbidden combinations in restraint of interstate commerce. But it did not stop there. The commodities clause was aimed, not at the practices of railroads already penalized, but at the suppression of the power and the favorable opportunity, inseparable from actual control of both shipper and carrier by the same interest, to engage in practices already forbidden and others inimical to the performance of carrier duties to the public. See *Delaware, L. & W. R. Co.* v. *United States,* 231 U. S. 363, 370; *United States* v. *Reading Co., supra.*" 298 U. S. at 504.[17]

In my opinion this expresses the intent of the letter and the policy of the commodities clause, and we should now return to it on our own responsibility. Congress should not again be required to reenact what it has once provided for, only to have its mandate nullified in part by this Court's misconstruction.

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[17] See also note 4.

UNITED STATES *v.* SCOPHONY CORPORATION OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 41. Argued January 12–13, 1948.—Decided April 26, 1948.

A British corporation with its principal place of business in London engaged in the Southern District of New York in various but continuing efforts to conserve and exploit its television inventions and patents. This was done through a series of complex contractual arrangements made with certain American corporations and involved the British company's constant intervention and supervision. The company was represented in the New York district by two of its directors, one of whom held a comprehensive power of attorney to protect its interests in the United States. *Held:* The company was "transacting business" and was "found" in the Southern District of New York, within the meaning of § 12 of the Clayton Act, so that it could be sued and served there in a civil proceeding charging violations of §§ 1 and 2 of the Sherman Act. Pp. 796–818.

(a) The venue provision of § 12 of the Clayton Act permitting suit in any district wherein a corporation "transacts business" is met by the carrying on of business "of any substantial character." Practical, nontechnical business or commercial standards are to be applied in determining whether the requirement is satisfied. P. 810.

(b) Section 12 of the Clayton Act is not to be construed in a manner to bring back the obstacles to enforcement of antitrust policies and remedies which it was enacted to eliminate. In this case, the determination whether the British corporation was "found" within the Southern District of New York so that it could be served there is not to be made by atomizing the enterprise into minute parts or events, in disregard of the unity and continuity of the whole course of conduct. P. 817.

69 F. Supp. 666, reversed.

In a civil proceeding brought in the Southern District of New York under § 12 of the Clayton Act and charging violations of §§ 1 and 2 of the Sherman Act, the District

Court quashed service of process and dismissed the complaint as to a British corporation having its principal place of business in London. 69 F. Supp. 666. On direct appeal to this Court, *reversed and remanded*, p. 818.

Sigmund Timberg argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Sonnett, Charles H. Weston* and *Robert L. Stern.*

Edwin Foster Blair argued the cause and filed a brief for Scophony, Ltd., appellee.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The appellee Scophony, Limited is a British corporation which has its offices and principal place of business in London, England. The question is whether that company "transacted business" and was "found" within the Southern District of New York under § 12 of the Clayton Act,[1] so that it could be sued and served there in a civil proceeding charging violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The violations stated were that Scophony and the other defendants[2] had monopolized, attempted to monopolize, and conspired to restrain and monopolize interstate and

[1] "SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 Stat. 736, 15 U. S. C. § 22.

[2] The suit was instituted against Scophony, Limited (designated in this opinion as "Scophony"), Scophony Corporation of America (designated "American Scophony"), General Precision Equipment Corporation (designated "General Precision"), Television Produc-

foreign commerce in products, patents and inventions useful in television and allied industries. The cause is here on direct appeal [3] from an order of the District Court granting Scophony's motion to quash the service of process and dismiss the complaint as to it. 69 F. Supp. 666.

Scophony manufactures and sells television apparatus and is the owner and licensor of inventions and patents covering television reception and transmission.[4] With the outbreak of the European War in 1939, the British Broadcasting Corporation stopped television broadcasting. Consequently it became impossible for Scophony to continue in the commercial development, manufacture and sale of television equipment in England. It therefore sent personnel to the United States, opened an office in New York City, and began demonstrations of its product and other activities preliminary to establishing a manufacturing and selling business in this country.

Late in 1941 Scophony found itself in financial distress, in part because of restrictions imposed by the British Government on the export of currency. It became imperative that new capital from American sources be found for the enterprise. Accordingly, Arthur Levey, a director

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tions, Inc. (designated "Productions"), Paramount Pictures, Inc. (designated "Paramount"), and three individual defendants, Arthur Levey and the presidents of General Precision and Productions. The corporations, except Scophony, are incorporated in the United States.

[3] Pursuant to § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, 43 Stat. 938, 28 U. S. C. § 345.

[4] The inventions and patents in the main relate to two systems of television transmission and reception, one known as the "supersonic" system and the other as the "skiatron" system. We shall at times refer to the present and future patents, processes, designs, technical data, etc., relating to these two systems as the Scophony inventions.

A third system, the cathode-fluorescent system, was developed early in this century and is the principal method of television transmission and reception used in the United States today.

of Scophony and one of its founders, undertook negotiations in New York with American motion picture and television interests, including Paramount and General Precision. They culminated in the execution of three interlacing contracts, the so-called master agreement of July 31, 1942, and two supplemental agreements of August 11, 1942. Copies of the latter had been attached to the master agreement, which provided for their later execution, and they when executed in effect carried out its terms. The alleged violations of the Sherman Act center around these agreements.

The master agreement was executed by Scophony, William George Elcock, as mortgagee of all of Scophony's assets, General Precision, and Productions, the latter a wholly owned subsidiary of Paramount. It provided for the formation of a new Delaware corporation, American Scophony, with an authorized capital stock of 1,000 Class "A" shares and a like number of Class "B" shares. Scophony and individuals interested in it [5] were to be given the Class "A" shares. Under the agreement, ownership of those shares conferred the right to elect three of American Scophony's five directors and its president, vice president and treasurer. The Class "B" shares were allotted to General Precision and Productions. By virtue of such ownership those two corporations were entitled to name the remaining two directors and the secretary and assistant secretary of American Scophony. Levey was named in the agreement as the president and a director of the new corporation.

The master agreement set forth the general desire of the parties to promote the utilization of the Scophony inventions "particularly in the United States of America

[5] An agreement of February 4, 1943, amended the original agreement so as to give two-thirds of the "A" shares to Scophony, the remainder to individuals.

and generally in the Western Hemisphere." It then stated that American Scophony had been organized "as a means therefor." Scophony agreed to transfer all its television equipment then in the United States to American Scophony and to enter into the first supplemental agreement. Scophony, with the other parties, also undertook to cause American Scophony to enter into both supplemental agreements. For the "B" stock in American Scophony and other rights acquired, General Precision and Productions agreed to enter into the second supplemental agreement and to pay specified sums in cash to Scophony or for its benefit in liquidation of listed obligations.

Pursuant to the master agreement's terms, the first supplemental agreement was executed by Scophony, Elcock, as mortgagee of its assets, and American Scophony; the other, by American Scophony, General Precision, and Productions. For present purposes it is necessary to set forth only the general effect of the agreements taken together. Scophony transferred to American Scophony not only all of its equipment in the United States, but also all patents and other interests in the Scophony inventions within the Western Hemisphere. General Precision and Productions were granted exclusive licenses under American Scophony's patents. They agreed to pay royalties on the products produced under the licenses and American Scophony undertook to transmit fifty per cent of such royalties to Scophony. American Scophony gave Scophony an exclusive sublicense for the Eastern Hemisphere on a royalty basis under all patents licensed to American Scophony by General Precision and Productions. Provision was also made for the interchange of technical data and information respecting the Scophony inventions. Finally, it was agreed that Scophony would not market any product involving the Scophony inven-

tions in the Western Hemisphere and that General Precision and Productions would not export any such product to the Eastern Hemisphere.[6]

This rather complex plan soon fell of its own weight. Starting in 1943, an impasse developed in the affairs of American Scophony. It stemmed from the failure and unwillingness of General Precision and Productions to exploit the Scophony inventions themselves and their refusal to modify the agreements to permit the licensing of other American firms under the inventions. Several manufacturers expressed an interest in obtaining licenses. But in each instance the directors representing the American interests holding the Class "B" shares were unwilling to approve the necessary modifications in the existing arrangements. In July, 1945, the directors representing the "B" interests resigned. This made it impossible for American Scophony to transact business, since charter and by-law provisions adopted pursuant to the master and supplemental agreements required the presence of at least one Class "B" director for a quorum. Adding to the difficulties were American Scophony's shortage of funds and the apparent reluctance of the American interests to cooperate in efforts to place American Scophony on firmer financial footing. American Scophony's affairs were further complicated by the institution of the present antitrust proceeding on December 18, 1945.

Levey kept Scophony advised of developments in the dispute between the "A" and "B" factions and otherwise

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[6] The complaint alleged that the effects of the agreements and understandings were to create a territorial division of the manufacture and sale of television products, assigning the Eastern Hemisphere to Scophony and the Western Hemisphere to General Precision and Productions; to suppress and restrain competition in the manufacture and sale of television equipment, both in the domestic and in the export markets; and to give General Precision and Productions monopoly power over the Scophony inventions which enabled them to suppress their exploitation and deprive others of their use.

made progress reports to Scophony on its interests in the United States. As the impasse heightened, other individuals were authorized by Scophony to act in its behalf in the United States.[7] Service of process as to Scophony was made first on Levey in New York City on December 20, 1945.[8]

On April 5, 1946, a summons and a copy of the complaint directed to Scophony were also served on Elcock in New York City. He was a dominant figure in Scophony. He arrived in this country in March, 1946, with the mission of investigating and ending the impasse and disposing of Scophony's interest in American Scophony. Elcock not only was mortgagee of Scophony's assets by virtue of having made a large loan to the company. He was also its financial comptroller and a member of its board. At the time of service on him, he held a comprehensive power of attorney, irrevocable until March, 1947, giving him complete power to act with regard to Scophony's interests in the United States, including those in American Scophony.[9]

The District Court, in granting the motion to quash service and dismiss the complaint as to Scophony, held

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[7] These included at various times two American attorneys, a member of the British Parliament, and an English officer.

[8] Levey immediately informed Scophony in England of this action and advised it to designate appropriate counsel. On December 21, 1945, he sent a copy of the complaint to Scophony by airmail.

[9] The power of attorney set forth Scophony's desire to appoint Elcock to act "and bind the Company in all or any matters affecting the Company's interests in the United States . . . ." It then authorized Elcock to institute and prosecute all proceedings necessary to conserve Scophony's interests; to defend or compromise any suits brought against Scophony; to settle accounts; to engage or dismiss subagents; to borrow money; to dispose of any and all of Scophony's property and interests in the United States; and "generally to represent the Company in the United States of America in all matters in any way affecting or pertaining to the Company . . . ."

that it was not "found" in the Southern District of New York within the meaning of § 12. The court rejected the contention that Scophony was within the jurisdiction by reason of the activities of its agents. It concluded that none of those activities related to Scophony's ordinary business of manufacturing, selling and licensing television apparatus, but all were confined to protecting Scophony's interest in American Scophony. It also found that the conduct of American Scophony did not serve to bring Scophony within the jurisdiction. 69 F. Supp. 666.

I.

Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits against corporations; second, to determine where process in such suits may be served. Venue may be had "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business.*" And all process may be served "in the district of which it is an inhabitant, or wherever it may be found." (Emphasis added.)

A plain and literal reading of the section's words gives it deceptively simple appearance. The source of trouble lies in the use of verbs descriptive of the behavior of human beings to describe that of entities characterized by Chief Justice Marshall as "artificial . . . , invisible, intangible, and existing only in contemplation of law." *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 636.[10]

[10] More than once Marshall had difficulty in transferring to corporations or other institutions legal conceptions and relations shaped in nomenclature and in fact from normative evolution in relation to persons of flesh and blood.

See, *e. g., Bank* v. *Deveaux,* 5 Cranch 61, where he was unable to adapt the concept of corporate "inhabitancy," applied in decisions he cited, for fitting the corporation into the constitutional scheme of diversity jurisdiction. His individualistic solution brought difficulties

The process of translating group or institutional relations in terms of individual ones, and so keeping them distinct from the nongroup relations of the people whose group rights are thus integrated, is perennial, not only because the law's norm is so much the individual man, but also because the continuing evolution of institutions more and more compels fitting them into individualistically conceived legal patterns. Perhaps in no other field have the vagaries of this process been exemplified more or more often than in the determination of matters of jurisdiction, venue and liability to service of process in our federal system.[11] It has gone on from *Bank* v. *Deveaux,* 5 Cranch 61, and *Baptist Association* v. *Hart's Executors,* 4 Wheat. 1, to *International Shoe Co.* v. *Washington,* 326 U. S. 310, and now this case.[12]

The translation, or rather the necessity for it, permeates every significant word of § 12, not wholly excluding "or transacts business." If the statutory slate were clean, one might readily conclude that the words "inhabitant" and "found" would have the same meaning for locating both

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which lasted for decades. See Henderson, The Position of Foreign Corporations in American Constitutional Law 50–76; Harris, A Corporation As a Citizen, 1 Va. L. Rev. 507. Cf. *Baptist Association* v. *Hart's Executors,* 4 Wheat. 1.

[11] See, *e. g.,* Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory, 30 Harv. L. Rev. 676; Scott, Jurisdiction over Nonresidents Doing Business within a State, 32 Harv. L. Rev. 871; Bullington, Jurisdiction over Foreign Corporations, 6 N. C. L. Rev. 147; Note, What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction, 29 Col. L. Rev. 187.

[12] The very federalism of our structure magnifies the problem, by multiplying state and other governmental boundaries across which corporate activity runs with the greatest freedom. The problem arises on constitutional as well as statutory and common-law levels. Cf. *International Shoe Co.* v. *Washington,* 326 U. S. 310; *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476.

venue and the proper place for serving process. But even so, each of those terms and indeed the term "transacts business" would have to be given specific content actually descriptive of corporate events taking place within specified areas. Because all corporate action must be vicarious, that content could be determined only by an act of judgment which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand.

The statutory slate, however, is neither entirely new nor clean. Both legislative and judicial hands have written upon it. The writing is meandering, unclear in part, and partly erased. But it cannot be disregarded. What is legible must furnish guidance to decision. We deal here with a problem of statutory construction, not one of constitutional import.[13] Nor do we have any question of the exercise of Congress' power to its farthest limit. The issue is simply how far Congress meant to go, and specifically whether it intended to create venue and liability to service of process through the occurrence within a district of the kinds of acts done here on Scophony's behalf.

Section 12 of the Clayton Act is an enlargement of § 7 of the Sherman Anti-Trust Act. *Eastman Co.* v. *Southern Photo Co.,* 273 U. S. 359. The earlier statute

[13] Appellee makes no suggestion of a constitutional issue. The Government, however, suggests that, in view of our recent decision in *International Shoe Co.* v. *Washington,* 326 U. S. 310, which was concerned with the jurisdiction of a state over a foreign corporation for purposes of suit and service of process, and in view of aspects of similarity between that problem and the one now presented, we extend to this case and to § 12 the criteria there formulated and applied. There is no necessity for doing so. The facts of the two cases are considerably different and, as we have said, we are not concerned here with finding the utmost reach of Congress' power.

provided for suit in the district in which the defendant "resides or is found." 26 Stat. 210. That wording controlled for both venue and fixing the places for service of process.

We do not stop to review the decisions construing § 7 and similar statutes, cf. *Suttle* v. *Reich Bros.*, 333 U. S. 163; see *International Shoe Co.* v. *Washington, supra,* at 317–319, except to refer to *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. There the foreign corporation was sued in a district in which it did not "reside." Because the Court found that the company had withdrawn from the state in which the district was located and had revoked the authority of its principal agents there, it held that the defendant was not "found" in the district, although certain corporate activities continued.

The conventional rationalization applied equated "found" in sequence to "presence," to "doing business by its agents there," to "of a character warranting inference of subjection to the local jurisdiction." [14] The facts that the company continued to advertise its goods in the state and district, to make interstate sales to jobbers there, to send in drummers who solicited retail orders to be turned over to the jobbers, and finally to own stock in local subsidiaries, were held not to constitute the sort of "doing business" warranting the inference of subjection to the local jurisdiction for the statute's purposes. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, was narrowly distinguished. 246 U. S. at 87.

[14] The Court said: "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted. *Philadelphia & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264; *St. Louis Southwestern Ry. Co.* v. *Alexander,* 227 U. S. 218, 226." 246 U. S. 79, 87.

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The suit in the *People's Tobacco* case was begun in 1912, but the decision was not rendered until 1918. Meanwhile, in 1914, Congress had enacted the Clayton Act, including § 12. The following year the *Eastman* case, *supra,* was begun in the Northern District of Georgia. Process issued and was served under § 12 on the defendant, a New York corporation, at its principal place of business in Rochester. In 1927 this Court sustained both the venue and the service, as against objections that § 12 had not broadened § 7 of the Sherman Act, but merely made explicit what had been decided under it.[15]

The argument was certainly plausible, but for the fact that it made the addition of "or transacts business" to "inhabitant" and "found" in § 12 redundant and meaningless. The Court refused to accept the argument, because doing so would have defeated the plain remedial purpose of § 12.[16] That section was enacted, it held, to enlarge the jurisdiction given by § 7 of the Sherman Act

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[15] Counsel for the defendant equated the words "inhabitant" and "found" of § 12 to "resides or is found" of § 7 of the Sherman Act. They then went on to argue that the addition of "or transacts business" in the venue clause of § 12 did not broaden the section, but merely made explicit what the Court had already decided under the earlier statute. 273 U. S. at 361. This, because "or transacts business" was said to be nothing more than "carrying on business," which was the content the Court had given to "is found" in § 7, by the *People's Tobacco* case and others.

[16] Rather, the Court said, the section supplements "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation *in fact* transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found.'" 273 U. S. 359, 373. (Emphasis added.)

over corporations by adding those words, "so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business'—although neither residing nor 'found' therein—in which case the process may be issued to and served in a district in which the corporation either resides or is 'found.'" 273 U. S. at 372.[17]

This construction gave the words "transacts business" a much broader meaning for establishing venue than the concept of "carrying on business" denoted by "found" under the preexisting statute and decisions. The scope of the addition was indicated by the statement "that a corporation is engaged in transacting business in a district . . . if *in fact, in the ordinary and usual sense,* it 'transacts business' therein *of any substantial character.*" *Id.* at 373. (Emphasis added.)

In other words, for venue purposes, the Court sloughed off the highly technical distinctions theretofore glossed upon "found" for filling that term with particularized meaning, or emptying it, under the translation of "carrying on business." In their stead it substituted the practical and broader business conception of engaging in any substantial business operations. Cf. *Frene* v. *Louisville Cement Co.,* 77 U. S. App. D. C. 129, 134 F. 2d 511; *International Shoe Co.* v. *Washington, supra.* Refinements such as previously were made under the "mere solicitation" and "solicitation plus" criteria, cf. *Frene* v. *Louisville Cement Co., supra,* and like those drawn, *e. g.,* between the *People's Tobacco* and *International Harvester* cases, *supra,* were no longer determinative. The practical, everyday business or commercial concept of doing or carrying on business "of any substantial character" became the test of venue.

[17] See also note 16.

Applying it, the Court stated that "manifestly" the Eastman Company was not "present" in the Georgia district under the earlier tests of § 7 of the Sherman Act, either for the purpose of venue or as being amenable to service of process. P. 371. It thus aligned the case under those tests with the *People's Tobacco* decision rather than the *International Harvester* one. But, under the broader room given by § 12, venue was held to have been established.[18]

Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"–"present"–"carrying-on-business" sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating[19] to its headquarters defeat or delay the retribution due.

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[18] The concrete facts held to sustain the venue were that the Eastman Company was engaged "not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales . . . ." 273 U. S. at 374.

The Court also expressly stated that, in contrast to prior limitations, the company was "none the less engaged in transacting business . . . because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district," referring in this connection to *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 587, and *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 316. 273 U. S. 359, 373.

[19] *I. e.*, by artful arrangement of agents' authority, or of their comings and goings, or of the geography of minute incidents in contracting. Cf. *People's Tobacco Co.* v. *American Tobacco Co.*, 246

With venue established under the new and broader approach, the *Eastman* case presented no problem regarding the service of process, except possibly for the ruling that process might run to another district than the one in which suit was brought. 273 U. S. at 374. For by whatever test, whether of the old § 7 or the new § 12, the service was good. As we have noted, the process had been directed to and served in the district where the Eastman Company was an "inhabitant." [20] There was therefore no necessity for ruling upon the meaning of "found" as relating to any other district. Any such ruling necessarily could be no more than dictum, since no such issue was presented by the facts.

Nevertheless, for service of process § 12 had specified "the district of which it is an inhabitant, or wherever it may be found" without adding "or transacts business," as was done in the venue clause. Accordingly the Court took account of this difference and went on to indicate that for purposes of liability to service the section merely carried forward the preexisting law, so that in some situations service in a district would not be valid, even though venue were clearly established under § 12.[21]

U. S. 79. Such artifice saw its day end for creating substantive liability through a course of dealing contrary to the antitrust statutes, but without thereby also creating venue to enforce it, with the advent of § 12.

[20] As has been stated, the company was incorporated in New York and had its principal office and place of business in Rochester.

[21] Although difference of that sort may appear to be generally incongruous, since ordinarily it would seem that susceptibility to suit in a district should be accompanied by amenability to process there, such things of course are for Congress' determination as matters of policy relating to the scope and correlation, or lack of it, of venue and service provisions. There is certainly no constitutional requirement that the two be coextensive. And to support the dictum, if it were now necessary to rule on the matter, considerations beyond the verbal difference to which the *Eastman* opinion pointed might be stated.

But regardless of the pronouncement's effect, the decision, by resolving the venue problem, substantially removed the serious obstacles and practical immunities to suit which had grown up under § 7 of the Sherman Act, in by far the larger number of antitrust cases, *i. e.,* for those not involving companies incorporated outside the United States. In them the fact that service may be dubious in the district of suit and can be assured only by causing process to run to another district, as in the *Eastman* case, presents no such obstacle to bringing and maintaining the suit as existed prior to § 12. The necessity, if it is that, for directing process to another district, creates at most some slight inconvenience and additional expense.

II.

In this case, however, we deal with a company incorporated outside the United States. But there can be no question of the existence of "jurisdiction," in the sense of venue under § 12, over Scophony in the Southern District of New York. To say that on the facts presented Scophony transacted no business "of any substantial character" there during the period covered by institution of the suit and the times of serving process would be to disregard the practical, nontechnical, business standard supplied by "or transacts business" in the venue provision. It would be also to ignore the fact that Scophony then and there was carrying on largely, if not exclusively, the only business in which it could engage at the time.

Scophony's operations in New York were a continuous course of business before and throughout the period in question here. They consisted in strenuous efforts not simply to save an American "investment," as is urged, but to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war. As with

such efforts generally, changes in method and immediate objective took place as each one tried in turn failed to work out. But those changes brought none in ultimate objective, namely, to find a mode of saving and profitably exploiting the Scophony inventions; and none in the intensity or continuity with which that object was pursued in New York.

First was the phase of attempting to set up in this country as manufacturer and seller of television equipment. When that failed, the company turned to licensing and exploiting its patents by other means. This was done through the complicated arrangements for what practically if not also technically was a joint adventure with other companies. That project was carried out not merely through corporate forms and arrangements but by contracts binding the participating companies to the common enterprise, as well as the special medium of executing it, American Scophony. In this each corporate participant had its special functions, controls and restrictions created in part by share ownership in American Scophony, but also in important respects by contract both beyond the stock controls and dictating their character.[22] Finally, as the affairs of the keystone of the structure,

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[22] *E. g.*, the hemispheric division of territories between the British and American interests; the exclusive licensing agreements which prevented Scophony from granting licenses to interested American companies; and the arrangements for the interchange of technical information were contractual, not charter limitations on corporate powers. The particular corporate medium used, American Scophony, and the refinements in its charter and by-laws giving General Precision and Productions an effective veto power over its operations were themselves aspects of the contractual undertakings embodied in the master agreement and the two supplemental agreements. The master agreement also designated the persons to become officers and directors of American Scophony, as representatives of both the British and the American interests.

American Scophony, came to and continued in stalemate, the immediate objective shifted once more, to getting out of the trap. Again the shift was in direct and constant pursuit of Scophony's primary and continuing object, to find a way to save and to exploit its patents.

This is a story of business in trouble, even desperate. We may have sympathy for the company's plight. But it does not follow that such continuing, intensive activities to save the business and put it on a normal course, even though shifting as they did in the successive winds that blew, did not constitute "transacting business" of "any substantial character." Nor can we say that any of the major shifts in tacking toward the ultimate end stopped or interrupted the course of the company's business activity. At no time was the drive toward achieving its basic objects suspended.

Appellee would avoid this view and its consequences by taking an entirely different conception of what took place. It emphasizes that Scophony's corporate objects, as stated in its charter, were to manufacture and sell television equipment. Hence it concludes that when all New York activity directly pointing to that end ceased, and was followed by the phase of seeking to exploit the patents through the arrangements centering around American Scophony, the British company ceased to be engaged in promoting its corporate objects and thus in carrying on or doing business in New York for the relevant statutory purposes. From then on, it is claimed, Scophony became concerned solely with creating and protecting an "investment," namely, in American Scophony's shares. Nor did Scophony resume the doing of business when that effort also failed and the final stage of seeking to break the impasse arrived, because manufacturing and sale of equipment were not revived.

To this view of the sequence of events appellee then seeks to apply this Court's decisions interpreting "found"

under § 7 and similar requirements in application to manufacturing and selling companies,[23] and also the like *Eastman* dictum concerning § 12. In doing this it seeks especially to invalidate the service by casting up from those decisions a check list of specific and often minor incidents of that sort of business done or not done as relevant to whether business is being carried on, and then matching against the list Scophony's New York activities as of the times of service.[24]

Obviously this view of the facts and of the determinative legal approach is at wide variance from the ones we have taken in dealing with the question of venue. But we do not find it necessary, in order to reject it for purposes of sustaining the service, to consider whether the process clause of § 12 should be given scope beyond that indicated by the *Eastman* dictum. For in any event we think that appellee and the District Court have misconceived the effects of the facts and of the decisions on which they rely, for determining the validity of the service in this case.

Certainly appellee's conclusionary premise cannot be accepted, that its sole authorized or actual business was manufacturing and selling equipment; or therefore the

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[23] *E. g., Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79.

[24] The catalogue emphasizes things not being done as of the dates of service, *e. g.*, maintaining an office, warehouse or place of business; owning realty or other physical property; keeping a staff of employees; having agents "other than counsel in this case and . . . Elcock"; keeping a telephone or a listing; making sales; conducting research; soliciting orders. Correspondingly appellee atomizes the things then being done into separate, disconnected events, *viz.*, stock ownership (in American Scophony); contracting with American Scophony and the other corporations for transfer and licensing of patents; activities to protect Scophony's American "interests" by resolving the impasse.

further one that no other activity on its behalf could constitute doing or engaging in business. Indeed it was authorized to take out, hold and exploit television patents, and doing this was certainly as much part of its business as manufacturing and selling the equipment they covered. There is nothing to show that Scophony was restricted by its charter or otherwise to exploiting its patents exclusively by direct manufacture and sale. When therefore, after that method had failed, the company chose another, it was not ceasing to do business. That consequence did not follow merely because it discontinued the activities incident to continuing the discarded method.

The alternative one chosen was not a matter simply of licensing patents to others, for active exploitation by them. Nor was it only a casual act or acts of contracting. The whole framework of this phase of the New York activities was dictated by the master and supplemental agreements. These were not mere licensing arrangements, nor did they make Scophony nothing more than a shareholder for investment purposes, with only such a shareholder's voting rights and control in American Scophony. The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs.[25] We need not decide whether, in view of the agreements' continuing and pervasive effects, they could be considered as sufficing in themselves to make Scophony "found" within the New York district.[26]

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[25] See note 22 *supra*. Indeed the contracts shaped the nature of the corporate distribution of powers and voting rights, so as to make them conform to the over-all character and objects of the larger common enterprise. The charter and by-law provisions of American Scophony therefore not only were governed by the contractual arrangements but carried them into execution.

[26] Especially in view of the fact that § 12 fixes venue and the places for serving process in antitrust suits, there would seem to be sound

Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention.

That necessity was shown, among other ways, by the contractual provisions for interchange of data and information, and further by the fact that there was sustained interchange of correspondence between Levey and Scophony devoted to Scophony's affairs and interests in this country. Levey kept Scophony informed fully of all that went on here, and in turn received and carried out its instructions respecting American Scophony's affairs and its own.

In all this he was not acting merely as an officer of American Scophony. Rather he was also Scophony's director and representative, authorized to act in its behalf and interest. Indeed it was as Scophony's representative that he was named as president of American Scophony. His position was a dual one. He was not a mere shareholder's or investor's agent seeking information about that corporation's affairs for purposes of dealing with the stock. His functions and activities were much broader and related to Scophony's interests as much as to American Scophony's. Scophony's New York activities therefore were not confined to negotiation and execution of the agreements. Neither were they concerned only with mere stock ownership or "investment" as is urged, nor were they simply occasional acts of contracting, like those in the decisions appellee cites.

Moreover, other individuals carried on for Scophony in continuing efforts [27] to resolve the impasse. Apart

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basis for differentiating the execution of agreements so all-pervasive and far-reaching in their effects upon the statutory policies from run-of-mine casual or intermittent sales of commodities by a manufacturing or selling company, for the section's purposes.

[27] See note 7.

from what was done by others, Elcock came to New York with unrestricted and irrevocable power to act on Scophony's behalf. Indeed it might almost be said, in view of his triple position as mortgagee, corporate officer and attorney-in-fact, that for all relevant purposes at this phase of Scophony's activity, he was the company. The stalemate put Scophony's affairs in this country at a standstill along with those of American Scophony. And Scophony's efforts to extricate itself were both strenuous and continuous.

Those efforts were not cessation of engaging in business. They were directed entirely to warding off that fate. Their object was not to liquidate, it was to resuscitate the business of Scophony and, as in all previous stages, put it on a normal course again. In doing all this, Scophony was engaging in business constantly and continuously, not retiring from it or interrupting it. Cf. *Mutual Life Insurance Co.* v. *Spratley,* 172 U. S. 602; *Pennsylvania Lumbermen's Insurance Co.* v. *Meyer,* 197 U. S. 407; *St. Louis S. W. R. Co.* v. *Alexander,* 227 U. S. 218. The interruptions were only in particular phases of its authorized adventure, not in the continuity, intensity or totality of the adventure itself.

In sum, we have no such situation as was presented in the manufacturing and selling cases on which appellee relies. They concerned entirely different facts and enterprises. In none was there a shifting from a course of business in pursuit of one corporate object or objects, *viz.,* manufacturing and selling, to another continuing mode of achieving a basic corporate objective, namely, the exploiting of patents by complex working arrangements partaking practically of the character of a common enterprise with others and requiring constant supervision and intervention beyond normal exercise of shareholders' rights by the participating companies' representatives *qua* such.

We know of no decision which has held or indicated that on such facts the process clause of § 12 is not adequate to confer power to make valid service. Such a continuing and far-reaching enterprise is not to be governed in this respect by rules evolved with reference to the very different businesses and activities of manufacturing and selling. Nor, what comes to the same thing, is the determination to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct, by the process sometimes applied in borderline cases involving manufacturing and selling activities.

For present purposes those decisions may be left untouched for the facts and situations in which they have arisen and to which they have been applied. But there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one, comprehended within neither their rulings nor their effects. More especially would such an extension be inappropriate, when it is recalled that § 12 governs venue and service in antitrust suits against corporations. For, in cases against companies incorporated outside the United States, that extension would bring back all the obstacles to enforcement of antitrust policies and remedies which existed for domestic corporations before § 12 was enacted to give relief from those obstacles. Even though venue were clearly established, as here, the extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are "inhabitants." We are unwilling to construe § 12 in a manner to bring back the evils it abolished, for situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the antitrust laws, so as to make another amendment necessary.

We think that Scophony not only was "transacting business" of a substantial character in the New York district at the times of service, so as to establish venue there, but also on the sum of the facts regarding its activities was "found" there within the meaning of the service-of-process clause of § 12. Of course such a ruling presents no conceivable element of offense to "traditional notions of fair play and substantial justice." See *International Shoe Co.* v. *Washington, supra,* at 316; cf. *Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141.

It remains only to say that we do not stop to consider whether, as is argued, Levey's authority to act for Scophony had expired or been revoked at the time service was made by delivery of process to him. For when service was made by delivery to Elcock, he had unrevoked and irrevocable authority to act in Scophony's behalf in the New York district, and that service was valid to confer personal jurisdiction over Scophony.

Accordingly, the judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE FRANKFURTER, concurring.

I deem it appropriate to state why I concur merely in the Court's result.

The only question in this case is whether Scophony Limited, a British corporation, which has its offices and principal place of business in London, may be made a party defendant in a suit by the United States for violation of the Sherman Law pending in the Southern District of New York. The corporation may be brought into court in that District if its activities there satisfy the requirements of § 12 of the Clayton Act. According to

this provision, Scophony Limited is properly a party defendant in this suit only if, by virtue of its activities, it is "found or transacts business" in the Southern District of New York, and it may be served in that District if it is "found" there.

Whether a corporation "transacts business" in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be "found" anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges.

What was done in the Southern District of New York on behalf of Scophony Limited, as detailed in the Court's opinion, establishes that the corporation was there transacting business and was found there in the only sense in which a corporation ever "transacts business" or is "found." Accordingly, Scophony Limited was amenable to suit and service in the District within the requirements of § 12 of the Clayton Act.

To reach this result, however, I do not find it necessary to open up difficult and subtle problems regarding the law's attitude toward corporations. I abstain from joining the Court's opinion not because I am in disagreement with what is said but because I am not prepared to agree. And I am not prepared to agree because I do not wish to forecast, which agreement would entail, the bearing of the Court's discussion upon situations not now before us but as to which such theoretical discussion is bound to be influential. Law, no doubt, is concerned with "practical and substantial rights, not to maintain theories."

Davis v. *Mills,* 194 U. S. 451, 457. But theories often determine rights. Since I do not know where the opinion in this case will take me in the future, I prefer to reach its destination by the much shorter route of recognizing that a corporation as such never transacts business and is never found anywhere, but does "transact business" and is "found" somewhere by attribution to the corporation of what human beings do for it. No doubt legal reasoning must be on its guard not to oversimplify. Dangers also lurk in overcomplicating.

From earliest times the law has enforced rights and exacted liabilities by utilizing a corporate concept—by recognizing, that is, juristic persons other than human beings. The theories by which this mode of legal operation has developed, has been justified, qualified, and defined are the subject-matter of a very sizable library. The historic roots of a particular society, economic pressures, philosophic notions, all have had their share in the law's response to the ways of men in carrying on their affairs through what is now the familiar device of the corporation. Law has also responded to religious needs in recognizing juristic persons other than human beings. Thus, in the Hindu law an idol has standing in court to enforce its rights. See, *e. g., Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick,* 52 L. R. I. A. 245 (1925). Attribution of legal rights and duties to a juristic person other than man is necessarily a metaphorical process. And none the worse for it. No doubt, "metaphors in law are to be narrowly watched," Cardozo, J., in *Berkey* v. *Third Avenue R. Co.,* 244 N. Y. 84, 94. But all instruments of thought should be narrowly watched lest they be abused and fail in their service to reason.

ANDERSON, ADMINISTRATRIX, *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 620. Decided April 26, 1948.

In a suit against a railroad in a state court under the Federal Employers' Liability Act to recover damages for the wrongful death of a conductor, a complaint alleging that he disappeared from a moving train in very cold weather at a time when his duty required his presence on the rear vestibule, that his absence was discovered by other trainmen, that they negligently failed to make prompt efforts to have him rescued, and that he died from the resulting exposure, *held* sufficient to support a judgment for plaintiff, if a jury should find under appropriate instructions that the death resulted "in whole or in part" from failure of the railroad's agents to do what "a reasonable and prudent man would ordinarily have done under the circumstances." Pp. 821–823.

31 Cal. 2d 117, 187 P. 2d 729, reversed.

In a suit against a railroad under the Federal Employers' Liability Act to recover damages for the alleged wrongful death of an employee, a state court held that the allegations of the complaint, even if true, were insufficient to support a judgment for plaintiff, and entered judgment for defendant. The state supreme court affirmed. 31 Cal. 2d 117, 187 P. 2d 729. *Certiorari granted, judgment reversed, and cause remanded,* p. 823.

Clifton Hildebrand filed a brief for petitioner.

Frank B. Belcher filed a brief for respondent.

PER CURIAM.

Petitioner, as administratrix, filed a complaint in a California state court under the Federal Employers' Liability Act, 45 U. S. C. § 51, to recover damages for the alleged

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wrongful death of one L. C. Bristow. The trial court held that the allegations of the complaint, even if true, were totally insufficient to support a judgment for plaintiff, and entered judgment for the defendant. The State Supreme Court, two judges dissenting, affirmed on the same ground. 31 Cal. 2d 117, 187 P. 2d 729.[1]

The complaint's allegations and the inferences fairly drawn from them in summary are as follows: November 24, 1942, the deceased was a conductor on respondent's passenger train westbound from Amarillo, Texas, to Belen, New Mexico. At about 5:30 a. m., while the train was moving approximately opposite defendant's station at Gallaher, New Mexico, decedent fell from the train's rear vestibule where it was necessary for him to be in order properly to perform the duty in which he was then engaged, "checking a certain train order signal at said station" of Gallaher. Decedent's fall resulted in injuries which made it impossible for him to secure help by his own efforts. At the next station where the train stopped, St. Vrain, respondent's employees "made note of the absence of decedent," but passed by it and three other station stops, Melrose, Taiban, and Fort Sumner, without taking any steps of any kind to ascertain the whereabouts of decedent or what had happened to him. Finally, however, at Yeso, New Mexico, the regular train conductor directed respondent's employees there to wire other employees along the route the train had traversed to ascertain decedent's whereabouts. The Yeso employees "carelessly and negligently" failed to transmit any message "for an unnecessarily long period of time," and

[1] The sufficiency of the complaint to state a cause of action was raised under California procedure by an objection of respondent to hearing evidence. Such a procedure, the State Supreme Court held, is in the nature of a general demurrer under which allegations of the complaint are deemed true.

when the message was finally received by other of respondent's employees at Clovis, New Mexico, they "carelessly and negligently failed to institute and pursue a search for decedent within a reasonable period of time." When search was ultimately made decedent was found lying alongside the track adjacent to the point where he had fallen while performing his duties on the rear vestibule opposite the station at Gallaher. Three days later decedent died, due to exposure to the very cold weather from the time he fell until he was finally rescued.

It thus appears that we have a complaint which charges that a conductor disappears from a moving train in bitter cold weather at a time when his duty requires him to be on the rear vestibule, his absence is discovered, and efforts of any kind to ascertain and save him from his probable peril are not promptly made by other train employees, the only persons likely to know of his disappearance and the probable dangers incident to it. We are unable to agree that had petitioner been permitted to introduce all evidence relevant under her allegations, the facts would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due "in whole or in part" to failure of respondent's agents to do what "a reasonable and prudent man would ordinarily have done under the circumstances of the situation." *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 67. See also *Jamison* v. *Encarnacion,* 281 U. S. 635, 640, 641; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353; *Blair* v. *Baltimore & O. R. Co.,* 323 U. S. 600, 604; *Lillie* v. *Thompson,* 332 U. S. 459, 461–462.

Certiorari is granted, the judgment is reversed, and the cause is remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed.

DECISIONS PER CURIAM AND ORDERS FROM JANUARY 20, 1948, THROUGH APRIL 26, 1948.

FEBRUARY 2, 1948.

Per Curiam Decision.

No. 275. DYER *v.* CITY COUNCIL OF BELOIT ET AL. Appeal from the Supreme Court of Wisconsin. Submitted December 8, 1947. Decided February 2, 1948. *Per Curiam:* On consideration of the motion of the appellees to dismiss, it appearing that the cause has become moot, the judgment of the Supreme Court of Wisconsin is vacated and the cause is remanded for such further proceedings as by that court may be deemed appropriate. Costs in this Court will be taxed against the appellees. MR. JUSTICE BLACK and MR. JUSTICE BURTON are of the opinion that costs should be divided equally. *Claude D. Stout* submitted on brief for appellant. *J. Arthur Moran* submitted on brief for appellees. Reported below: 250 Wis. 613, 27 N. W. 2d 733.

Miscellaneous Orders.

No. 467. JUNGERSEN *v.* OSTBY & BARTON CO. ET AL.; and

No. 468. OSTBY & BARTON CO. ET AL. *v.* JUNGERSEN, 332 U. S. 851, 852. Motions to extend the time to file petitions for rehearing until the expiration of this term denied.

No. 147, Misc. UNITED STATES EX REL. LUDECKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION. An order is entered staying execution and enforcement of the Attorney General's removal order herein dated January 18, 1946, until the further order of this Court.

No. 259, Misc. BIRNBAUM ET AL. *v.* EVANS ET AL., JUDGES. Motion for leave to file petition for writ of mandamus denied. *Barnabas F. Sears* for petitioners.

No. 258, Misc. IN RE MYERS. Application denied.

No. 260, Misc. EX PARTE HAWTHORNE. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 446. AHRENS ET AL. *v.* CLARK, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia. Certiorari granted. *James J. Laughlin* for petitioners. *Solicitor General Perlman, H. G. Morison, Stanley M. Silverberg* and *Samuel D. Slade* for respondent.

Certiorari Denied.

Nos. 19 and 20. NEPTUNE METER CO. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 22. INDEPENDENT EMPLOYEES ASSOCIATION OF THE NEPTUNE METER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. C. A. 2d. Certiorari denied. *Edward L. Coffey* for petitioner in Nos. 19 and 20. *Irving Sweet* for petitioner in No. 22. *Solicitor General Perlman, David P. Findling, Ruth Weyand* and *Dominick L. Manoli* for respondent in Nos. 19 and 20. *George T. Washington,* then Acting Solicitor General, *Gerhard P. Van Arkel, Morris P. Glushien, Ruth Weyand* and *Dominick L. Manoli* were also on a brief for respondent in Nos. 19, 20 and 22. Reported below: 158 F. 2d 448.

No. 479. STATLER *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *L. E. Gwinn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 164 F. 2d 94.

No. 481. TOWER *v.* WATER HAMMER ARRESTER CORP. C. C. A. 7th. Certiorari denied. *Harold Olsen* for petitioner. *Ralph W. Brown* and *Sidney Neuman* for respondent. Reported below: 156 F. 2d 775.

No. 487. ATLANTIC COAST LINE RAILROAD CO. ET AL., DOING BUSINESS AS CLINCHFIELD RAILROAD CO., *v.* MEEKS. Court of Appeals of Tennessee. Certiorari denied. *Robert L. Taylor, James H. Epps, Jr.* and *William E. Miller* for petitioners. *Clarence W. Bralley* and *John Frank Bryant* for respondent. Reported below: — Tenn. App. —, 208 S. W. 2d 355.

No. 491. BRADLEY *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. *Elliott R. Katz* for petitioner. *Abraham S. Ullman* and *Arthur T. Gorman* for respondent. Reported below: 134 Conn. 102, 55 A. 2d 114.

No. 493. JANKIEWICZ ET AL. *v.* SLEAR ET UX. Court of Appeals of Maryland. Certiorari denied. *Joseph J. Rehm* for petitioners. Reported below: — Md. —, 54 A. 2d 137.

No. 503. ZIEBER *v.* UNITED STATES. C. C. A. 3d. Certiorari denied. *Hayden C. Covington* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 161 F. 2d 90.

No. 507. BERENBEIM *v.* UNITED STATES; and

No. 508. SCHECHTER *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. *Philip Hornbein, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 164 F. 2d 679.

No. 492. BIRNBAUM ET AL., A PARTNERSHIP UNDER THE NAME OF BIRNBAUM & CO., ET AL. *v.* CHICAGO TRANSIT AUTHORITY ET AL. C. C. A. 7th. Certiorari denied. *Barnabas F. Sears* for petitioners. *Werner W. Schroeder* for the Chicago Transit Authority; and *Claude A. Roth, Tappan Gregory, Henry F. Tenney* and *J. Arthur Miller* for the Bondholders' Protective Committees, respondents.

No. 475. BRUSZEWSKI *v.* ISTHMIAN STEAMSHIP CO. C. C. A. 3d. Certiorari denied. *Abraham E. Freedman* for petitioner. *Thomas E. Byrne, Jr., John B. Shaw* and *Rowland C. Evans, Jr.* for respondent. Reported below: 163 F. 2d 720.

No. 477. MONROE *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application. *Murray I. Gurfein, Orrin G. Judd* and *Saul A. Shames* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 164 F. 2d 471.

No. 480. SECURITIES & EXCHANGE COMMISSION *v.* PHILADELPHIA COMPANY. United States Court of Appeals for the District of Columbia. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Solicitor General Perlman* and *Roger S. Foster* for petitioner. *Thomas J. Munsch, Jr.* for respondent. Reported below: 82 U. S. App. D. C. 335, 164 F. 2d 889.

No. 494. FLAKOWICZ *v.* ALEXANDER. C. C. A. 2d. Shank substituted as the party respondent. Certiorari denied. MR. JUSTICE MURPHY is of the opinion the petition for certiorari should be granted. *Hayden C. Covington* for petitioner. *Solicitor General Perlman, Assistant*

Attorney General Quinn, Robert S. Erdahl and *Irving S. Shapiro* for respondent. Reported below: 164 F. 2d 139.

No. 175, Misc. JOHNSON *v.* HIATT, WARDEN. C. C. A. 3d. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Sheldon E. Bernstein* for respondent. Reported below: 163 F. 2d 1018.

No. 186, Misc. RITENOUR *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 231, Misc. BAUGH *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 236, Misc. COLIER *v.* MEYER ET AL. Court of Errors and Appeals of New Jersey. Certiorari denied. *Abram A. Golden* for petitioner. Reported below: 140 N. J. Eq. 469, 55 A. 2d 29.

No. 253, Misc. GAINES *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 263, Misc. BIRD *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 277, Misc. TAYLOR *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 280, Misc. SMITH *v.* NEW YORK. Supreme Court of New York, Kings County. Certiorari denied.

No. 281, Misc. SANCHEZ *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 300, Misc. WHEELER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia.

Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 82 U. S. App. D. C. 363, 165 F. 2d 225.

No. 327, Misc. PATTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. *Wesley S. Williams* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 82 U. S. App. D. C. 363, 165 F. 2d 225.

Rehearing Denied.

No. 66. COX *v.* UNITED STATES;

No. 67. THOMPSON *v.* UNITED STATES; and

No. 68. ROISUM *v.* UNITED STATES, 332 U. S. 442. Rehearing denied.

No. 442. PHILLIPS *v.* BALTIMORE & OHIO RAILROAD CO., 332 U. S. 844. Rehearing denied.

No. 205. GLOBE LIQUOR CO., INC. *v.* SAN ROMAN ET AL., DOING BUSINESS AS INTERNATIONAL INDUSTRIES, 332 U. S. 571. The petitions for rehearing are denied. The motion for stay of mandate is also denied.

FEBRUARY 5, 1948.

Miscellaneous Order.

No. 351, Misc. EGGERS *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. Application for stay of execution granted pending further order of this Court.

Certiorari Denied.

No. 350, Misc. ADAMSON *v.* CALIFORNIA. Supreme Court of California. Application for stay of execution denied. Certiorari denied. *Morris Levine* for petitioner.

FEBRUARY 9, 1948.

Miscellaneous Order.

No. 284, Misc. HARRIS *v.* NIERSTHEIMER, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted.

No. 59. LOFTUS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. Petitioner *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 395 Ill. 479, 70 N. E. 2d 573.

No. 233, Misc. PATERNO *v.* LYONS, COMMISSIONER. Court of Appeals of New York. Certiorari granted. Petitioner *pro se. Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, and *Irving I. Waxman,* Assistant Attorney General, for respondent. Reported below: 297 N. Y. 617, 75 N. E. 2d 630.

Certiorari Denied.

No. 472. CAMP, ADMINISTRATRIX, *v.* THOMPSON, TRUSTEE; and

No. 517. THOMPSON, TRUSTEE, *v.* CAMP, ADMINISTRATRIX. C. C. A. 6th. Certiorari denied. *Walter P. Armstrong* and *R. G. Draper* for petitioner in No. 472 and respondent in No. 517. *Edward P. Russell* for petitioner in No. 517 and respondent in No. 472. Reported below: 163 F. 2d 396.

No. 482. A. J. PARETTA CONTRACTING CO., INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Emanuel Harris* for petitioner. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney, John R. Benney* and *Alvin O. West* for the United States. Reported below: 109 Ct. Cl. 324.

No. 496. KENNECOTT COPPER CORP. *v.* SALT LAKE COUNTY;

No. 497. SILVER KING COALITION MINES CO. *v.* SUMMIT COUNTY ET AL.;

No. 498. PARK UTAH CONSOLIDATED MINES CO. *v.* SUMMIT COUNTY ET AL.;

No. 499. PARK UTAH CONSOLIDATED MINES CO. *v.* WASATCH COUNTY ET AL.; and

No. 500. NEW PARK MINING CO. *v.* WASATCH COUNTY ET AL. C. C. A. 10th. Certiorari denied. *C. C. Parsons* and *William W. Ray* for petitioners. *Grover A. Giles,* Attorney General of Utah, *Zar E. Hayes* and *Calvin L. Rampton,* Assistant Attorneys General, for respondents. Reported below: 163 F. 2d 484.

No. 506. A. B. T. MANUFACTURING CO. *v.* NATIONAL SLUG REJECTORS, INC. C. C. A. 7th. Certiorari denied. *Clarence E. Threedy* for petitioner. *Clarence J. Loftus* for respondent. Reported below: 164 F. 2d 333.

No. 510. STEVENSON *v.* JOHNSTON, WARDEN. C. C. A. 9th. Certiorari denied. *A. J. Zirpoli* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for respondent. Reported below: 163 F. 2d 750.

No. 511. BRUNO *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Walter H. Duane* and *Albert A. Spiegel* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 164 F. 2d 693.

No. 516. OHIO OIL CO. *v.* UNITED STATES. C. C. A. 10th. Certiorari denied. *W. Hume Everett, Harold H. Healy, A. M. Gee* and *Hal W. Stewart* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech* and *Marvin J. Sonosky* for the United States. Reported below: 163 F. 2d 633.

No. 520. WABASH RAILROAD CO. *v.* HAMPTON, ADMINISTRATRIX. Supreme Court of Missouri. Certiorari denied. *Joseph A. McClain, Jr.* and *Sam B. Sebree* for petitioner. *Walter A. Raymond* for respondent. Reported below: 356 Mo. 999, 204 S. W. 2d 708.

No. 470. CLARK *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Lloyd Paul Stryker* for petitioner. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney, Harry I. Rand* and *Edgar T. Fell* for the United States. Reported below: 109 Ct. Cl. 444, 72 F. Supp. 594.

No. 244, Misc. ANDERSON *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 583, 74 N. E. 2d 693.

No. 252, Misc. ERNEST *v.* RAGEN, WARDEN. Criminal Court of Cook County, Circuit Court of Will County, and Supreme Court of Illinois. Certiorari denied.

No. 285, Misc. SKENE *v.* RAGEN, WARDEN. Circuit Court of Kane County, Illinois. Certiorari denied.

No. 301, Misc. GUTKOWSKY *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 308, Misc. GUNN *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 321, Misc. PASCO *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

Rehearing Denied.

No. 1455, October Term, 1946. FLAHERTY *v.* ILLINOIS, 331 U. S. 856. Leave to file a fifth petition for rehearing denied.

No. 459. JOHNSON *v.* UNITED STATES, 332 U. S. 852. Rehearing denied. MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 85, Misc., October Term, 1946. EX PARTE DAYTON, 329 U. S. 690. Rehearing denied.

No. 197, Misc. THOMPSON *v.* PESCOR, WARDEN, 332 U. S. 834. Rehearing denied.

FEBRUARY 16, 1948.

Per Curiam Decision.

No. 545. INDIANA EX REL. MAVITY *v.* TYNDALL ET AL. Appeal from the Supreme Court of Indiana; and

No. 557. PACIFIC EMPLOYERS INSURANCE CO. *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. Appeal from the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *C. James McLemore* for relator in No. 545. *W. N. Mullen* for appellant in No. 557. *Donald E. Wachhorst* for Humphreys, appellee in No. 557. Reported below: No. 545, 225 Ind. 360, 74 N. E. 2d 914; No. 557, 81 Cal. App. 2d 37, 183 P. 2d 344.

Order and Decree.

No. 10, Original. UNITED STATES *v.* WYOMING ET AL. The motion of the United States for an interlocutory

decree is granted. Pursuant to the decision of this Court rendered June 2, 1947, 331 U. S. 440, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The United States is now and at all times herein material has been the owner in fee and entitled to the possession of Section 36 of Township 58, North of Range 100, West of the Sixth Principal Meridian, located in Park County, Wyoming.

2. The defendants have no right, title, or interest in or to said land or any part thereof.

3. The defendants are hereby perpetually enjoined from asserting any right, title, or interest to said land or any part thereof.

4. Jurisdiction of this cause is retained by the Court for the purpose of making such other and further orders and decrees as may be necessary.

Miscellaneous Orders.

No. 1389, October Term, 1946. LUSTIG *v.* UNITED STATES. The petition received from petitioner on July 5, 1947, as supplemented by his petition received January 28, 1948, is treated as a petition for rehearing and rehearing is granted. The order entered June 16, 1947, 331 U. S. 853, denying certiorari is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted. *Louis Halle* for petitioner. Reported below: 159 F. 2d 798.

No. 337, Misc. CANTRELL *v.* MISSOURI. Application of petitioner for leave to withdraw the petition for writ of certiorari to the Supreme Court of Missouri granted.

No. 196, Misc. DICKEY *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States.

No. 286, Misc. BRANDT *v.* UNITED STATES;
No. 287, Misc. BRACK *v.* UNITED STATES;
No. 288, Misc. BRANDT *v.* UNITED STATES;
No. 289, Misc. GEBHARDT *v.* UNITED STATES;
No. 290, Misc. HOVEN *v.* UNITED STATES;
No. 291, Misc. MRUGOWSKY *v.* UNITED STATES;
No. 292, Misc. SIEVERS *v.* UNITED STATES;
No. 293, Misc. FISCHER *v.* UNITED STATES;
No. 294, Misc. GENZKEN *v.* UNITED STATES;
No. 295, Misc. HANDLOSER *v.* UNITED STATES;
No. 296, Misc. ROSE *v.* UNITED STATES;
No. 297, Misc. SCHROEDER *v.* UNITED STATES;
No. 298, Misc. BECKER-FREYSENG *v.* UNITED STATES; and
No. 299, Misc. BEIGELBOECK *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus and prohibition denied. MR. JUSTICE BLACK, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petitions should be set for hearing on the question of the jurisdiction of this Court. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

Certiorari Granted. (*See also No. 1389, Oct. Term, 1946, supra.*)

No. 530. BRIGGS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. C. C. A. 2d. Certiorari granted. *Sol Gelb* for petitioner. *Louis J. Carruthers* and *James G. Johnson, Jr.* for respondent. Reported below: 164 F. 2d 21.

Certiorari Denied.

No. 495. BIBB MANUFACTURING CO. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR. C. C. A. 5th. Certiorari denied. *A. O. B. Sparks* for petitioner. *Solicitor Gen-*

eral Perlman, John R. Benney, William S. Tyson and *Bessie Margolin* for respondent. Reported below: 164 F. 2d 179.

No. 502. FOREMAN'S ASSOCIATION OF AMERICA *v.* L. A. YOUNG SPRING & WIRE CORP. ET AL. United States Court of Appeals for the District of Columbia. Certiorari denied. *Walter M. Nelson, Allan R. Rosenberg* and *Warren L. Sharfman* for petitioner. *Solicitor General Perlman, David P. Findling, Ruth Weyand* and *Harvey B. Diamond* for the National Labor Relations Board; and *Richard E. Cross* for the L. A. Young Spring & Wire Corp., respondents. Reported below: See 82 U. S. App. D. C. 327, 163 F. 2d 905.

No. 521. SHURIN *v.* UNITED STATES. C. C. A. 4th. Certiorari denied. *Henry G. Singer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 164 F. 2d 566.

No. 522. ROOT ET AL. *v.* FRED WOLFERMAN, INC. Supreme Court of Missouri. Certiorari denied. *Clif Langsdale* and *Clyde Taylor* for petitioners. *R. B. Caldwell* and *Blatchford Downing* for respondent. Reported below: 356 Mo. 976, 204 S. W. 2d 733.

No. 523. SHILMAN *v.* UNITED STATES ET AL. C. C. A. 2d. Certiorari denied. *William L. Standard* for petitioner. *Solicitor General Perlman, H. G. Morison, Samuel D. Slade* and *Leavenworth Colby* for the United States. Reported below: 164 F. 2d 649.

No. 532. KOTT ET AL. *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *David Berger, John W. Bohlen, Thomas D. McBride* and *Louis Halle* for petitioners.

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Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl and *Beatrice Rosenberg* for the United States. Reported below: 163 F. 2d 984.

No. 519. FOOK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. *Harlan Wood* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 82 U. S. App. D. C. 391, 164 F. 2d 716.

No. 528. JOINT COUNCIL DINING CAR EMPLOYEES, LOCALS 456 AND 582, *v.* SOUTHERN PACIFIC CO. C. C. A. 9th. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *George M. Naus* and *Clifton Hildebrand* for petitioner. *Burton Mason* and *A. G. Goodrich* for respondent. Reported below: 165 F. 2d 26.

No. 535. JOSEPHSON *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE are of the opinion that the petition should be granted. *Samuel A. Neuburger* and *Barent Ten Eyck* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 165 F. 2d 82.

No. 215, Misc. ROSS *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 221, Misc. DUNCAN *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 283, Misc. SLAYTON *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 311, Misc. GRECO *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 315, Misc. BROWN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 346, Misc. LILYROTH *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

Rehearing Granted. (*See No. 1389, Oct. Term, 1946, supra.*)

Rehearing Denied.

No. 200. KRUGER *v.* WHITEHEAD, DOING BUSINESS AS WHITEHEAD CO., 332 U. S. 774. Motion for leave to file a second petition for rehearing denied.

No. 458. FIELDS *v.* UNITED STATES, 332 U. S. 851. Rehearing denied. MR. JUSTICE BURTON took no part in the consideration or decision of this application.

No. 95, Misc. TARAS *v.* NEW YORK, 332 U. S. 818. Rehearing denied.

No. 135, Misc. MCGREGOR *v.* RAGEN, WARDEN, 332 U. S. 819. Rehearing denied.

No. 200, Misc. HOLLER *v.* UNITED STATES, 332 U. S. 855. Rehearing denied.

MARCH 8, 1948.

Miscellaneous Orders.

No. 643. HUNTER, WARDEN, *v.* MARTIN. On petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. The motion of the Solicitor General for a further stay is granted and it is ordered that execution and

enforcement of the judgment and mandate of the Circuit Court of Appeals be stayed pending consideration of the petition for writ of certiorari filed herein and, in the event certiorari is granted, until the mandate of this Court issues. Reported below: 165 F. 2d 215.

No. 347, Misc. ASPINOOK CORPORATION *v.* BRIGHT, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of mandamus is denied. *Dean Hill Stanley* and *Thomas F. Daly* for petitioner.

No. 235, Misc. CONWAY *v.* SQUIER, WARDEN;
No. 279, Misc. SZERLIP *v.* VETERANS' ADM'N;
No. 302, Misc. GROSS *v.* FLOWER;
No. 305, Misc. PADGETT *v.* CLARK, ATTORNEY GEN.;
No. 317, Misc. CAUDRON *v.* ASHE, WARDEN;
No. 323, Misc. STEVENS *v.* ILLINOIS; and
No. 332, Misc. JOHNSON *v.* IDAHO. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 313, Misc. HARRIS *v.* NEW YORK. Application denied.

No. 314, Misc. FOXALL *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 318, Misc. SKINNER *v.* SEARCY, CLERK OF THE SUPREME COURT OF ILLINOIS. The motion for leave to file petition for writ of mandamus is denied.

No. 329, Misc. IN RE MCMILLAN. Application denied.

No. 365, Misc. TAYLOR *v.* POUST, DIRECTOR. The motion for leave to file petition for writ of mandamus is denied.

Certiorari Granted.

No. 551. BRINEGAR *v.* UNITED STATES. C. C. A. 10th. Certiorari granted. *Leslie L. Conner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, W. Marvin Smith* and *Robert S. Erdahl* for the United States. Reported below: 165 F. 2d 512.

No. 560. HILTON *v.* SULLIVAN, SECRETARY OF THE NAVY, ET AL. United States Court of Appeals for the District of Columbia. Certiorari granted. *Charles Fahy, Philip Levy* and *Walter B. Wilbur* for petitioner. *Solicitor General Perlman, H. G. Morison* and *Paul A. Sweeney* for respondents. Reported below: 83 U. S. App. D. C. —, 165 F. 2d 251.

No. 590. KENNEDY ET AL. *v.* SILAS MASON CO. C. C. A. 5th. Certiorari granted. *Leonard Lloyd Lockard* for petitioners. *Charles D. Egan* for respondent. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* urging the petition be granted. Reported below: 164 F. 2d 1016.

No. 527. UNITED STATES *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. C. C. A. 2d. Certiorari granted. MR. JUSTICE REED, MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this application. *Solicitor General Perlman* for the United States. *William Watson Smith, Frank B. Ingersoll, Leon E. Hickman, Charles E. Hughes, Jr.* and *L. Homer Surbeck* for the Aluminum Company of America, respondent. Reported below: 164 F. 2d 159.

No. 395, Misc. PHYLE *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari granted. It is further ordered that execution of the sentence of death imposed

on this petitioner be stayed pending the final disposition of the case by this Court. *Morris Lavine* for petitioner. Reported below: 30 Cal. 2d 838, 186 P. 2d 134.

Certiorari Denied.

No. 518. DINEEN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Camden R. McAtee* for petitioner. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 109 Ct. Cl. 18, 71 F. Supp. 742.

No. 525. ARMSTRONG *v.* ARMSTRONG. District Court of Appeal, 2d Appellate District, of California. Certiorari denied. *Hubert T. Morrow* and *John C. Morrow* for petitioner. *John Stewart Ross* for respondent. Reported below: 81 Cal. App. 2d 316, 183 P. 2d 901.

No. 529. HOWARTH *v.* HOWARTH. District Court of Appeal, 2d Appellate District, of California. Certiorari denied. *Hiram T. Kellogg* for petitioner. Reported below: 81 Cal. App. 2d 266, 183 P. 2d 670.

No. 536. PETROWSKI *v.* NUTT, COLONEL, AIR CORPS, U. S. A. C. C. A. 9th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Harry I. Rand* for respondent. Reported below: 161 F. 2d 938.

No. 537. GLENSHAW GLASS CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 3d. Certiorari denied. *Max Swiren, Ben W. Heineman* and *Joseph D. Block* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Harry Baum* for respondent.

No. 538. DAVAULT ET AL. *v.* ERICKSON. District Court of Appeal, 4th Appellate District, of California. Certiorari denied. *Eugene W. Miller* for petitioners. Reported below: 80 Cal. App. 2d 970, 183 P. 2d 39.

No. 540. ESTATE OF THORP ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 3d. Certiorari denied. *W. Denning Stewart* and *Charles M. Thorp, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 164 F. 2d 966.

No. 543. WALLACE, DOING BUSINESS AS WALLACE NOVELTY CO., *v.* CITY OF CARTERSVILLE ET AL. Supreme Court of Georgia. Certiorari denied. *Jefferson L. Davis* for petitioner. *Croom Partridge* for respondents. Reported below: 203 Ga. 63, 45 S. E. 2d 63.

No. 546. STEELE ET AL., EXECUTORS, ET AL. *v.* GUARANTY TRUST COMPANY OF NEW YORK. C. C. A. 2d. Certiorari denied. *Meyer Abrams* for petitioners. *Ralph M. Carson* and *Francis W. Phillips* for respondent. Reported below: 164 F. 2d 387.

No. 547. POAGUE *v.* BUTTE COPPER & ZINC CO. C. C. A. 9th. Certiorari denied. *Lowndes Maury* and *Earle N. Genzberger* for petitioner. *D. M. Kelly* and *John C. Hauck* for respondent. Reported below: 164 F. 2d 201.

No. 548. FLEMING ET AL., TRUSTEES, *v.* HUSTED. C. C. A. 8th. Certiorari denied. *Ralph L. Read* and *Alden B. Howland* for petitioners. *Tom Davis, Carl Yaeger* and *Walter F. Maley* for respondent. Reported below: 164 F. 2d 65.

No. 549. AMERICAN PROCESSING & SALES CO. *v.* CAMPBELL, COLLECTOR OF INTERNAL REVENUE. C. C. A. 7th. Certiorari denied. *Delbert A. Clithero* and *Herman A. Fischer* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Morton K. Rothschild* for respondent. Reported below: 164 F. 2d 918.

No. 550. DENNY *v.* UNITED STATES. C. C. A. 7th. Certiorari denied. *Edmond J. Leeney* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 165 F. 2d 668.

No. 552. DUNSCOMBE *v.* KANNER, JUDGE. Supreme Court of Florida. Certiorari denied. *T. T. Oughterson* for petitioner. *Solicitor General Perlman* and *Lewis A. Sigler* for respondent.

No. 553. JUSTICE *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied. *Clay S. Crouse* for petitioner. Reported below: 130 W. Va. 662, 44 S. E. 2d 859.

No. 554. PRINCIPALE *v.* GENERAL PUBLIC UTILITIES CORP. ET AL. C. C. A. 2d. Certiorari denied. Petitioner *pro se*. *Allen E. Throop* for respondent. Reported below: 164 F. 2d 220.

No. 556. KORACH BROS. *v.* CLARK, DIRECTOR OF THE DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE. United States Emergency Court of Appeals. Certiorari denied. *Samuel E. Hirsch* and *Julian H. Levi* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for respondent. Reported below: 165 F. 2d 218.

No. 559. REPUBLIC AVIATION CORP. ET AL. *v.* LOWE, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL. C. C. A. 2d. Certiorari denied. *John P. Smith* and *Albert P. Thill* for petitioners. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Alvin O. West* for Lowe, Deputy Commissioner, respondent. Reported below: 164 F. 2d 18.

No. 567. MOUNTAIN STATES FEDERATION OF TELEPHONE WORKERS ET AL. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. Court of Civil Appeals of Texas. Certiorari denied. *Leo Jaffe* for petitioners. *Elmer L. Brock* for respondent.

No. 568. LASSITER *v.* POWELL ET AL. C. C. A. 4th. Certiorari denied. *Murray Allen* for petitioner. *Clyde A. Douglass* and *B. S. Royster, Jr.* for respondents. Reported below: 164 F. 2d 186.

No. 572. PRUDENCE REALIZATION CORP. *v.* EDDY ET AL. C. C. A. 2d. Certiorari denied. *Irving L. Schanzer* for petitioner. *Samuel Silbiger* for Eddy; *Frank L. Weil* for White et al.; *James F. Dealy* and *Edward L. Friedman, Jr.* for the Reconstruction Finance Corporation; *Charles M. McCarty* and *Geo. C. Wildermuth* for the Prudence-Bonds Corporation et al.; and *Joseph Nemerov* for Reese et al., respondents. Reported below: 165 F. 2d 157.

No. 573. GRIMES *v.* CAPITAL TRANSIT CO. United States Court of Appeals for the District of Columbia. Certiorari denied. *Arthur G. Lambert* and *George L. Hart, Jr.* for petitioner. Reported below: 82 U. S. App. D. C. 393, 164 F. 2d 718.

No. 483. HART *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General*

Perlman, Assistant Attorney General Quinn, Robert S. Erdahl and *Beatrice Rosenberg* for the United States. Reported below: 163 F. 2d 1017.

No. 534. KENNEDY *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Thurgood Marshall, W. Robert Ming* and *Z. Alexander Looby* for petitioner. *Nat Tipton* for respondent. Reported below: 186 Tenn. —, 210 S. W. 2d 132.

No. 569. ASPINOOK CORPORATION *v.* BRIGHT, U. S. DISTRICT JUDGE. C. C. A. 2d. Certiorari denied. *Dean Hill Stanley* and *Thomas F. Daly* for petitioner. *Milton Paulson* for respondent. Reported below: 165 F. 2d 294.

No. 164, Misc. MCGUIRE ET AL. *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States.

No. 167, Misc. WILLIAMS *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States.

No. 169, Misc. BYRD *v.* PESCOR, WARDEN. C. C. A. 8th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for respondent. Reported below: 163 F. 2d 775.

No. 176, Misc. NOLAN *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. Petitioner *pro se*. *Solicitor*

General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl and *Philip R. Monahan* for the United States. Reported below: 163 F. 2d 768.

No. 183, Misc. CALDWELL *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 163 F. 2d 181.

No. 184, Misc. THOMAS *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for respondent. Reported below: 163 F. 2d 1021.

No. 188, Misc. BANKEY *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 165 F. 2d 788.

No. 199, Misc. OWENS *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 164 F. 2d 93.

No. 205, Misc. SPENCER *v.* PESCOR, WARDEN. C. C. A. 8th. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 164 F. 2d 342.

No. 223, Misc. FERRELL *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 228, Misc. LACEY *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for respondent. Reported below: 163 F. 2d 876.

No. 245, Misc. MCNEALY *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 164 F. 2d 600.

No. 251, Misc. NEWTON *v.* UNITED STATES. C. C. A. 4th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Ellis N. Slack* for the United States. Reported below: 162 F. 2d 795.

No. 255, Misc. BIRTCH ET AL. *v.* UNITED STATES. C. C. A. 4th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 164 F. 2d 880.

No. 257, Misc. WIEBE *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 163 Kan. 30, 180 P. 2d 315.

No. 309, Misc. WILLIAMS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 312, Misc. MOSTELLER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 316, Misc. HAYES *v.* JACKSON, WARDEN. C. C. A. 2d. Certiorari denied.

No. 328, Misc. SKAGGS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 478, 76 N. E. 2d 455.

No. 330, Misc. DAVIS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 331, Misc. WILSON *v.* RAGEN, WARDEN. Circuit Court of Kane County, Illinois. Certiorari denied.

No. 335, Misc. MUSIAL *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 342, Misc. DUNBAR *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 344, Misc. WILSON *v.* BUSH, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 348, Misc. BONINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 296 N. Y. 1004, 73 N. E. 2d 579.

No. 357, Misc. BYTNAR *v.* NIERSTHEIMER, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 358, Misc. PARKS *v.* NIERSTHEIMER, WARDEN. Circuit Court of Salina County, Illinois. Certiorari denied.

No. 359, Misc. STUKINS *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 362, Misc. NEAVOR *v.* RAGEN, WARDEN. Circuit Court of Tazewell County, Illinois. Certiorari denied.

No. 363, Misc. GEHANT *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

Rehearing Denied.

No. 70. KAVANAGH, COLLECTOR OF INTERNAL REVENUE, *v.* NOBLE, 332 U. S. 535. Rehearing denied.

No. 71. JONES, COLLECTOR OF INTERNAL REVENUE, *v.* LIBERTY GLASS CO., 332 U. S. 524. Rehearing denied.

No. 100. UNITED STATES *v.* BROWN, *ante*, p. 18. Rehearing denied.

No. 479. STATLER *v.* UNITED STATES, *ante*, p. 826. Rehearing denied.

No. 510. STEVENSON *v.* JOHNSTON, WARDEN, *ante*, p. 832. Rehearing denied.

No. 170. DIXON *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., 332 U. S. 764. The motion for leave to file a third petition for rehearing is denied.

No. 506. A. B. T. MANUFACTURING CORP. *v.* NATIONAL SLUG REJECTORS, INC., *ante*, p. 832. Rehearing denied. Neither the petition for rehearing nor the supplemental petition is based upon a ground which is substantial within the meaning of Rule 33, as amended October 13, 1947. (See 332 U. S. 857.)

No. 22, Misc. LOWE *v.* UNITED STATES, 332 U. S. 777. Leave to file a second petition for rehearing is denied.

No. 311, Misc. GRECO *v.* MISSOURI, *ante*, p. 839. Rehearing denied.

March 15, 1948.

Per Curiam Decisions.

No. 292. Brunson *v.* North Carolina;

No. 293. King *v.* North Carolina;

No. 294. Jones *v.* North Carolina;

No. 295. James et al. *v.* North Carolina; and

No. 296. Watkins et al. *v.* North Carolina. Certiorari, 332 U. S. 841, to the Supreme Court of North Carolina. Argued February 3, 1948. Decided March 15, 1948. *Per Curiam:* Reversed. *Strauder* v. *West Virginia,* 100 U. S. 303; *Ex parte Virginia,* 100 U. S. 339; *Neal* v. *Delaware,* 103 U. S. 370; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226; *Norris* v. *Alabama,* 294 U. S. 587; *Hollins* v. *Oklahoma,* 295 U. S. 394; *Hale* v. *Kentucky,* 303 U. S. 613; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Patton* v. *Mississippi,* 332 U. S. 463. *William Reid Dalton* argued the cause for petitioners. With him on the brief was *Nathan Witt.* *Ralph Moody,* Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief were *Harry McMullan,* Attorney General, and *James E. Tucker,* Assistant Attorney General. Reported below: 227 N. C. 558, 559, 560, 561, 43 S. E. 2d 82, 83.

No. 609. Full Salvation Union et al. *v.* Portage Township. Appeal from the Supreme Court of Michigan. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Mr. Justice Murphy is of the opinion that probable jurisdiction should be noted. Mr. Justice Rutledge is of the opinion that the question of jurisdiction should be postponed to a hearing of the case on the merits. *Burton Allen Andrews* for appellants. *Lewis George Meader* and *Harry F. Smith* for appellee. Reported below: 318 Mich. 693, 29 N. W. 2d 297.

No. 630. KING ET AL. *v.* PRIEST ET AL. Appeal from the Supreme Court of Missouri. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE are of the opinion that probable jurisdiction should be noted. *S. D. Flanagan* and *E. D. Franey* for appellants. *J. C. Taylor,* Attorney General of Missouri, for appellees. Reported below: 357 Mo. 68, 206 S. W. 2d 547.

Miscellaneous Orders.

No. 93. MARINO *v.* RAGEN, WARDEN. The motion of the Attorney General of Illinois for this Court's instructions to the Circuit Court of Winnebago County, Illinois, is denied.

No. 379. GRAND RIVER DAM AUTHORITY *v.* GRAND-HYDRO, INC. The petition for rehearing is granted. The order entered December 15, 1947, denying certiorari, 332 U. S. 841, is vacated and the petition for writ of certiorari to the Supreme Court of Oklahoma is granted. *Robert Leander Davidson* for petitioner. *Samuel Frank Fowler* for respondent. Reported below: 192 Okla. 693, 139 P. 2d 798.

No. 366, Misc. MAYES *v.* CALIFORNIA ET AL. The motions for leave to file petitions for writs of certiorari and habeas corpus are denied.

Certiorari Granted. (*See also No. 379, supra.*)

No. 531. BELLASKUS *v.* CROSSMAN, OFFICER IN CHARGE, U. S. IMMIGRATION AND NATURALIZATION SERVICE. C. C. A. 5th. Certiorari granted. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for respondent. Reported below: 164 F. 2d 412.

No. 533. TAKAHASHI *v.* FISH AND GAME COMMISSION ET AL. Supreme Court of California. Certiorari granted. *A. L. Wirin, Dean Acheson, Charles A. Horsky, Saburo Kido* and *Fred Okrand* for petitioner. *Fred N. Howser,* Attorney General of California, for respondents. Briefs of *amici curiae* in support of the petition were filed by *Attorney General Clark* and *Solicitor General Perlman* for the United States; *Lee Pressman* and *Frank Donner* for the Congress of Industrial Organizations; and *Thurgood Marshall* and *Marian Wynn Perry* for the National Association for the Advancement of Colored People. Reported below: 30 Cal. 2d 719, 185 P. 2d 805.

Nos. 580 and 581. INTERNATIONAL UNION, U. A. W., A. F. OF L., LOCAL 232, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL. Supreme Court of Wisconsin. Certiorari granted. *J. Albert Woll* and *Herbert S. Thatcher* for petitioners. *John E. Martin,* Attorney General of Wisconsin, and *Stewart G. Honeck,* Deputy Attorney General, for the Wisconsin Employment Relations Board, respondent. *Edgar L. Wood, Richard H. Tyrrell* and *Bernard V. Brady* for the Briggs & Stratton Corp., respondent. Reported below: 250 Wis. 550, 27 N. W. 2d 875.

No. 607. CALLAWAY, TRUSTEE, ET AL. *v.* BENTON ET AL. C. C. A. 5th. Certiorari granted. *T. M. Cunningham, A. R. Lawton, Jr., Walter A. Harris* and *Wallace Miller* for petitioners. *Charles J. Bloch* for respondents. Reported below: 165 F. 2d 877.

No. 582. MANDEL BROTHERS, INC. *v.* WALLACE. C. C. A. 7th. Certiorari granted. *Leonard S. Lyon* and *Thomas A. Sheridan* for petitioner. *Charles J. Merriam* and *Bernard A. Schroeder* for respondent. Reported below: 164 F. 2d 861.

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No. 643. HUNTER, WARDEN, *v.* MARTIN. C. C. A. 10th. Certiorari granted. *Solicitor General Perlman* for petitioner. Reported below: 165 F. 2d 215.

No. 319, Misc. HEDGEBETH *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari granted. Petitioner *pro se*. *Harry McMullan,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 228 N. C. 259, 45 S. E. 2d 563.

Certiorari Denied.

No. 340. BLACK ET AL. *v.* ROLAND ELECTRICAL CO. C. C. A. 4th. Certiorari denied. *Paul Berman, Sigmund Levin* and *Theodore B. Berman* for petitioners. *O. R. McGuire* for respondent. *William L. Marbury* filed a brief for the Bethlehem-Fairfield Shipyard, Inc., as *amicus curiae,* opposing the petition. Reported below: 163 F. 2d 417.

No. 512. WILLIAMS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO.;

No. 513. THOMAS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO.; and

No. 514. NEIS *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. Supreme Court of Missouri. Certiorari denied. *W. L. Cunningham* for petitioners. *R. S. Outlaw, Wm. J. Milroy* and *Sam D. Parker* for respondent. Reported below: 356 Mo. 967, 204 S. W. 2d 693.

No. 515. PEDERSEN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Joseph B. Ely, George P. Dike, Cedric W. Porter* and *Frederick M. Kingsbury* for petitioner. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 109 Ct. Cl. 226.

No. 558. General Motors Corp. *v.* Kesling. C. C. A. 8th. Certiorari denied. *Horace Dawson, Casper W. Ooms, Edwin S. Booth* and *Joseph J. Gravely* for petitioner. *Edmund C. Rogers* and *Estill E. Ezell* for respondent. Reported below: 164 F. 2d 824.

No. 563. Sikora Realty Corp. *v.* Woods, Housing Expediter. United States Emergency Court of Appeals. Certiorari denied. *Agnes Sikora Gilligan* for petitioner. *Solicitor General Perlman, John R. Benney, Ed Dupree, Charles P. Liff* and *Philip Travis* for respondent.

No. 564. Summers *v.* McCoy, U. S. Postmaster at Columbus, Ohio. C. C. A. 6th. Certiorari denied. *James N. Linton* and *Henry J. Linton* for petitioner. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Morton Liftin* for respondent. Reported below: 163 F. 2d 1021.

No. 565. Jongebloed, Administrator, *v.* Erie Railroad Co. Supreme Court of New York, County of New New York. Certiorari denied. *Milton Dunn* for petitioner. *Theodore Kiendl, William H. Timbers* and *Cleveland C. Cory* for respondent. Reported below: See 297 N. Y. 534, 603, 74 N. E. 2d 470.

No. 566. Fletcher *v.* Commissioner of Internal Revenue. C. C. A. 2d. Certiorari denied. *Laurence Sovik* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewell Key, Lee A. Jackson* and *Fred E. Youngman* for respondent. Reported below: 164 F. 2d 182.

No. 575. Unity Railways Co. *v.* Kurimsky, Administratrix. Supreme Court of Pennsylvania. Certiorari

denied. *J. Roy Dickie* for petitioner. *William S. Doty* for respondent. Reported below: 357 Pa. 521, 55 A. 2d 378.

No. 578. TRUST COMPANY OF GEORGIA, SUCCESSOR TRUSTEE, *v.* ALLEN, COLLECTOR OF INTERNAL REVENUE. C. C. A. 5th. Certiorari denied. *Dan MacDougald* and *Robert S. Sams* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Melva M. Graney* for respondent. Reported below: 164 F. 2d 438.

No. 588. BUNTING *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 6th. Certiorari denied. *Walter A. Eversman* and *Josiah T. Herbert* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Harry Baum* for respondent. Reported below: 164 F. 2d 443.

No. 509. RANDALL *v.* UNITED STATES; and

No. 555. HACKBUSCH *v.* UNITED STATES. C. C. A. 7th. The motion for leave to file a supplemental petition in No. 509 is granted. Certiorari denied. *Mack Taylor* for petitioner in No. 509. *Theodore Lockyear* for petitioner in No. 555. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States. Reported below: 164 F. 2d 284.

No. 606. ILLGES ET AL. *v.* CONGDON. Circuit Court of Walworth County, Wisconsin. The motion to return the record is denied. Certiorari denied. *J. Arthur Moran* for petitioners. *Arthur T. Thorson* for respondent. See 251 Wis. 50, 27 N. W. 2d 716.

No. 163, Misc. THOMPSON *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se*. *Solici-*

tor General Perlman, Assistant Attorney General Quinn, Frederick Bernays Wiener, Robert S. Erdahl and *Beatrice Rosenberg* for respondent. Reported below: 163 F. 2d 830.

No. 198, Misc. RICHETSKY *v.* NEW YORK. County Court of Queens County, New York. Certiorari denied. Reported below: See 297 N. Y. 717, 77 N. E. 2d 18.

No. 219, Misc. BAUTZ *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 249, Misc. KAUFMAN *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. *Arthur W. A. Cowan* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *W. Victor Rodin* for the United States. Reported below: 163 F. 2d 404.

No. 256, Misc. BLOOM *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 164 F. 2d 556.

No. 276, Misc. GRIFFIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari denied. *Joseph A. McMenamin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 83 U. S. App. D. C. —, 164 F. 2d 903.

No. 322, Misc. MAZAKAHOMNI *v.* NORTH DAKOTA. Supreme Court of North Dakota. Certiorari denied. Reported below: 75 N. D. —, 25 N. W. 2d 772.

No. 324, Misc. MEYERS *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 336, Misc. CARR *v.* MARTIN, WARDEN. Appellate Division of the Supreme Court of New York. Certiorari denied. Reported below: — App. Div. —, 76 N. Y. S. 2d 542.

No. 341, Misc. MATTHEWS *v.* BURFORD, WARDEN. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 186 P. 2d 840.

No. 351, Misc. EGGERS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 30 Cal. 2d 676, 185 P. 2d 1.

No. 380, Misc. O'NEILL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

Rehearing Granted. (*See No. 379, supra.*)

Rehearing Denied.

No. 532. KOTT ET AL. *v.* UNITED STATES, *ante,* p. 837. Rehearing denied.

No. 535. JOSEPHSON *v.* UNITED STATES, *ante,* p. 838. Rehearing denied.

No. 545. INDIANA EX REL. MAVITY *v.* TYNDALL ET AL., *ante,* p. 834. Rehearing denied.

MARCH 29, 1948.

Decisions Per Curiam.

No. 618. REEDER *v.* BANKS ET AL. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a substantial federal question. *Solon W. Smith* for appellant. *Milton Keen* for appellees. Reported below: 199 Okla. 647, 192 P. 2d 683.

No. 636. DAVIS ET AL. *v.* BEELER, ATTORNEY GENERAL, ET AL. Appeal from the Supreme Court of Tennessee. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Weldon B. White* for appellants. *Nat Tipton* for appellees. Reported below: 185 Tenn. 638, 207 S. W. 2d 343.

Miscellaneous Order.

No. 432, Misc. MURRAY *v.* MISSISSIPPI. On petition for appeal to the Supreme Court of Mississippi. The petition for the allowance of an appeal is denied but the appeal papers will be treated as an application for a writ of certiorari. It is ordered that execution of the sentence of death imposed on the petitioner (appellant) by the Circuit Court of Stone County, Mississippi, be, and the same hereby is, stayed until the further order of this Court. Reported below: — Miss. —, 33 So. 2d 291.

Certiorari Granted.

No. 608. VERMILYA-BROWN CO., INC. ET AL. *v.* CONNELL ET AL. C. C. A. 2d. Certiorari granted. *J. Randall Creel* and *Charles Fahy* for petitioners. *Jacob Bromberg* for respondents. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* urging that the petition be granted. Reported below: 164 F. 2d 924.

No. 604. HOINESS *v.* UNITED STATES. C. C. A. 9th. Certiorari granted limited to questions (1) (b) and (2) (a) presented by the petition for the writ. *Herbert Resner* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 165 F. 2d 504.

No. 640. NATIONAL MUTUAL INSURANCE CO. *v.* TIDEWATER TRANSFER CO., INC. C. C. A. 4th. Certiorari granted. In view of the Act of August 24, 1937, 28 U. S. C. § 401, the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Act of April 20, 1940 (c. 117, 54 Stat. 143), is drawn in question in this case. *Alvin L. Newmyer, David G. Bress* and *Sheldon E. Bernstein* for petitioner. *Solicitor General Perlman* filed a brief for the United States, as *amicus curiae,* urging that the petition be granted. Reported below: 165 F. 2d 531.

No. 667. GOGGIN, TRUSTEE IN BANKRUPTCY, *v.* DIVISION OF LABOR LAW ENFORCEMENT OF CALIFORNIA. C. C. A. 9th. Certiorari granted. *Martin Gendel* for petitioner. *Fred N. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General, for respondent. Reported below: 165 F. 2d 155.

Certiorari Denied.

No. 561. GOTTFRIED ET AL. *v.* UNITED STATES; and

No. 562. GOTTFRIED ET AL. *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Joseph L. Weiner* and *Henry Epstein* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 165 F. 2d 360.

No. 570. MEYER *v.* TERRITORY OF HAWAII. C. C. A. 9th. Certiorari denied. *O. P. Soares* for petitioner. *A. J. Zirpoli* for respondent. Reported below: 164 F. 2d 845.

No. 571. MEYER *v.* TERRITORY OF HAWAII. C. C. A. 9th. Certiorari denied. *O. P. Soares* for petitioner. *A. J. Zirpoli* for respondent. Reported below: 164 F. 2d 845.

No. 579. GARLAND *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Henry Klepak* for petitioner. *Solicitor General Perlman, Assistant Attorney General Sonnett, Edward Dumbauld* and *James A. Murray* for the United States. Reported below: 164 F. 2d 487.

No. 587. KOSDON ET AL. *v.* DIVERSEY HOTEL CORP. C. C. A. 7th. Certiorari denied. *Meyer Abrams* and *William H. Rubin* for petitioners. *Edward Blackman* for respondent. *Solicitor General Perlman* and *Roger S. Foster* filed a brief for the Securities & Exchange Commission opposing the petition. Reported below: 165 F. 2d 655.

No. 589. STEELE *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, ET AL. C. C. A. 9th. Certiorari denied. *Leo R. Friedman* for petitioner. Reported below: 164 F. 2d 781.

No. 595. BALTIMORE & OHIO RAILROAD CO. *v.* PLOUGH;

No. 596. BALTIMORE & OHIO RAILROAD CO. *v.* HANSON, ADMINISTRATRIX;

No. 597. BALTIMORE & OHIO RAILROAD CO. *v.* VAN SLYKE; and

No. 598. BALTIMORE & OHIO RAILROAD CO. *v.* LYNCH, ADMINISTRATRIX. C. C. A. 2d. Certiorari denied. *William C. Combs* for petitioner. *Manly Fleischmann* for respondents. Reported below: 164 F. 2d 254.

No. 599. ANTHONY P. MILLER, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 3d. Certiorari denied. *S. Leo Ruslander* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Helen Goodner* for respondent. Reported below: 164 F. 2d 268.

No. 601. BANGS, TRUSTEE, *v.* FOGEL. C. C. A. 7th. Certiorari denied. *U. S. Lesh* for petitioner. Reported below: 164 F. 2d 214.

No. 602. GORDON *v.* UNITED STATES. C. C. A. 6th. Certiorari denied. *John Wattawa* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 164 F. 2d 855.

No. 605. WATSON, ATTORNEY GENERAL, *v.* LARSON, STATE TREASURER, ET AL. Supreme Court of Florida. Certiorari denied. *J. Tom Watson,* Attorney General of Florida, and *Sumter Leitner,* Assistant Attorney General, for petitioner. *Lawrence A. Truett* for respondents. Reported below: — Fla. —, 33 So. 2d 155.

No. 610. POLAND COAL CO. *v.* HILLMAN COAL & COKE CO. Supreme Court of Pennsylvania. Certiorari denied. *Fred C. Houston* and *Leonard K. Guiler* for petitioner. *Earl F. Reed* and *Charles M. Thorp, Jr.* for respondent. Reported below: 357 Pa. 535, 55 A. 2d 414.

No. 614. CALCASIEU PAPER CO., INC. *v.* CARPENTER PAPER CO. C. C. A. 5th. Certiorari denied. *William E. Allen* and *Sam A. Billingsley* for petitioner. *G. L. DeLacy* and *Ogden K. Shannon* for respondent. Reported below: 164 F. 2d 653.

No. 616. SWACKER *v.* PENNROAD CORPORATION ET AL. Supreme Court of Delaware. Certiorari denied. *Harvey D. Jacob* and *Alexander Conn* for petitioner. *James R. Morford* and *William D. Donnelly* for respondents. Reported below: — Del. —, 57 A. 2d 63.

No. 622. WESTERN UNION TELEGRAPH CO. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR. C. C. A. 6th.

Certiorari denied. *Charles W. Milner* for petitioner. *Solicitor General Perlman, William S. Tyson, Bessie Margolin* and *Sidney S. Berman* for respondent. Reported below: 165 F. 2d 65.

No. 624. MATLAW CORPORATION *v.* WAR DAMAGE CORPORATION. C. C. A. 7th. Certiorari denied. *James E. Watson, Orin deM. Walker, Walter Myers, Jr.* and *Jay E. Darlington* for petitioner. *Solicitor General Perlman, H. G. Morison* and *Paul A. Sweeney* for respondent. Reported below: 164 F. 2d 281.

No. 631. SALAMONIE PACKING CO. *v.* UNITED STATES. C. C. A. 8th. Certiorari denied. *William C. Bachelder* and *Jacob M. Lashly* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Vincent A. Kleinfeld* for the United States. Reported below: 165 F. 2d 205.

No. 634. WM. J. LEMP BREWING CO. *v.* EMS BREWING CO. C. C. A. 7th. Certiorari denied. *Samuel H. Liberman* and *Bruce A. Campbell* for petitioner. *Walter R. Mayne* for respondent. Reported below: 164 F. 2d 290.

No. 635. YOUNG *v.* MURPHY ET AL., EXECUTORS. C. C. A. 6th. Certiorari denied. *Robert J. Bulkley, James A. Butler* and *Robert W. Purcell* for petitioner. *Charles K. Arter, L. C. Wykoff, Kingsley A. Taft* and *Raymond T. Jackson* for respondents. Reported below: 164 F. 2d 426.

No. 639. METZGER *v.* HOSSACK, ADMINISTRATRIX. C. C. A. 8th. Certiorari denied. *George J. Danforth, G. J. Danforth, Jr.* and *Seth W. Richardson* for petitioner. *Roy E. Willy* for respondent. Reported below: 165 F. 2d 1.

No. 625. O'CONNELL ET AL. *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Sol Gelb* and *Herbert Zelenko* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 165 F. 2d 697.

No. 206, Misc. CLEARY *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 163 F. 2d 748.

No. 234, Misc. SHOTKIN *v.* FRIEDMAN ET AL. Supreme Court of Colorado. Certiorari denied. Reported below: 116 Colo. 295, 180 P. 2d 1021.

No. 237, Misc. PIERCE *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Beatrice Rosenberg* for the United States.

No. 304, Misc. SPRUILL *v.* CAMPBELL, EXECUTOR. United States Court of Appeals for the District of Columbia. Certiorari denied. Reported below: 82 U. S. App. D. C. 401, 166 F. 2d 210.

No. 352, Misc. KENNEDY *v.* SANFORD, WARDEN. C. C. A. 5th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for respondent. Reported below: 166 F. 2d 568.

No. 377, Misc. WILES *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Reported below: 159 Fla. 638, 32 So. 2d 273.

Rehearing Denied.

No. 516. OHIO OIL CO. *v.* UNITED STATES, *ante*, p. 833. Rehearing denied.

APRIL 5, 1948.

Per Curiam Decision.

No. 675. MARSHALL *v.* LOUISIANA. Appeal from the District Court, First Judicial District, Parish of Caddo, Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Leonard Lloyd Lockard* for appellant. *Edwin L. Blewer* for appellee.

Miscellaneous Orders.

No. 138. JOHNSON *v.* UNITED STATES, 333 U. S. 46. The motion of the respondent to recall and redirect the mandate to the Circuit Court of Appeals is denied.

No. 147, Misc. UNITED STATES EX REL. LUDECKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION. The petition for rehearing is granted. The order entered January 12, 1948, denying certiorari, 332 U. S. 853, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. Relator *pro se*. *Solicitor General Perlman, Herbert A. Bergson* and *Samuel D. Slade* for respondent. Reported below: 163 F. 2d 143.

No. 413, Misc. IN RE EICHEL ET AL. Petition denied.

No. 216, Misc. MARKWELL *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Circuit Court of Knox County, Illinois, dismissed on motion of petitioner.

Certiorari Granted. (*See also No. 147, Misc., supra.*)

No. 600. PENN *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. C. A. 7th. Certiorari granted. *Royal W. Irwin* for petitioner. *Lowell Hastings* for respondent. Reported below: 163 F. 2d 995.

No. 612. MICHELSON *v.* UNITED STATES. C. C. A. 2d. Certiorari granted. *Louis J. Castellano* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 165 F. 2d 732.

No. 613. HYNES, REGIONAL DIRECTOR, FISH & WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *v.* GRIMES PACKING CO. ET AL. C. C. A. 9th. Certiorari granted. *Solicitor General Perlman* for petitioner. *Edward F. Medley* and *Charles A. Horsky* for respondents. Reported below: 165 F. 2d 323.

No. 628. ECKENRODE, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. C. C. A. 3d. Certiorari granted. *John H. Hoffman* for petitioner. *Philip Price* for respondent. Reported below: 164 F. 2d 481, 996.

Nos. 650 and 651. COMMISSIONER OF INTERNAL REVENUE *v.* JACOBSON. C. C. A. 7th. Certiorari granted. *Solicitor General Perlman* for petitioner. Respondent *pro se.* Reported below: 164 F. 2d 594.

No. 400, Misc. TAYLOR *v.* ALABAMA. Supreme Court of Alabama. Certiorari granted. *Thurgood Marshall* for petitioner. *A. A. Carmichael,* Attorney General of Alabama, and *James L. Screws,* Assistant Attorney General, for respondent. Reported below: 249 Ala. 667, 32 So. 2d 659.

No. 415, Misc. LOVELADY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari granted limited to the question of the constitution of the grand jury, the second question presented by the petition for the writ. Execution of the sentence of death imposed on this petitioner is ordered stayed pending the final disposition of the case by this Court. *Sam W. Davis* for petitioner. Reported below: — Tex. Cr. R. —, 207 S. W. 2d 396.

Certiorari Denied.

No. 524. NORRIS & HIRSHBERG, INC. *v.* SECURITIES & EXCHANGE COMMISSION. United States Court of Appeals for the District of Columbia. Certiorari denied. *Joseph B. Brennan, William A. Sutherland* and *Carl McFarland* for petitioner. *Solicitor General Perlman* and *Roger S. Foster* for respondent. Reported below: 82 U. S. App. D. C. 32, 163 F. 2d 689.

No. 574. BORNHURST *v.* UNITED STATES. C. C. A. 9th. Certiorari denied. *Kneland C. Tanner* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Oscar H. Davis* for the United States. Reported below: 164 F. 2d 789.

No. 586. TURLOCK IRRIGATION DISTRICT ET AL. *v.* COUNTY OF TUOLUMNE ET AL. Supreme Court of California. Certiorari denied. *W. Coburn Cook* for petitioners.

No. 615. SOCIEDAD ESPAÑOLA DE AUXILIO MUTUO Y BENEFICENCIA DE PUERTO RICO *v.* BUSCAGLIA, TREASURER OF PUERTO RICO, ET AL. C. C. A. 1st. Certiorari denied. *Gabriel De La Haba* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Vanech* for respondent. Reported below: 164 F. 2d 745.

No. 627. ESTATE OF COLLINS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 2d. Certiorari denied. *Weston Vernon, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Melva M. Graney* for respondent. Reported below: 164 F. 2d 276.

No. 629. MART *v.* LAINSON, WARDEN. Supreme Court of Iowa. Certiorari denied. *Carlos W. Goltz* for petitioner. Reported below: 239 Iowa 21, 30 N. W. 2d 305.

No. 637. MERCANTILE-COMMERCE BANK & TRUST CO. ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. C. C. A. 8th. Certiorari denied. *Abraham Lowenhaupt, Jacob Chasnoff* and *Henry C. Lowenhaupt. Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key* and *Harry Baum* for respondent. Reported below: 165 F. 2d 307.

No. 647. RUBINSTEIN *v.* UNITED STATES; and

No. 648. FOSTER *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Edwin B. Wolchok* and *Lemuel B. Schofield* for petitioner in No. 647. *George Wolf* and *Thomas D. McBride* for petitioner in No. 648. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl, Irving S. Shapiro* and *Beatrice Rosenberg* for the United States. Reported below: 166 F. 2d 249.

No. 229, Misc. FOWLER *v.* HUNTER, WARDEN. C. C. A. 10th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 164 F. 2d 668.

No. 326, Misc. O'LOUGHLIN *v.* PARKER, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMIS-

SION. C. C. A. 4th. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, H. G. Morison, Paul A. Sweeney* and *Alvin O. West* for respondent. Reported below: 163 F. 2d 1011.

No. 353, Misc. HOWELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 354, Misc. RITENOUR *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 355, Misc. JONES *v.* RAGEN, WARDEN. Circuit Court of Will County and Supreme Court of Illinois. Certiorari denied. Reported below: 397 Ill. 264, 73 N. E. 2d 278.

No. 356, Misc. BUTLER *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 386, Misc. VAN TASSELL *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 432, Misc. MURRAY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. Reported below: — Miss. —, 33 So. 2d 291.

Rehearing Granted. (*See No. 147, Misc., supra.*)

Rehearing Denied.

No. 13. UNITED STATES *v.* UNITED STATES GYPSUM CO. ET AL., *ante*, p. 364. Rehearing denied. MR. JUSTICE JACKSON took no part in the consideration or decision of this application.

No. 552. DUNSCOMBE *v.* KANNER, JUDGE, *ante*, p. 844. Rehearing denied.

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No. 558. General Motors Corp. *v.* Kesling, *ante*, p. 855. Rehearing denied.

No. 196, Misc. Dickey *v.* United States, *ante*, p. 835. Rehearing denied.

No. 255, Misc. Birtch et al. *v.* United States, *ante*, p. 848. Rehearing denied.

No. 351, Misc. Eggers *v.* California, *ante*, p. 858. Rehearing denied. The stay order entered February 5, 1948, is vacated.

April 19, 1948.

Per Curiam Decision.

No. 153, Misc. Wagner *v.* United States. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The order of the Circuit Court of Appeals is reversed and the cause is remanded to that court with directions to reinstate petitioner's appeal and to instruct the District Court to afford petitioner an opportunity to prepare a record on appeal in accordance with Rule 39 of the Rules of Criminal Procedure. Mr. Justice Black took no part in the consideration or decision of this case. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States.

Miscellaneous Orders.

No. 703. Oklahoma Tax Commission *v.* Texas Company; and

No. 704. Oklahoma Tax Commission *v.* Magnolia Petroleum Co. Appeals from the Supreme Court of

Oklahoma. 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 granted. The Solicitor General is requested to file a brief as *amicus curiae*. *Mac Q. Williamson,* Attorney General of Oklahoma, *Fred Hansen,* Assistant Attorney General, and *R. F. Barry* for appellant.

No. 266, Misc. McCann *v.* Clark, Attorney General, et al. The motion for leave to file petition for writ of certiorari is denied. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for respondents.

No. 396, Misc. Brill *v.* Ragen, Warden. Supreme Court of Illinois. Certiorari denied. The motion for leave to file petition for writ of habeas corpus is also denied.

No. 343, Misc. Ex parte Montgomery;
No. 349, Misc. Orono *v.* California et al.;
No. 360, Misc. Barnett *v.* Wright;
No. 382, Misc. Reed *v.* Nierstheimer, Warden;
No. 392, Misc. Fortune *v.* Verdel;
No. 394, Misc. Hile *v.* Overholser; and
No. 398, Misc. Ruthven *v.* Overholser, Superintendent. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 369, Misc. Kruse *v.* Supreme Court of Illinois;
No. 372, Misc. Miner *v.* Supreme Court of Illinois; and

No. 399, Misc. REAVIS *v.* CONGRESS OF THE UNITED STATES. The motions for leave to file petitions for writs of mandamus are severally denied.

No. 339, Misc. EX PARTE KASPER. Application denied.

Certiorari Granted. (*See also Nos. 153, Misc., 703 and 704 supra.*)

No. 577. UNITED STATES *v.* URBETEIT. C. C. A. 5th. Certiorari granted. *Solicitor General Perlman* for the United States. *H. O. Pemberton* for respondent. Reported below: 164 F. 2d 245.

No. 645. KORDEL *v.* UNITED STATES. C. C. A. 7th. Certiorari granted. *Arthur D. Herrick* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 164 F. 2d 913.

No. 649. LITTLEJOHN, WAR ASSETS ADMINISTRATOR AND SURPLUS PROPERTY ADMINISTRATOR, *v.* DOMESTIC AND FOREIGN COMMERCE CORP. United States Court of Appeals for the District of Columbia. Larson substituted for Littlejohn as the party petitioner. Certiorari granted. *Solicitor General Perlman* for petitioner. *Seth W. Richardson* for respondent. Reported below: 83 U. S. App. D. C. —, 165 F. 2d 235.

No. 678. MCDONALD ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari granted. *John Lewis Smith, Jr.* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn* and *Robert S. Erdahl* for the United States. Reported below: 83 U. S. App. D. C. —, 166 F. 2d 957.

No. 213, Misc. FRAZIER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia. Certiorari granted. Petitioner *pro se*. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 82 U. S. App. D. C. 332, 163 F. 2d 817.

Certiorari Denied. (*See also No. 396, Misc., supra.*)

No. 576. STANDARD OIL CO. (NEW JERSEY) ET AL. *v.* CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN; and

No. 641. CLARK, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* STANDARD OIL CO. (NEW JERSEY) ET AL. C. C. A. 2d. Certiorari denied. *John W. Davis* and *Theodore S. Kenyon* for petitioners in No. 576 and respondents in No. 641. *Solicitor General Perlman* for respondent in No. 576 and petitioner in No. 641. With him on the brief in No. 576 were *Assistant Attorney General Bazelon, Max Isenbergh* and *James L. Morrisson*. Reported below: 163 F. 2d 917.

No. 632. BROWN *v.* UNITED STATES ET AL. C. C. A. 3d. Certiorari denied. *Saul J. Zucker* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 164 F. 2d 490.

No. 633. KANSAS CITY SOUTHERN RAILWAY CO. *v.* COOK, COMMISSIONER OF REVENUE. Supreme Court of Arkansas. Certiorari denied. *Joseph R. Brown* for petitioner. Reported below: 212 Ark. 253, 205 S. W. 2d 441.

No. 638. MELLON *v.* UNITED STATES. C. C. A. 2d. Certiorari denied. *Louis Halle* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn,*

Robert S. Erdahl and *Joseph M. Howard* for the United States. Reported below: 165 F. 2d 80.

No. 652. Edgerton *v.* Kingsland, Commissioner of Patents. United States Court of Appeals for the District of Columbia. Certiorari denied. *David Rines* and *Frank W. Dahn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Alvin O. West* and *W. W. Cochran* for respondent. Reported below: 83 U. S. App. D. C. —, 168 F. 2d 131.

No. 653. Russell Box Co. *v.* Grant Paper Box Co. C. C. A. 1st. Certiorari denied. *Herbert A. Baker* for petitioner. *William H. Parmelee* and *Hector M. Holmes* for respondent.

No. 654. National Nugrape Co. *v.* Guest, doing business as Tot Beverage Co. and Truegrape Co. C. C. A. 10th. Certiorari denied. *Ernest P. Rogers* for petitioner. *F. M. Dudley* for respondent. Reported below: 164 F. 2d 874.

No. 656. Bloom et al. *v.* Ryan. Supreme Court of Montana. Certiorari denied. *S. P. Wilson* for petitioners. *Walter L. Pope* for respondent. Reported below: — Mont. —, 186 P. 2d 879.

No. 658. Canister Company *v.* Commissioner of Internal Revenue. C. C. A. 3d. Certiorari denied. *Weston Vernon, Jr.* and *Clarence E. Dawson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *L. W. Post* for respondent. Reported below: 164 F. 2d 579.

No. 659. Bernard G. Brennan Co. *v.* United States. C. C. A. 7th. Certiorari denied. *William R. Brown* for

petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, A. F. Prescott* and *Fred E. Youngman* for the United States. Reported below: 165 F. 2d 500.

No. 662. HERREN *v.* FARM SECURITY ADMINISTRATION, DEPARTMENT OF AGRICULTURE. C. C. A. 8th. Certiorari denied. *DuVal L. Purkins* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Harry I. Rand* and *Melvin Richter* for respondent. Reported below: 165 F. 2d 554.

No. 664. ANDREW J. MCPARTLAND, INC. *v.* MONTGOMERY WARD & CO., INC. United States Court of Customs and Patent Appeals. Certiorari denied. *Emmet L. Holbrook* for petitioner. *Stuart S. Ball* for respondent. Reported below: 35 C. C. P. A. (Patents) 802, 164 F. 2d 603.

No. 665. SCHUCKMAN *v.* RUBENSTEIN ET AL. C. C. A. 6th. Certiorari denied. *Maurice J. Dix* for petitioner. *William B. Cockley* and *J. Malcolm Strelitz* for respondents. Reported below: 164 F. 2d 952.

No. 668. RICE ET AL. *v.* ELMORE. C. C. A. 4th. Certiorari denied. *Christie Benet, Irvine F. Belser, Charles B. Elliott* and *William P. Baskin* for petitioners. *Thurgood Marshall, William R. Ming, Jr.* and *Marian W. Perry* for respondent. Reported below: 165 F. 2d 387.

No. 669. GOLLIN ET AL. *v.* UNITED STATES. C. C. A. 3d. Certiorari denied. *Frederic M. P. Pearse* and *Harold Simandl* for petitioners. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Josephine H. Klein* for the United States. Reported below: 166 F. 2d 123.

No. 673. GAHAGAN CONSTRUCTION CORP. *v.* ARMAO. C. C. A. 1st. Certiorari denied. *Paul R. Frederick* for petitioner. *Samuel B. Horovitz* for respondent. Reported below: 165 F. 2d 301.

No. 679. DEMILLE *v.* AMERICAN FEDERATION OF RADIO ARTISTS, LOS ANGELES LOCAL, ET AL. Supreme Court of California. Certiorari denied. *Edgar J. Goodrich, James M. Carlisle, Lipman Redman, Jerome J. Dick* and *Neil S. McCarthy* for petitioner. *A. Frank Reel* for respondents. Reported below: 31 Cal. 2d 139, 187 P. 2d 769.

No. 657. UNITED STATES EX REL. WEDDEKE *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. C. A. 2d. Certiorari denied. *Gunther Jacobson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 166 F. 2d 369.

No. 180, Misc. WEISS *v.* LOS ANGELES BROADCASTING CO., INC. ET AL. C. C. A. 9th. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that certiorari should be granted. *A. L. Wirin* for petitioner. *Paul M. Segal* for respondent. Reported below: 163 F. 2d 313.

No. 272, Misc. MCCANN *v.* PESCOR, WARDEN; and

No. 273, Misc. MCCANN *v.* PESCOR, WARDEN. C. C. A. 8th. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 164 F. 2d 279.

No. 376, Misc. EASON *v.* TURNER, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 146 Tex. Cr. R. 527, 176 S. W. 2d 947.

No. 378, Misc. PRATHER *v.* NIERSTHEIMER, WARDEN. Circuit Court of Madison and Randolph Counties, Illinois. Certiorari denied.

No. 389, Misc. REED *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 393, Misc. REED *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 397, Misc. WHEELER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 402, Misc. WILLIAMS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 405, Misc. BAILEY *v.* NIERSTHEIMER, WARDEN. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 535, October Term, 1946. SUNAL *v.* LARGE, SUPERINTENDENT, 332 U. S. 174. The motion for leave to file a second petition for rehearing and to recall the mandate is denied.

No. 101. ECCLES ET AL. *v.* PEOPLES BANK OF LAKEWOOD VILLAGE, CALIFORNIA, *ante*, p. 426. Rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

No. 171. KING *v.* ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, *ante*, p. 153. Rehearing denied.

No. 214. SUTTLE, ADMINISTRATRIX, *v.* REICH BROS. CONSTRUCTION CO. ET AL., *ante*, p. 163. Rehearing denied.

No. 509. RANDALL *v.* UNITED STATES, *ante*, p. 856. Rehearing denied.

No. 554. PRINCIPALE *v.* GENERAL PUBLIC UTILITIES CORP. ET AL., *ante*, p. 844. Rehearing denied.

No. 630. KING ET AL. *v.* PRIEST ET AL., *ante*, p. 852. Rehearing denied.

No. 9, Misc. WAGNER *v.* HUNTER, WARDEN, 332 U. S. 776. Rehearing denied.

No. 164, Misc. MCGUIRE ET AL. *v.* UNITED STATES, *ante*, p. 846. Rehearing denied.

No. 249, Misc. KAUFMAN *v.* UNITED STATES, *ante*, p. 857. Rehearing denied.

APRIL 26, 1948.

Per Curiam Decision.

No. 719. SCHENLEY DISTILLING CORP. ET AL. *v.* ANDERSON, SECRETARY OF AGRICULTURE. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The parties being in agreement that the cause is moot, the motion to dismiss is granted and the appeal is dismissed. *Robert S. Marx* and *Henry H. Fowler* for appellants. *Solicitor General Perlman* for appellee.

Miscellaneous Orders.

No. —, Original. ILLINOIS *v.* WISCONSIN ET AL. The motion for leave to file bill of complaint is denied. *Massachusetts* v. *Missouri,* 308 U. S. 1. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for complainant. *John E. Martin,* Attorney General of Wisconsin, and *George I. Haight* for defendants.

No. 722. LOVELADY *v.* TEXAS. Writ of certiorari, *ante,* p. 867, to the Court of Criminal Appeals of Texas dismissed on motion of counsel for the petitioner. *Sam W. Davis* for petitioner. Reported below: — Tex. Cr. R. —, 207 S. W. 2d 396.

No. 381, Misc. CASTLEMAN *v.* OVERHOLSER;

No. 404, Misc. SWEET *v.* HOWARD, WARDEN; and

No. 406, Misc. EX PARTE FEBRE. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 391, Misc. BARNETT *v.* DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS. The motion for leave to file petition for writ of mandamus is denied.

No. 407, Misc. IN RE BLUME. Petition denied.

No. 432, Misc. MURRAY *v.* MISSISSIPPI. The stay order entered March 29, 1948, *ante,* p. 859, is vacated.

Certiorari Granted. (*See also No. 620, ante, p. 821.*)

Nos. 593 and 594. WOLF *v.* COLORADO. Supreme Court of Colorado. Certiorari granted. *Philip Hornbein, Jr.* for petitioner. *H. Lawrence Hinkley,* Attorney General of Colorado, for respondent. Reported below: 117 Colo. 321, 187 P. 2d 926, 928.

Certiorari Denied.

No. 526. UNITED STATES *v.* KRUSZEWSKI. C. C. A. 7th. Certiorari denied. *Solicitor General Perlman* for the United States. *Julius L. Kabaker* for respondent. Reported below: 163 F. 2d 884.

No. 603. CROWELL *v.* BAKER OIL TOOLS, INC. C. C. A. 5th. Certiorari denied. *Emory L. Groff* for petitioner. Reported below: 164 F. 2d 487.

No. 670. CROWELL *v.* BAKER OIL TOOLS, INC. C. C. A. 9th. Certiorari denied. *Emory L. Groff* for petitioner. Reported below: 165 F. 2d 214.

No. 617. BLAIR *v.* UNITED STATES ET AL. C. C. A. 5th. Certiorari denied. *Fred S. Ball, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for the United States. Reported below: 164 F. 2d 115.

No. 646. MILLER, TRUSTEE, *v.* TEXAS COMPANY. C. C. A. 5th. Certiorari denied. *Fred Hull* for petitioner. Reported below: 165 F. 2d 111.

No. 666. WORTHAM *v.* UNITED STATES. C. C. A. 5th. Certiorari denied. *Wm. A. Porteous, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Quinn, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 164 F. 2d 979.

No. 671. CARGILL, INC. *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. C. C. A. 7th. Certiorari denied. *Leo F. Tierney* and *Louis A. Kohn* for petitioner. *Weymouth Kirkland, Howard Ellis, Walter Bachrach, Walter H. Moses, Stanley Morris* and *Floyd E. Thompson* for respondents. Reported below: 164 F. 2d 820.

No. 685. Belz *v.* Board of Trade of the City of Chicago et al. C. C. A. 7th. Certiorari denied. *Abraham W. Brussell* and *Arthur J. Goldberg* for petitioner. *Weymouth Kirkland, Howard Ellis, Walter Bachrach, Walter H. Moses, Stanley Morris* and *Floyd E. Thompson* for respondents. Reported below: 164 F. 2d 824.

No. 677. Deauville Corporation et al. *v.* Garden Suburbs Golf & Country Club, Inc. C. C. A. 5th. Certiorari denied. *R. H. Ferrell* and *J. M. Flowers* for petitioners. *A. Frank Katzentine* and *Alonzo Wilder* for respondent. Reported below: 164 F. 2d 430, 165 F. 2d 431.

No. 684. Joseph F. Hughes & Co. *v.* Machen, Trustee in Bankruptcy. C. C. A. 4th. Certiorari denied. *Nathan Patz* for petitioner. *Frederick J. Singley* and *Charles G. Page* for respondent. Reported below: 164 F. 2d 983.

No. 689. Great Lakes Towing Co. *v.* American Steamship Co. C. C. A. 6th. Certiorari denied. *Walker H. Nye* for petitioner. *Laurence E. Coffey* for respondent. Reported below: 165 F. 2d 368.

No. 691. Chicago Mines Co. *v.* Commissioner of Internal Revenue;

No. 692. London Extension Mining Co., Transferee, *v.* Commissioner of Internal Revenue; and

No. 693. London Extension Mining Co. *v.* Commissioner of Internal Revenue. C. C. A. 10th. Certiorari denied. *Frazer Arnold* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Sewall Key, Lee A. Jackson* and *Hilbert P. Zarky* for

respondent. *Wayne D. Williams* filed a brief for Hamm, as *amicus curiae,* supporting the petition. Reported below: 164 F. 2d 785.

No. 707. AMBROSIA CHOCOLATE CO. *v.* AMBROSIA CAKE BAKERY, INC. C. C. A. 4th. Certiorari denied. *Thornton H. Brooks* and *Ira Milton Jones* for petitioner. *William S. Pritchard, Winston B. McCall* and *D. Edward Hudgins* for respondent. Reported below: 165 F. 2d 693.

No. 680. MCRAE *v.* WOODS, HOUSING EXPEDITER. United States Emergency Court of Appeals. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, John R. Benney, Ed Dupree, Charles P. Liff* and *Philip Travis* for respondent. Reported below: 165 F. 2d 790.

No. 210, Misc. EASTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 430, 75 N. E. 2d 688.

No. 282, Misc. CARTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 398 Ill. 336, 75 N. E. 2d 861.

No. 384, Misc. GENTILE *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 388, Misc. WASIAKOWSKI *v.* BURKE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

Rehearing Denied.

No. 536. PETROWSKI *v.* NUTT, COLONEL, AIR CORPS, U. S. A., *ante,* p. 842. Rehearing denied.

No. 561. GOTTFRIED ET AL. *v.* UNITED STATES; and
No. 562. GOTTFRIED ET AL. *v.* UNITED STATES, *ante*, p. 860. Rehearing denied.

No. 618. REEDER *v.* BANKS ET AL., *ante*, p. 858. Rehearing denied.

No. 622. WESTERN UNION TELEGRAPH CO. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR, *ante*, p. 862. Rehearing denied.

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