

exist is therefore used not to override an earlier express authority but merely to extend it to a degree. For in final analysis the Arkansas tax does have some relation to the use of petitioner's property. The existence of the implied authority does not therefore do violence to the earlier statutory grant.

*Affirmed.*

MR. JUSTICE REED concurs on the ground that the Act of Congress of March 3, 1891 (26 Stat. 842) in which the United States consented "for the taxation . . . as personal property, of all structures and other property in private ownership on the Hot Springs Reservation," should be interpreted to give consent to the application of the Arkansas Unemployment Compensation Law. *Collins v. Yosemite Park & Curry Co.*, 304 U. S. 518, 532, 534.

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HELIS v. WARD, EXECUTRIX, ET AL.

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

No. 68. Argued December 6, 1939.—Decided December 18, 1939.

1. In a suit in equity for specific performance of a contract to purchase an oil lease, the issue was whether a greater sum than had been paid was due, and the decisive question was whether a particular well would produce 3,000 barrels of oil per day. An umpire's report, based on tests made in accordance with the contract, and admitted in evidence without objection, showed that the well would not produce that quantity of oil through a  $\frac{3}{8}$  inch choke, but would produce in excess of that quantity on open flow. Interpreting the contract to mean that the test was as to the quantity the well would produce through a  $\frac{3}{8}$  inch choke, the District Court gave judgment for the defendant. The Circuit Court of Appeals, interpreting the contract to mean that the test was what the well would produce on open flow, reversed the District Court and directed entry of judgment for the plaintiff. *Held*, that the failure of the Circuit Court of Appeals to remand the case for a

new trial did not deprive the defendant of his day in court in violation of the Fifth Amendment. *Saunders v. Shaw*, 244 U. S. 317, distinguished. P. 369.

2. The defendant is not entitled here to urge that a new trial should be allowed in order that he may attack the competency and accuracy of the umpire's report, when that point was not a ground either of his petition to the Circuit Court of Appeals for rehearing or of his petition here for certiorari. P. 369.
3. Review by certiorari in this Court is confined to the grounds upon which the writ was sought or granted. P. 370.  
102 F. 2d 519, affirmed.

CERTIORARI, *post*, p. 537, to review the reversal of a judgment, 20 F. Supp. 514, dismissing a suit upon a contract.

*Mr. Eugene D. Saunders* for petitioner.

When a litigant objects to the introduction of evidence and the objection is sustained he may rely upon such ruling. He need not introduce evidence to refute a point which the trial court upon his objection has ruled to be irrelevant and not involved in the litigation. A litigant is deprived of his day in court and of due process of law when a court, either trial or appellate, decides a case against him upon a point which he has not tried because of justifiable reliance upon a ruling of the trial judge.

The real issue in this case has never been litigated. The trial judge excluded all evidence except that relating to a particular point or issue, and that point or issue has been declared by the appellate court to be immaterial to the determination of the controversy. See *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 256, 267; *Saunders v. Shaw*, 244 U. S. 317; *Collins v. Yosemite Park & Curry Co.*, 304 U. S. 518; *United States v. Rio Grande Dam & Irrigation Co.*, 184 U. S. 416; *Willing v. Binstock*, 302 U. S. 272; *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Fifth Third National Bank v. Johnson*, 219 F. 89; *Columbus Gas & Fuel Co. v. City of Columbus*, 55 F. 2d

56; *Faulks v. Schrider*, 90 F. 2d 370; *Hughes v. Reed*, 46 F. 2d 435; *Wilson v. Spencer*, 261 F. 357; *Underwood v. Commissioner*, 56 F. 2d 67; *Finefrock v. Kenova Mine Car Co.*, 22 F. 2d 627; *Hamilton Gas Co. v. Watters*, 75 F. 2d 176.

Petitioner believes he has an adequate defense and is confident that a retrial of this cause on the theory announced by the Circuit Court of Appeals will result in judgment being again rendered in his favor.

The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer and the written report of an employee of respondents. Neither of these reports was offered as evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading. Both reports would, however, have been relevant because of dealing in part with tests which the trial court ruled to be properly the subject of proof.

If these reports had been offered in evidence and if their contents had been ruled relevant to the issues petitioner would have shown that they were worthless in that the conclusions or opinions expressed therein were founded on errors apparent upon the face of the reports.

*Mr. William N. Bonner*, with whom *Mr. W. D. Gordon* was on the brief, for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a suit for specific performance of a contract to purchase a mineral lease brought by respondents, as vendors. The contract price was to be determined pursuant to a formula based upon the production of certain designated wells on the property. That price was fixed at \$300,000 "if the average daily production of said wells for a period of fifteen days after completion is less than

3,000 barrels each, calculated on a  $\frac{3}{8}$ -inch choke according to the methods usually employed in gauging the capacity of oil wells." In case the production, calculated in that manner, was more than 3,000 barrels per day, the purchase price was fixed at \$400,000. The test was to be made jointly by a representative of respondents and a representative of petitioner; and "in the event they fail to agree on the proper gauge," it was provided that "Judge Hardin . . . will appoint a reputable engineer to act as umpire."

The parties failed to agree on the proper gauge and Judge Hardin appointed W. L. Massey, a petroleum engineer, to make the test.<sup>1</sup> Massey conducted a test and submitted a written report, which without objection was admitted at the trial. That report stated that although "the well will not make 3,000 barrels per day on such  $\frac{3}{8}$ " choke," it was "capable of flowing merchantable oil at a rate much in excess of 3,000 barrels of oil per day on an open flow, or through any choke larger than a  $\frac{5}{8}$ " choke." At the trial there was other testimony that the production "through a  $\frac{3}{8}$ -inch choke" was not more than 3,000 barrels a day. The trial court held that the contract meant that the well was to be flowed through a  $\frac{3}{8}$ -inch choke. Accordingly it dismissed the bill, since on that interpretation it was clear that the production was not more than 3,000 barrels a day and since petitioner already had paid \$300,000. On appeal, the Circuit Court of Appeals held that the test provided in the contract "was not to measure the production through a  $\frac{3}{8}$ -inch choke, but to calculate on a  $\frac{3}{8}$ -inch choke the amount the well was capable of producing." It then turned to the record and ascertained that Massey, the umpire appointed pur-

<sup>1</sup> Judge Hardin instructed Massey: "You are requested to determine, first, the actual production of three-eighths ( $\frac{3}{8}$ ) choke; second, by using the three-eighths ( $\frac{3}{8}$ ) choke you are to calculate the open flow capacity of the well."

suant to the agreement of the parties, had found that by using the  $\frac{3}{8}$ -inch choke as a base and "building up therefrom by using other chokes to determine pressures and conditions" the well was capable of producing much in excess of 3,000 barrels of oil per day. Since that calculation by Massey was consistent with the Circuit Court of Appeals' interpretation of the formula in the contract, that court concluded that petitioner was liable to pay the higher amount provided in the contract, \$400,000. It accordingly reversed the judgment directing the District Court to enter judgment for respondents for \$100,000, the balance due under the contract, with interest. We granted certiorari, limited to the question whether a new trial should not have been granted, on the assertion that the failure to remand for a new trial deprived petitioner of his day in court in violation of the rule of *Saunders v. Shaw*, 244 U. S. 317.

We conclude that the Circuit Court of Appeals committed no error.

The fact that the case was tried by the District Court on an interpretation of the contract different from that of the Circuit Court of Appeals is not *per se* sufficient to cause a remand for a new trial under the rule of *Saunders v. Shaw*, *supra*. The production of the well was tested by the umpire in the manner provided in the contract and the results of that test were without objection admitted at the trial. Complete establishment of the facts necessary for application of the formula was thus made in the manner provided by the parties in their contract. To be sure, petitioner now asserts that on a new trial he would attack the competency and accuracy of the umpire's report—matters which were immaterial to the issues on the trial in view of the fact that it was not contested that no more than 3,000 barrels of oil a day could be produced through a  $\frac{3}{8}$ -inch choke. But the difficulty with petitioner's position is that he has not pre-

served that point. On his petition for rehearing to the Circuit Court of Appeals, petitioner did not ask that court to allow him a new trial in order to attack the umpire's report.<sup>2</sup> Nor was that the ground upon which the petition for certiorari was predicated. For review by this Court was sought and granted on the ground that the Circuit Court of Appeals had decided the merits on facts not contained in the record and on a theory which had never been tried by the litigants. There was no intimation in the petition for certiorari that a new trial should be granted in order to afford petitioner an opportunity to attack the competency and accuracy of the umpire's report. It is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review here being no broader than that sought by the petitioner. *Clark v. Williard*, 294 U. S. 211, 216; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481, 498; *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 146. Accordingly, petitioner cannot now complain that he has not had his day in court and has been deprived of due process of law contrary to the Fifth Amendment. Due process of law is not concerned with mere afterthoughts.

*Affirmed.*

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<sup>2</sup>In addition to attacking the interpretation of the contract by the Circuit Court of Appeals, petitioner merely asserted, "Your Honors have erred in predicating your opinion upon facts not contained in the record and upon facts which are disproved by the record."