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UNITED STATES REPORTS

VOLUME 310

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1939

FROM APRIL 22, 1940 (CONCLUDED) TO AND INCLUDING
JUNE 3, 1940 (END OF TERM)

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ERRATUM.

299 U. S., p. 231, Note 28, line 4. Reference to Note 13 should be to Note 19.

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

CHARLES EVANS HUGHES, Chief Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
HUGO L. BLACK, Associate Justice.
STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
FRANK MURPHY, Associate Justice.

RETIRED

WILLIS VAN DEVANTER, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.

ROBERT H. JACKSON, Attorney General.
FRANCIS BIDDLE, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
THOMAS ENNALLS WAGGAMAN, Marshal.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the Circuits, agreeably to the Acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, HARLAN F. STONE, Associate Justice.

For the Third Circuit, OWEN J. ROBERTS, Associate Justice.

For the Fourth Circuit, CHARLES EVANS HUGHES, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, JAMES C. MCREYNOLDS, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, STANLEY REED, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, STANLEY REED, Associate Justice.

For the District of Columbia, CHARLES EVANS HUGHES, Chief Justice.

February 12, 1940.

(For next previous allotment, see 308 U. S. p. iv.)

IN MEMORY OF MR. JUSTICE BUTLER.

Members of the Bar of the Supreme Court, and Officers of the Court, met in the Court Room, on January 27, 1940, to commemorate the high character and service of Mr. Justice Butler, who died in Washington, D. C., November 16, 1939.[1]

The meeting was called to order by Mr. Solicitor General Biddle.[2]

Mr. Biddle said:

"This meeting of the Bar of the Supreme Court of the United States is called in commemoration of the late Mr. Justice Butler, who died on November 16, 1939. He had not sat since June 5th of that year, the last day of the term, when, in the absence of the Chief Justice and of Mr. Justice McReynolds, he presided over the Court.

"Justice Butler was born six years after the Civil War, and grew up in Minnesota during the reconstruction period, and in the vigorous and unregulated thrust of immense material expansion. He was self-made, working his way through Carleton College by teaching; admitted to the bar when he was twenty-two; serving as Assistant County Attorney, County Attorney and Special Assistant to the State Attorney General. When President Harding appointed him to the bench in 1922, his firm was one of the leading law offices in St. Paul. He was a regent of the University of Minnesota for more than fifteen years.

[1] See 308 U. S. pp. III and V.

[2] The members of the Committee on Arrangements for this meeting were: The Solicitor General, Chairman; and Messrs. Frank J. Hogan, J. Harry Covington, Charles Warren, and Seth W. Richardson, all of Washington, D. C.

"Justice Butler was a court lawyer, trained in the rough and tumble of general practice. He had the trial lawyer's conviction that the trial and argument of cases were necessary to turn out a complete lawyer. He was a voracious worker, absorbing and disentangling the tough material of facts with skill and patience, and arranging them with clear precision. He was conscious of his office as a judge, scrupulous to maintain its high dignity, and somewhat withdrawn into the reserve which he felt should characterize the position.

"But behind any aloofness, members of the highest court hold and express convictions. Difference in point of view on great national issues finds its way not only into Congress, but ultimately in the Court, sometimes with urbanity, as with Justice Sutherland, often with a passionate conviction, as with Pierce Butler, who stood by his guns and would not be silenced. By such stuff, whatever the immediate result in a particular case, is the democratic process enriched.

"He was brought up in a school of thought which had not learned to doubt the implications of its perhaps over-simplified assumptions—laissez-faire, individualism, free competition. These things meant the American way. By this way he had come to the top and the failure of others to arrive seemed to indicate personal fault rather than economic disadvantage. The frontiers were open. Success was at the end of a straight road.

"He did not change as the frontiers changed; and perhaps this quality of steadfast resistance to a different world was what Justice Holmes had in mind when he spoke of him as a 'monolith.' He had courage and unalterable convictions. To those to whom his outlook seemed inexpressive of our changed economy, and narrow in dealing with the human problems of constitutional construction, Pierce Butler appeared ultra-conservative. For those who thought like him he expressed the American way. We all know that he filled his high office with zeal and a courteous dignity.

"His partner, for many years, in St. Paul, was the Honorable William D. Mitchell, a former Solicitor General and Attorney General of the United States. I move that Mr. Mitchell be elected Chairman, and Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Secretary of this meeting."

This motion having been carried, Mr. Mitchell took the chair and called upon a Committee on Resolutions [3] for its report.

Mr. George Wharton Pepper, acting for the Committee, presented the following

RESOLUTIONS.

At a meeting of the members of the Bar of the Supreme Court of the United States held on January 27th, 1940, to take appropriate action following the death of Mr. Justice Butler, the Committee appointed by the Solicitor General reported this Minute for submission to the meeting:

"Pierce Butler's life story is an epic of America. From his birth on a small Minnesota farm to the day of

[3] Those who composed the Committee were: Mr. William D. Mitchell, of New York, Chairman; Messrs. Henry F. Ashurst, of Arizona; Garret W. McEnerney, of California; Patrick J. Farrell, John Spalding Flannery, and George E. Hamilton and Mrs. Mabel Walker Willebrandt, of Washington, D. C.; Messrs. Alexander W. Smith, Jr., of Georgia; James M. Sheean, of Illinois; Robert Stone, of Kansas; William Marshall Bullitt, of Kentucky; J. Blanc Monroe, of Louisiana; William L. Rawls, of Maryland; Barton Corneau, Robert G. Dodge, and Charles B. Rugg, of Massachusetts; Charles W. Bunn, Michael J. Doherty, and Fred B. Snyder, of Minnesota; Daniel N. Kirby, of Missouri; John W. Davis, Charles Evans Hughes, Jr., Daniel J. Kenefick, and Nathan L. Miller, of New York; Arthur T. Vanderbilt, of New Jersey; J. Crawford Biggs, of North Carolina; Charles J. Murphy, of North Dakota; Robert M. Rainey, of Oklahoma; John G. Buchanan and George Wharton Pepper, of Pennsylvania; P. F. Henderson, of South Carolina; William L. Frierson and J. E. McCadden, of Tennessee; Hatton W. Sumners, of Texas; George T. Donworth, of Washington; and Louis Quarles, of Wisconsin.

his death while a Justice of the Supreme Court of the United States his record was one of obstacles surmounted, of professional distinction achieved, and of merit appropriately rewarded.

"His father and mother, Irish immigrants from County Wicklow, had settled in Dakota County, Minnesota, where they lived the life of pioneer farmers. They reared a family of eight children, of whom the future jurist was one. He was born on St. Patrick's day (March 17th), 1866. Strong of body and of vigorous mind, he dominated his environment and used its limitations as opportunities for self-development. A country school-teacher at sixteen, he qualified for admission to Carleton College at Northfield, Minnesota, from which he was graduated in 1887. During his student days he did farm chores early and late, and in the daily interval rode a farm horse to school. Having determined to become a lawyer, he moved to Saint Paul and in 1888 was admitted to the bar.

"His abilities were early recognized, and after serving for two years as an assistant he became the County Attorney of Ramsey County. In this way he acquired proficiency in the art of the successful trial lawyer and was noted for his capacity to win the confidence of all the diverse elements of which local juries were composed.

"In 1897 he began the general practice of the law. Here again his character and ability made their mark and important clients were eager to retain him. While throughout his career he represented great railroads and other powerful corporations and became in this sense a corporation lawyer, he never sacrificed his independence of judgment and it was always he who dominated the client. His professional services were often placed at the disposal of the Government and he figured in many important cases arising under the Anti-Trust Laws and the Railroad and Utility Statutes. He was of the sort that men instinctively trust. He became one of the notable figures in the life of the great Northwest.

When it was known that he was to appear, the court room was wont to be crowded with people eager to hear him and to see him in action.

"He had great energy, prodigious memory and large capacity for logical thinking. His character was a unit without internal stress. There was inherent a belief that there exists a philosophical rightness, and he sought to apply it to each matter in hand. A skillful legal tactician, his sole strategy was to drive forward unswervingly in the direction which he regarded as the right one. Expediency never justified retreat or indirection.

"As senior member of the firm of Butler, Mitchell and Doherty, he was constantly at work and always with notable fidelity to court and client. For the five years from 1913 to 1918, he served as a member of the Committee of Counsel for the Federal Valuation of Railroads. In 1919 he was of counsel for shareholders in proceedings in Canada under the Canadian Northern Acquisition Act. Later he was appointed one of the counsel for the Dominion of Canada in the Arbitration at Montreal held under the Grand Trunk System Acquisition Act. In this proceeding William H. Taft sat as one of the arbitrators. Although Mr. Taft dissented from the decision supporting the views urged by Mr. Butler, their association led to a warm friendship. The acquaintance with his powers and fairness gained in the course of that association doubtless was a factor in Chief Justice Taft's later recommendation of Mr. Butler for appointment to the Supreme Court, when a vacancy was caused by the retirement of Mr. Justice Day. It was on November 23, 1922, while he was serving as counsel in the Toronto Railway Arbitration, that he, a Democrat, was nominated by President Harding to be an Associate Justice of the Supreme Court of the United States. The nomination not having been acted upon at that session of Congress, the President re-nominated him on December 5, 1922. He was confirmed by the Senate on December 21, 1922, and on the 2nd of January, 1923,

the judicial oath was administered and he took his seat upon the Bench.

"During his seventeen years of service on the Court he saw his country pass through an era of unstable prosperity and into a period of resulting depression. Under such circumstances it was not surprising that many should lose faith in the soundness of the American tradition; but with such a life story behind him, it was inevitable that the faith of Mr. Justice Butler should never waver. He had, indeed, that capacity for deep emotion which was his by inheritance, but his experience had taught him to think realistically.

"Fearful of the rule of men in place of the rule of law, he appealed to the accumulated body of the law as a continuous social expression and not as what might appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges may from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its misapplication merely because the end in view appeared at the moment to be desirable.

"He had faith in the power of objective reasoning and in the intellectual integrity of man, with correlative responsibility of the individual to develop himself and pursue the course that to him seemed right. This faith in the individual man was expressed by resistance to any attempted infringement of the bill of rights, and, in the absence of constitutional amendment, to centralization of government and to extension of its powers over the individual. He felt that greater material welfare under a paternal government—if possible of achievement—rather than ennobling the citizen would debase him by destroying his integrity and denying his will to exercise his moral and intellectual forces. He refused to concede that the individual is a helpless creature of an environment built by others, and opposed the kind

of humanitarianism that would relegate him to that position.

"It would be out of place in this Minute to attempt an analysis of his judicial opinions. That will follow in due course. Suffice it to say here that during all the years of his service he contributed to the Court not merely sound learning and ripe experience, but calm judgment and the stabilizing influence of tested character.

"While Mr. Justice Butler was a man of deep conviction, he could differ from other men without losing their good will. He was far from being a bitter partisan. Rather he was a man of generous sympathy and broad comprehension. His friends included old and young alike. Institutions of learning conferred honorary degrees upon him. The law students of Georgetown University named a law club in his honor. An American in the best sense of the word, he retained throughout his life an affectionate regard for the land of his ancestors. A visit to Ireland in 1934 was esteemed by him to be one of the happiest episodes in life. He was a lover of outdoor life, and on his farm in Maryland sought refreshment of spirit—whenever the rigorous round of judicial duties permitted.

"The land and people of Minnesota remained close to him, and he carried with him great and irreplaceable knowledge of the history of the Northwest, gathered from his own youthful experiences, from delighted reading of earlier days, and from wide personal knowledge of most of its later leaders and characters. The mention of a name would start a flow of reminiscence and anecdote reaching back into the development of that country, all full of the color of its personalities.

"The domestic life of such a man was certain to approximate the ideal. Happily married and deeply devoted to wife and children, his was a Christian household characterized by plain living and high thinking. He was a devoted member of the Roman Catholic Church.

The reality of his religion brought him comfort at times of domestic affliction. The high pressure of judicial work, and disease common to advanced years, overcame the powerful physique which was his by inheritance and conservation. After a brief illness, he died, in Washington, on November 16, 1939. At his funeral in St. Matthew's Cathedral all sorts and conditions of men attended in silent tribute to his memory. Today representative members of the Bar of the Supreme Court of the United States are in their turn witnessing to their admiration and affectionate regard for one whose simple godliness and faithful public service endeared him to all who came within the circle of his influence.

"*Resolved,* that the foregoing Minute be adopted; that a copy of it be transmitted to the Attorney General of the United States for presentation to the Court and that the Chairman of this meeting be directed to forward a copy of it to the family of Mr. Justice Butler."

Eulogies were delivered by Messrs. Wilfrid E. Rumble, of Minnesota; George I. Haight, of Illinois; Robert A. Taft, of Ohio, (delivered on his behalf and in his absence by Senator John A. Danaher, of Connecticut); Thomas D. Thacher, and William D. Mitchell, of New York.[4]

The resolutions were then adopted, and the meeting adjourned.

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[4] For a full account of this meeting, containing the resolutions, all of the addresses, and an excellent portrait of Mr. Justice Butler, see a pamphlet entitled "Pierce Butler," edited by the Committee and printed and distributed by Mr. Cropley. This publication contains also the speech made by the Attorney General in presenting the Resolutions to the Court on May 20, 1940, and the response of the Chief Justice upon that occasion, which are printed *infra,* in this volume, pp. xiii, xv, *et seq.*

MR. JUSTICE BUTLER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, MAY 20, 1940.

Present: THE CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY.

Mr. Attorney General Jackson addressed the Court as follows:

"*Mr. Chief Justice and Associate Justices:* The Bar of the Supreme Court has delegated me to lodge in your keeping its proceedings in memory of Mr. Justice Butler. By resolution it has expressed its high estimate of his life and services."

[Mr. Jackson read the Resolutions, which are set forth *ante,* p. VII *et seq.,* and proceeded:]

"Men eminent in the legal profession, former associates in the practice of the law, and public leaders have paid him eloquent and affectionate tribute. All of these tributes I offer for your records.

"I should not presume to add words of my own, except that the proceedings are lacking in one viewpoint which I should be qualified to supply.

"I knew Pierce Butler only as a Justice of this Court. He had reached the full maturity of his great intellectual powers. He was too earnest and forthright to wish me even on such an occasion to deny or minimize the conflict which your reports witness between the general philosophy I have advocated here and much of that to which he was so consistently devoted. But across that gulf, which always exists between two men who regard each other as representing ominous trends, I felt the

strength, the warmth, and the sincerity of a great character—one of the most firm and steady men I have known.

"His character was shaped by a hard way of life that left lasting convictions and attitudes in men who experienced it. Existence in a pioneer country, where nature is often hard and hostile and the competition of the elements is relentless, presents the choice between courage and self-discipline—or extinction. It offers a simple and rugged society in which place is won and held only by will and work and worth. It develops intense love of liberty and hatred of restraint and a self-reliance that does not know how to dodge, and never fears to stand firmly and, if need be, alone. These were the primary characteristics of Mr. Justice Butler.

"To them he added an accumulation of learning and experience and legal abilities which won for him the respect of all shades of opinion at the Bar. In many cases here I feared his interrogations more than the argument of my adversary. He knew his way among the intricate procedures of the law. He knew from long experience the arts of advocacy. He could sense the point in an argument where the most candid advocate is tempted to stop a little short of a complete revelation, and he knew where there was an urge to overemphasis. His questions from the bench cut to the heart of our cases. He could use his ready wit, his humor, his sarcasm or his learning with equal ease and skill. He was relentless in bringing the lawyer face to face with the issues as he saw them. I think I never knew a man who could more quickly orient a statement of facts with his own philosophy. When the facts were stated the argument was about over with him—he could relate the case to his conceptions of legal principles without aid of counsel.

"Even if it were otherwise appropriate, I have neither the perspective nor the detachment necessary to appraise

the place that his work as a Justice will take in the annals of this Court. Time only will write the verdict on its permanence and its significance. He has left a body of deliberate comment and seasoned judgment on the problems that have vexed this Court, as well as government and society, during his judicial life. The future will have no difficulty in learning what he meant and what he stood for. A man of no subtlety or sham, he pronounced his judgments without finesse, indirection, or obscurity. He has recorded the measure of his disagreement with the currents, and his deep anxiety about the drifts of our time.

"If only time can judge the verity of his work, it is equally true that only contemporaries can appraise the verity of his character. While the future will find that his work will speak for itself, it will turn to the testimony of contemporaries to learn the elusive qualities of the man.

"For those who shall ask 'What of the man'? we may record that in the memory of those who sought to win him in argument he will stand out as an impressive and formidable figure even among associates in whom those qualities were by no means rare. His judicial attitude was not one of frosty neutrality, but one of intensity and certitude of conviction on basic philosophies of life and society and law and government. He had no merely negative standard of goodness; experience and conviction committed him to profound affirmations, and he exemplified them unceasingly and with power. Among the public men of my time, I have known no one of more affirmative and immovable and masterful character than Mr. Justice Butler."

The CHIEF JUSTICE responded:

"*Mr. Attorney General:* The resolutions you have presented on behalf of the Bar fittingly epitomize the traits of character and outstanding achievements of an eminent

advocate and judge,—who would have considered this tribute by his professional brethren as the best possible reward for his long and arduous service.

"The early environment of Pierce Butler suited his ambition and talent. It was not ill fortune that in his childhood and youth he had to meet the rigorous demands of pioneer life in the northwest; that he had to win by self-denial and strenuous exertion the educational advantages which seem slender indeed as compared with the abundance of a later day. For he was in the midst of the opportunities of a fast developing community, where the very air quickened endeavor and the abilities and eager efforts of those endowed with physical and mental vigor received almost instant recognition. It was not ill fortune that he began the practice of the law in Saint Paul at a time when great enterprises were in the making, when legal talent held the key to a career of distinction and the standards of Bench and Bar were as high as in the older eastern States.

"The opportunities for practice had a most desirable variety, but, in accord with the traditions of the Bar, the highest prizes were to be won in the field of advocacy. Pierce Butler by temperament and aptitude was especially fitted for the contests of the forum. He had the fighting instinct, and his training developed rare skill in the use of the advocate's weapons. He soon had opportunity for public service as prosecuting attorney, and thus early secured wide recognition of his unusual talents. Favored by nature with a powerful physique, and with a distinguished mien aided by a deliberate and impressive manner of speech, he became a respected but dreaded antagonist. He was not content with showy and superficial successes with juries. He aimed at a thorough knowledge of the law and a complete mastery of facts, which especially commended him to the higher courts. He had a passion for exactness. He was not addicted to subtlety and he hated pretence. He recognized just

authority. He was faithful to every trust. He was rigorous in his self-discipline and spared no effort to realize his ideal of the careful and exact adviser, the zealous but accurate advocate, the intrepid vindicator of what he conceived to be the legal rights of those whose causes he espoused.

"It is not extraordinary that with the natural advantages of a noble bearing, with his indomitable will and courage both in attack and defense, with his unflagging industry and devotion to what he believed to be justice according to law, he rapidly rose to eminence, and his expert advice and assistance were sought in matters of the gravest importance of both private and public concern. There are not wanting those who disparage the training and experience of the successful advocate, ignoring the fact that among the varied activities of our democratic society there exists no harder school of discipline, no wider opportunity for the study of human relations or for the detection of faults and abuses, no more insistent demand for a sound practical judgment and for rectitude and fair dealing, than are found in the exacting daily work of the legal practitioner who tries to live up to the ethical standards of the best traditions of the Bar and thus to win the highest professional esteem, which is denied to the trickster and shallow pretender however otherwise apparently successful.

"It was with these qualities, and with that reputation, that Pierce Butler came to this Court at the height of his powers. He had already shown at this Bar his exceptional skill and thoroughness in the presentation of cases. In the *Minnesota Rate Cases* (230 U. S. 352) he presented one of the ablest, most comprehensive and most careful briefs ever submitted to this Court. On the bench, he at once demonstrated an extraordinary capacity for the sustained judicial labor which our work demands, and to the last he was faithful in every task, indefatigable, fearless, conscientious. At the conference table, he was ever

ready to present and defend his views with keenness, always with earnestness, and not infrequently with the thrusts of wit and eloquence which brought vivid reminders of forensic battles. He was always thoroughly prepared by close study of records and, endowed with an extraordinary memory, he justly took pride in his ability to marshal facts and precedents in the most impressive manner.

"It was natural that, with his success in winning his way to distinction in an expanding community, with his appreciation of liberty and law, he should have been eager to conserve both the essential authority of government and the freedom of enterprise. The former was necessary in order to insure the latter. His conservatism was rooted in profound religious convictions. It was always manifest that he had definite principles and he had no sympathy for those whose only principle was to be without principle. Cherishing the ideals of authority and certainty, he demanded adherence to precedent and deplored what he considered to be an undue flexibility in constitutional interpretation. As he put it,—'Generally speaking, at least, our decisions of yesterday ought to be the law of today.' He was a strong defender of the conception of property rights which he believed to be secured by the accepted construction of the due process clause. He believed in that conception as an essential stimulus to effort and as holding a better promise of social progress than governmental plans involving restriction of individual initiative. He believed in the right to choose one's calling, to pursue it unfettered, so far as consistent with good order and the equal rights of others, and to maintain and hold the material rewards of honest endeavor. In short, he sought to keep open the traditional path to individual achievement which he himself had trod.

"While solicitous for the public order and the authority of law, he was equally a stickler for the rights of those accused of crime to be protected against the abuses of

authority. He was zealous for the maintenance of just government but vehemently opposed to any action under any guise which he deemed to be arbitrary and capricious. He expressed his thought in the words of one of his opinions, which was quoted in one of the addresses at the meeting of the Bar: 'Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders.' *United States* v. *Motlow,* 10 F. 2d 657, 662. And in his dissent in the first *Wire-tapping case,* he thus voiced his conception of the appropriate interpretation of the great clauses of the Constitution for the safeguarding of personal liberty: 'This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since *McCulloch* v. *Maryland.*' *Olmstead* v. *United States,* 277 U. S. 438, 487, 488.

"And with these views which I have endeavored briefly to interpret,—as I think he would wish them expressed—he wrought to the end,—a man of deep-seated convictions, religious and political, with unfailing loyalty to basic principles as he conceived them,—a personality of rare force and determination, and yet with the kindliest disposition, the most generous sympathy, the warmest heart.

"It is not for us to speak of the sorrows that afflicted him, of his fortitude in severe trials, of the depth of his affection for those united to him by the strongest human ties. In the midst of judicial responsibilities which he was fully sharing with us, we were keenly aware of the

private burdens which pressed upon him and were so bravely borne.

"We mourn the loss of a great co-laborer. As the scenes of particular controversies swiftly shift, there abides the treasured memory of strength, of trained talent industriously applied, of unswerving integrity and fidelity,—the virtues of the just judge, always an exemplar and an inspiration,—the virtues which make secure the foundations of the temple of justice."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1939

UNION JOINT STOCK LAND BANK OF DETROIT *v.* BYERLY.

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

No. 579. Argued March 6, 1940.—Decided April 22, 1940.

1. Under § 75 of the Bankruptcy Act, prior to the amendment of August 28, 1935, an order of the bankruptcy court, made in a proceeding for composition and extension, and permitting a sheriff's sale to be made, subject to confirmation, under a decree of foreclosure previously entered in a state court, was erroneous if not granted on petition and after hearing and report by the conciliation commissioner, but was not void and could not be attacked collaterally in a state court. P. 7.
2. Jurisdiction of a state court in foreclosure, suspended by the institution of a proceeding under § 75 of the Bankruptcy Act, again attached upon dismissal of the bankruptcy case and empowered the state court to confirm a foreclosure sale previously made and to order a sheriff's deed. P. 8.
3. Reinstatement under the Act of 1935, *supra*, of a proceeding under § 75 (s) previously dismissed, did not invalidate a sheriff's sale and deed which were confirmed and authorized by a state court acting within its jurisdiction during the interval between the dismissal of the bankruptcy case and the motion to reinstate it. P. 8.
4. There is no occasion to refer a cause under § 75 of the Bankruptcy Act to a conciliation commissioner for the administration of property which, by reason of foreclosure proceedings already consummated in a state court, no longer belongs to the debtor. P. 10.

106 F. 2d 576, reversed.

269631°—40——1

CERTIORARI, 309 U. S. 643, to review a judgment reversing the district court in bankruptcy which, in a proceeding under § 75 (s), denied rehearing of an order of disclaimer and refused to refer the cause to a conciliation commissioner.

Mr. Ralph G. Martin, with whom *Mr. A. G. Masters* was on the brief, for petitioner.

Messrs. Elmer McClain and *William Lemke* for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

September 1, 1932, the petitioner instituted a mortgage foreclosure suit against respondent in the Common Pleas Court of Madison County, Ohio. The cause was prosecuted to judgment and advertisement was made of a sheriff's sale of the property to take place November 24, 1934.

November 19, 1934, the respondent filed his petition in the United States District Court under § 75 of the Bankruptcy Act,[1] and the court issued an order restraining proceedings in the foreclosure suit until the further order of the court.

November 23, 1934, the District Court, on application of the petitioner, without reference of the matter to a conciliation commissioner, modified the restraining order to permit the sale of the premises as advertised but enjoined any further proceedings, particularly confirmation of the sale or execution of sheriff's deed.

November 24, 1934, the sheriff, as permitted by the modification of the restraining order, held the sale as advertised. The petitioner bid the property in and the sheriff made return of the sale.

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[1] Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470.

December 14, 1934, the District Court approved the respondent's petition under § 75 of the Bankruptcy Act and ordered a reference to a conciliation commissioner. The latter reported that no agreement could be reached between the respondent and his creditors.

February 11, 1935, the respondent abandoned proceedings under subsections (a) to (r) of § 75 and filed an amended petition to be adjudged a bankrupt pursuant to § 75 (s).[2]

May 27, 1935, this court held certain features of § 75 (s) unconstitutional. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

August 26, 1935, on the application of the respondent, the District Court ordered that, because of the unconstitutionality of § 75 (s), the respondent's petition and amended petition be dismissed and that the case be terminated.

August 28, 1935, § 75 was amended[3] to meet the decision in *Louisville Bank* v. *Radford, supra.* The Act, as so amended, provided in paragraph 5 of § 75 (s):

"This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

September 10, 1935, the sheriff's sale was confirmed by the Common Pleas Court. Subsequently this action was, on appeal by respondent, affirmed by the Court of Appeals of Madison County.

September 11, 1935, the sheriff's deed was delivered to the petitioner and was recorded.

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[2] Subsection (s) was added to § 75 by the Act of June 28, 1934, c. 869, 48 Stat. 1289.

[3] Act of August 28, 1935, c. 792, 49 Stat. 942.

September 24, 1935, the respondent moved the District Court for reinstatement of his bankruptcy case. The motion was granted but apparently no amended petition has been filed nor any adjudication entered under § 75 (s).

May 8, 1936, the petitioner moved the District Court for an order of disclaimer of the real estate in question.

October 22, 1936, an order of disclaimer was entered. October 26 a petition for rehearing was filed by the respondent and was entertained by the court.

April 17, 1937, the respondent moved the District Court that the proceedings in bankruptcy be referred to a conciliation commissioner pursuant to § 75 (s).

May 6, 1937, the District Court overruled the respondent's petition for a rehearing of the order of disclaimer.

May 8, 1937, the District Court overruled the motion of the respondent to refer the cause to a conciliation commissioner.

May 27, 1937, the respondent petitioned the District Court for an appeal to the Circuit Court of Appeals from the order denying his petition for rehearing of the order of disclaimer and from the order denying his motion to refer the cause to a conciliation commissioner and, on the same date, the District Court allowed an appeal.

June 3, 1937, the respondent petitioned the Circuit Court of Appeals for leave to appeal from the orders of the District Court and, June 7, 1937, leave was granted.

The Circuit Court of Appeals reversed the orders of the District Court, holding that, at the time of filing his new petition under § 75, as amended, the respondent had a property right—a right of redemption—in the mortgaged premises, which had not been cut off by the sale and its confirmation in the state court, and that the cause should be referred to a conciliation commissioner and prosecuted before him.[4] On account of the

[4] *Byerly* v. *Union Joint Stock Land Bank*, 106 F 2d 576.

importance of the question involved in the administration of the Bankruptcy Act, we granted certiorari.

The petitioner asserts that the court below erred, as the action of the District Court modifying the restraining order and permitting a sale of the mortgaged premises was authorized by the Bankruptcy Act and, if not, it is binding upon the respondent since he failed to except to or appeal from it.

The petitioner further asserts that the respondent's procurement of the termination of the original bankruptcy case amounted to a waiver of any irregularity which occurred while the proceeding was pending and precluded the respondent from objecting to such irregularity. Further, petitioner contends that the sale made by the sheriff did not change the legal status of the debtor and his property since his right of redemption, under Ohio law, remained until confirmation of the sale by the state court; and, although that court was without jurisdiction while the original bankruptcy proceeding was pending, it regained such jurisdiction by the termination of the bankruptcy case, and had exclusive jurisdiction of the parties and the subject matter, when the decree of confirmation was entered. The claim is that the decree of confirmation cannot be collaterally attacked in the bankruptcy court.

The respondent, on the other hand, argues that the express provisions of § 75, in force at the time the sale was made, rendered void the District Court's permission to make the sale and the sheriff's action in making it; and that confirmation or delivery of a deed can give no validity to such void action, which the bankruptcy court should, therefore, have disregarded.

First. The action of the District Court in permitting the holding of the sale was not void but voidable; and the sale made pursuant thereto was not void.

Section 75, as it stood during the pendency of the original bankruptcy proceeding, provided:

"(e) . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:"

. . . . . .

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

The provisions of subsection (p) as it was when the petition was filed have no application. That subsection was amended by the act of August 28, 1935, *supra*, to

provide "The prohibitions of subsection (o) shall apply to all judicial and official proceedings in any court or under the direction of any official . . ." This amendment was made after the dismissal of the bankruptcy case.

Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the state court. Without action by the District Court the state court could not have proceeded further.[5] But without changing the status of the debtor's right of redemption the federal court gave permission to the state officer to hold the sale. The sale was, however, incomplete until confirmation by the court.[6] Until confirmed it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceeding was pending.

In view of the provisions of subsection (o), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale.[7] But the court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order.[8] The state court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable,

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[5] *Kalb* v. *Feuerstein,* 308 U. S. 433.

[6] *Bassett* v. *Daniels,* 10 Oh. St. 617, 619; *Reed* v. *Radigan,* 42 Oh. St. 292, 294.

[7] *Kalb* v. *Feuerstein, supra.*

[8] Compare *John Hancock Mutual Life Insurance Co.* v. *Bartels,* 308 U. S. 180.

but not void, and was not to be disregarded or attacked collaterally in the state court.[9]

Second. The termination of the bankruptcy proceeding restored the jurisdiction and power of the state court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.

Although the state court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the state court's procedure, it was as if no bankruptcy case had ever existed. With jurisdiction of the parties and the subject matter, the state court entered a decree confirming the sale and authorizing a deed, the sheriff executed his deed, which was duly recorded, and the petitioner went into possession as purchaser of the mortgaged premises. Thereafter the respondent moved for reinstatement of the bankruptcy case and his motion was granted. In the interim, no bankruptcy cause was pending and the state court had jurisdiction to proceed as it did.

We cannot assent to the view advanced by the respondent that the amendment to § 75 of August 28, 1935, automatically reinstated the earlier proceeding which had been dismissed; or that the motion to reinstate the proceeding operated by relation to close the gap of twenty-nine days between the dismissal of the original bankruptcy case, and the state court's action in confirming the sale, and to deprive the latter of jurisdiction to act in the interim. The amendatory act merely authorized the reinstatement of proceedings which had been dismissed. The case is analogous to one wherein a state court foreclosure proceeding

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[9] *Thompson* v. *Tolmie,* 2 Pet. 157, 163; *Voorhees* v. *Bank of United States,* 10 Pet. 449; *Florentine* v. *Barton,* 2 Wall. 210; *Cooper* v. *Reynolds,* 10 Wall. 308; *McNitt* v. *Turner,* 16 Wall. 352, 366; *Simmons* v. *Saul,* 138 U. S. 439; *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165, 173; *Insley* v. *United States,* 150 U. S. 512.

has been completed and deed delivered to the sheriff's vendee prior to the filing of a petition under § 75.[10] The provision for the reinstatement, upon the debtor's motion, of a proceeding theretofore dismissed and finally terminated, cannot affect the jurisdiction of the court conducting the foreclosure proceeding when no bankruptcy cause was pending.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131, relied upon by the respondent, is not in conflict with our decision. There a petition in bankruptcy filed under § 77B was dismissed by the bankruptcy court, not on motion of the bankrupt but at the instance of mortgage creditors and over the bankrupt's objection. In due time a petition for rehearing was filed. With notice of the filing of this petition for rehearing, and that it would be set for hearing before the bankruptcy court, the creditors took further steps in a foreclosure proceeding pending in a state court. The District Court entertained the petition for rehearing and an amended petition. The creditors who were prosecuting the foreclosure proceeding in the state court appeared and were heard in opposition. In entertaining the petition for rehearing the District Court found that good cause existed for vacation of its order of dismissal and reconsideration of the cause; that the application for rehearing had been seasonably presented, and that no rights had vested in reliance upon its earlier order of dismissal which would be disturbed by setting aside the order. The petition was dismissed, the debtor appealed to the Circuit Court of Appeals and was granted a supersedeas. From an order of the Circuit Court of Appeals affirming the dismissal of the petition by the District Court the debtor sought certiorari from this court. The state court in which the foreclosure proceeding was pending had full notice of all of these facts when it proceeded

[10] See *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 508.

to consummate the foreclosure sale. We held that, in the circumstances, no rights were acquired under the state court proceedings since termination of the bankruptcy case did not occur until final disposition of the efforts in the District Court and on appeal to reverse the decree of dismissal.

The District Court was right in refusing to refer the reinstated cause to a conciliation commissioner. Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor.[11] We have no occasion to pass upon the authority of the court to enter an order of disclaimer. It is sufficient that the court's action in refusing to refer the cause to a conciliation commissioner was justified. That order we think, should have been affirmed.

It is said that, even where title has passed from the mortgagor in foreclosure proceedings before the filing of the petition, the debtor should be, if he so requests, adjudicated a bankrupt so that a trustee may, if so advised, challenge the validity of the sale. Here, however, there is no suggestion of any infirmity in the petitioner's title save that the sale was made in violation of the prohibitions of the Bankruptcy Act. But that sale was made under leave of the bankruptcy court and it was within the state court's jurisdiction, when no bankruptcy proceeding was pending, to confirm the sale and order delivery of a deed. If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding. The fact is that the debtor appealed from the confirmation of the sale to the Court of Appeals of Madison County, Ohio, which affirmed the de-

[11] Compare *Wright* v. *Union Central Life Ins. Co., supra.*

cree of the Common Pleas Court. An issue of fraud alleged to have been practiced upon the debtor to obtain his withdrawal of his original bankruptcy proceeding was there finally decided against him.

The judgment of the Circuit Court of Appeals must be

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY, dissenting.

We believe that to deny this farmer the benefits of the Act because the purchase by the mortgagee at the sheriff's sale was confirmed during the short interval between the dismissal of his petition and its reinstatement, would be largely to defeat the purposes of the Act.

After the original subsection (s) of the Frazier-Lemke Act was declared unconstitutional by the decision of this Court, May 27, 1935,[1] this farmer's petition was dismissed, August 26, 1935. A scant two days after the dismissal, August 28, Congress enacted the present Frazier-Lemke Act designed to supply the constitutional deficiency and providing that all cases dismissed because of that decision "be promptly reinstated." [2] After the filing of the petition and even before dismissal, the bankruptcy court allowed this farmer's property to be sold by the sheriff under foreclosure in the state court. And it is admitted that the order purporting to permit the sale was erroneous because entered in disregard of the requirements of subsection (o).[3] The Ohio state court confirmed the sheriff's sale, September 10, 1935, a date prior to the lapse of the thirty day

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[1] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

[2] § 75 (s) (5).

[3] As we view the effect of reinstatement, it is unnecessary to determine whether the bankruptcy court's order was not merely erroneous, but void.

period within which an appeal would lie from an order of dismissal.[4]

Instead of appealing, the farmer, within the thirty day period, prayed relief from the dismissal decree by reinstatement in the District Court itself. In his application for reinstatement, he alleged that dismissal of his petition had been induced by the deliberate misrepresentations of the mortgagee-bank, that he had no notice of the consummation of the sheriff's sale until several days after it took place and that he wished to avail himself of § 75 as amended August 28. Upon the prayer "that his . . . proceeding . . . be reinstated as of the date of its . . . dismissal," the case was reinstated. We do not understand that either the power of the bankruptcy court to reinstate or the reinstatement which was in fact granted, is questioned.

Until disposition of the farmer's petition, he was entitled to the protection and benefit of the Act, and the bankruptcy court had exclusive jurisdiction of his property.[5] Dismissal of the proceeding did not constitute its final disposition where reinstatement was available. Certainly, this must hold true at least for the period of time after dismissal during which the farmer had a statutory right to appeal from the District Court's action.[6]

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[4] 11 U. S. C. 47, 48.

[5] *Kalb* v. *Feuerstein*, 308 U. S. 433.

[6] "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of. . . . When the final judgment was reached it determined the rights of . . . [the parties] *ab initio*, . . ." *MacKenzie* v. *Engelhard Co.*, 266 U. S. 131, 142–143. "Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued—it not being in condition to issue execution—the case could not be said to have reached that stage where it could be said it was not pending in that court." *Brannon* v. *Kentucky*, 162 Ky. 350, 357–8; 172 S. W. 703, 706. Cf.

Otherwise, even appeal might be wholly unavailing and futile. When a court of bankruptcy reinstates a case previously retired from the docket, as this farmer's case was reinstated, the court reconsiders the cause on the merits upon the original as well as any supplemental petitions unless rights have "intervened which would render it inequitable to reconsider the merits." *Wayne Gas Co.* v. *Owens Co.,* 300 U. S. 131, 137, 138. We find no intervening equities here.

In the *Wayne* case, a corporate reorganization in 77B was dismissed and subsequent to the dismissal a state court confirmed a foreclosure sale of the debtor's property which had been decreed prior to the filing of the 77B proceeding. After the Circuit Court of Appeals had denied the debtor's petition for allowance of an appeal and the time for appeal as of right had expired, the bankruptcy court reinstated the proceeding and reheard the case upon the merits. The plan of reorganization was again found wanting and the court entered a second order of dismissal. The debtor's appeal from the second dismissal was in turn dismissed by the Circuit Court of Appeals on the ground that lack of power in the District Court in bankruptcy rendered the order of reinstatement—as well as the second order of dismissal—void.[7]

When the case reached here, arguments presented by the foreclosure purchaser were in substance those upon which we are now asked to reverse the court below—that the first order of dismissal had terminated the cause (so that an appeal not taken within thirty days of its entry was not timely); and that the state court's confirmation

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State v. *Tugwell,* 19 Wash. 238; 52 P. 1056; 43 L. R. A. 717; *Bloom* v. *People,* 23 Colo. 416; 48 P. 519; *State ex rel. Andreu* v. *Canfield,* 40 Fla. 36, 44; 23 So. 591; *Brown* v. *Campbell,* 100 Cal. 635, 646; 35 P. 433; *Ex parte Howland,* 3 Okla. Crim. 142; 104 P. 927; Ann. Cas. 1912A, 840.

[7] 84 F. 2d 965.

of sale, after dismissal, had finally divested the bankrupt of all title to its foreclosed property leaving no property for administration by the bankruptcy court (and the controversy was therefore moot).

This Court denied these contentions, and held that the dismissal had not terminated the proceeding; that the controversy was not moot and that the District Court had properly found that no intervening rights had accrued to divest the debtor of its property foreclosed subsequent to the dismissal in the bankruptcy court; that the rehearing had been sought in good faith and with due diligence and that the Circuit Court of Appeals had erred in not passing upon the merits of a plan of reorganization which included the property sold under the state court's order. The decision here thus approved the exercise of the bankruptcy court's jurisdiction over the encumbered property of the debtor which, after dismissal, had been bought in the state court foreclosure by creditors who were parties to the 77B proceedings and who "went forward with the proceedings in the state court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted . . ." *Id.*, 135.

Accordingly, the case was not remanded to the District Court for reconsideration of its finding that no rights cognizable in equity had intervened as a result of the state court foreclosure. Instead, the remand went to the Court of Appeals for further proceedings. And that court properly construed the mandate to require consideration of the merits of the debtor's plan which assumed ownership in the debtor of the particular property upon which foreclosure had been attempted.[8]

So here, as in the *Wayne* case, state court proceedings subsequent to dismissal, but while further proceedings could be had in bankruptcy, did not divest the debtor of

[8] *Wayne Gas Co.* v. *Owens-Illinois Glass Co.*, 91 F. 2d 827.

his property; there "was no abuse of sound discretion in granting the motion [for reinstatement] and reconsidering the cause"; the district court in bankruptcy had "the power, for good reason, to revise its judgments [of dismissal and to reinstate] upon seasonable application and before rights . . . [had] vested on the faith of its action." *Id.*, 137, 138. And its general power to do so, at least during the period allowed for taking an appeal,[9] was reinforced by recognition of the specific statutory right of reinstatement in the amended 75(s), which sprang into being only two days after dismissal of this farmer's petition. Paralleling the situation presented by the *Wayne* case, not only was the mortgagee-purchaser here a party to the 75 proceeding, but the state court itself may be said to have acted with knowledge that the dismissal—of which it was notified—did not necessarily represent the last step in the federal court proceeding. Cf. *Id.*, 135.

Here, the only asserted rights which intervened against this farmer-debtor were not those of a *bona fide* purchaser. The purchaser was the mortgagee who was a party to the § 75 proceeding and who relied—at least in part—on an order of the bankruptcy court admittedly erroneous because contrary to the Frazier-Lemke Act, and rendered at the mortgagee's instigation. Therefore, the mortgagee-purchaser is not entitled to rely upon the status acquired by it in the state court after dismissal "as precluding further consideration of the petition" for composition. Cf. *Id.*, 135. To decide otherwise than that the dismissal here did not deprive the farmer-debtor of the right to proceed—before rights have vested—by reinstatement to obtain the benefits of the Act, is to permit dismissal at the instance of the farmer's creditors and without the farmer's knowledge to prove a ready means of circumvent-

[9] See note 6, *supra*.

ing the Act.[10] Title to a farmer's property acquired in the manner pursued by petitioner cannot limit the power of the bankruptcy court to afford the protection of and to enforce this remedial legislation.

UNITED STATES *v.* CITY AND COUNTY OF SAN FRANCISCO.

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

No. 587. Argued March 28, 1940.—Decided April 22, 1940.

1. Under the Raker Act of December 19, 1913, which granted to the City and County of San Francisco certain lands and rights of way in the Hetch-Hetchy Valley for use by the City in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system for generation and sale and distribution of electric energy, *held:*

   That § 6 prohibits the City from transferring to a public utility the right to sell electric power produced by the City under the grant, in addition to forbidding sale of the power itself as a commodity for resale. P. 20.

   Congress clearly intended to require—as a condition of its grant—sale and distribution of power exclusively by San Francisco and other municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies. P. 26.

2. The City, instead of selling the power produced under the grant directly to consumers at prices fixed by itself, delivered it under a contract, for a fixed compensation, to a public utility corporation, which, in turn, sold it to consumers in the City and elsewhere, along with power produced by itself, at the rates fixed from time to time by the State Railroad Commission. *Held* that the contract is in violation of the Act, and can not be defended upon the ground that the City has a right to sell through the corporation as its agent. P. 28.

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[10] Cf. *In re Price*, 99 F. 2d 691, 694.

3. The prohibitions of § 6 are not an unconstitutional invasion of the right of the State of California to regulate distribution of electricity, and are not mere covenants subject to alleged equitable defenses, but are conditions which Congress, in virtue of its power over the public domain, was authorized to attach to the grant. P. 28.
4. In disposing of rights to develop hydroelectric power in the public lands, Congress may impose limitations designed to avoid monopoly and to bring about a wide-spread distribution of benefits. P. 30.
5. A suit brought by the Attorney General in the name of the United States pursuant to the mandate of the granting Act, to enforce its provisions by an injunction is cognizable in equity. P. 30.
6. In such a suit, the duty of the court to enjoin plain violations of the Act is not measured by a balancing of equities but by the policy of the statute. P. 31.
7. A former erroneous administrative construction of § 6 of the Act (since abandoned) as forbidding no more than sale of power for resale, *held* ineffectual. P. 31.
8. The United States is not estopped by acts of its officers in sanctioning an agreement not permitted by law. P. 32.

106 F. 2d 569, reversed.

CERTIORARI, 309 U. S. 642, to review the reversal of a decree of injunction commanding the City and County of San Francisco to cease disposing of its electric power to a public utility corporation, or in the alternative, to cease further use of lands and rights granted to it by an Act of Congress, for generation and transmission of electricity.

Assistant Attorney General Littell, with whom *Solicitor General Biddle,* and *Messrs. William D. Donnelly, Lawrence S. Apsey,* and *Frederic L. Kirgis* were on the brief, for the United States.

Messrs. Garret W. McEnerney and *John J. O'Toole,* with whom *Messrs. Dion R. Holm* and *Robert M. Searls* were on the brief, for respondent.

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MR. JUSTICE BLACK delivered the opinion of the Court.

By the Raker Act of December 19, 1913,[1] Congress granted the City and County of San Francisco,[2] subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest. The Act in terms declared that this, known as the "Hetch-Hetchy" grant, was intended for use by the City both in constructing and maintaining a means of supplying water for the domestic purposes of the City and other public bodies, and in establishing a system "for generation and sale and distribution of electric energy."

Upon application of the Secretary of the Interior, the United States brought this suit [3] in equity charging the City with disposing of power through the Pacific Gas & Electric Company, a private utility, in violation of § 6 of the granting Act. Section 6 provides "That the grantee [the City] is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee: *Provided,* That the rights hereby granted shall not be sold,

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[1] c. 4, 38 Stat. 242.

[2] The City and County of San Francisco is a municipal corporation of California and will be referred to here as the City.

[3] Section 9 (u) of the Act contains the following: "*Provided, however,* That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." 38 Stat. 250.

assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The District Court concluded that the City was violating § 6 by the sale and distribution of Hetch-Hetchy power through the Pacific Gas & Electric Company, a private utility. Accordingly, the City was required by injunction alternatively to discontinue such disposal of the power or cease further use of the lands and rights granted it under the Act for generation and transmission of electric energy.[4] The Circuit Court of Appeals reversed,[5] finding that the private utility was merely acting as the City's agent in the sale and distribution of Hetch-Hetchy power and holding that § 6 does not prohibit such sale and distribution of that power by a private utility.

Here, as in the courts below, the City has defended the sale and distribution by Pacific Gas & Electric Company of power originating at Hetch-Hetchy upon the grounds that such disposition does not violate the prohibitions of § 6; that imposition of these prohibitions was not within the constitutional authority of Congress; and that if § 6 is valid and has been violated, the United States is not entitled to injunctive relief in equity.

First. Prohibitions of Section 6.—In the City's view, § 6 does not preclude private utilities from all participation in the ultimate sale and distribution of Hetch-Hetchy power. The City insists that the Section, so construed, does no more than prohibit the City from selling

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[4] 23 F. Supp. 40. The District Court stated: "In order that the City may face its problem and comply with its obligations under section 6 of the Raker Act, the court will make its injunction issuable forthwith, but effective six months from the date of its issue." p. 53.

[5] 106 F. 2d 569.

Hetch-Hetchy power to a private utility for resale to consumers and therefore permits consignment of the power to the Company, as agent of the City, for sale and distribution. On the contrary, the Government's position rests upon the claim that Pacific Gas & Electric Company is not in reality selling and distributing Hetch-Hetchy power as consignee and agent but as purchaser for resale; that the grant to the City was made upon the mandatory condition that this power be sold solely and exclusively by the City directly to consumers and without private profit in order to bring it into direct competition with adjacent privately owned utilities; and that § 6 not only withholds the right of selling for resale but also prohibits the City "from ever selling or letting" to any private corporation "the right to sell or sublet the . . . electric energy sold or given to it . . . " by the City. The language of the Act, its background and its history require the construction given § 6 by the Government.

From its provisions,[6] it is apparent that the Act conditions the grant upon and contemplates the development, sale and distribution of electrical power by the City itself "for municipal and commercial use" on a scale to be gradually stepped up over a period of years. "The . . . grantee shall develop and use hydroelectric power for the use of its people and shall . . . sell or supply such power for irrigation, pumping, or other beneficial use." The "right to sell or sublet the . . . electric energy" so generated by the City cannot, as a consequence of § 6, be sold or let. And in case of any attempt to "sell, assign, transfer, or convey [the rights granted], this grant shall revert to the Government of the United States."

From the statement of the Congressman responsible for the application of the prohibitions of § 6 specifically to

[6] See § 9 (m).

electric energy,[7] it is clear that as enacted § 6 was understood to prohibit the City from transferring to a private utility the right to sell Hetch-Hetchy power (the Government's contention) and not merely to forbid sale of power as a commodity for resale, as the City would have us hold:

"Mr. TAYLOR of Colorado. We have got to let the municipality sell to individuals or consumers.

"Mr. THOMSON of Illinois. Yes; but not the right to sell some one else the power.

"Mr. TAYLOR of Colorado. Supposing that San Francisco sells a certain block, you may say, of its power to Alameda. Has not Alameda got the right to resell that to its inhabitants?

"Mr. THOMSON of Illinois. Mr. Chairman, in answering the question of the gentleman from Colorado, I would like to call his attention to the fact that the subject of sale as printed in this section is not the power or the water, but the right to sell the power or the water.

". . .

"Mr. RAKER. That [the word "individual"] really is intended to cover any person who might attempt to buy this electric power or right. I think it would cover everybody outside of a corporation, the intention being to prevent anybody getting in and getting a right and sub-letting it." [8]

In its Report on the Bill, the House Committee on Public Lands stated that the provision of § 6 "acquiesced in by the grantee, was designed to prevent any monoply or private corporation from hereafter obtaining control of the water supply of San Francisco." [9]

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[7] 50 Cong. Rec., Part 4, p. 3906. Mr. Thomson of Illinois was a member of the committee that considered and reported the Bill.

[8] *Id.*, p. 3999.

[9] H. R. No. 41, 63rd Cong., 1st Sess., p. 11.

From the congressional debates on the passage of the Raker Act can be read a common understanding both on the part of sponsors of the Bill and its opponents that the grant was to be so conditioned as to require municipal performance of the function of supplying Hetch-Hetchy water and electric power directly to the ultimate consumers, and to prohibit sale or distribution of that power and water by any private corporation or individual.[10] On the floor of the House, the following took place between the Bill's author and other Representatives:

"Mr. SUMNERS. Does San Francisco own its own lighting plant now?

"Mr. KAHN. No; it does not.

"Mr. RAKER. I understand it does not.

"Mr. KAHN. It does not own its own water supply. Its present water supply is furnished by a private company.

"Mr. RAKER. The Spring Valley Water System.

"Mr. SUMNERS. Is it the purpose of this bill to have San Francisco supply electric power and water to its own people?

"Mr. RAKER. Yes.

"Mr. SUMNERS. Or to supply these corporations, which will in turn supply the people?

"Mr. RAKER. Under this bill it is to supply its own inhabitants first. . . ." [11]

These views were in accord with the recommendation of the then Secretary of the Interior, as set out in the Report of the Public Lands Committee of the House:

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[10] Reference to congressional debates may be made to establish a common agreement upon the general purpose of an Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 650; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 625.

[11] 50 Cong. Rec., Part 4, p. 3905.

"I think that it is very proper that the Federal Government should use whatever power it has over the public lands, over the parks, and over the forests, to compel the fullest use of these waters, and indirectly to require through its power to make conditions, the lowest possible rate for consumers." [12]

The theme—of an intent to require public utilization of Hetch-Hetchy power independently of private utilities—recurred at a later stage of the debate in the House:

"Mr. GRAY. . . .

"As I understand the bill, it provides for the furnishing of water, and also for power for commercial use. . . .

". . . if these works here are to be contructed to serve the baseness of commercialism, it is the vilest of all vandalism. My suggestion here to you is to strike out of this bill all the commercial profit. . . .

"Mr. KENT [a Member of the California delegation and a supporter of the measure]. Mr. Chairman, I should like to suggest to the gentleman from Indiana [Mr. GRAY] that this bill is strictly drawn in the public interest, that there is no possibility of selfish gain, and that no corporation or individual can obtain any benefit whatsoever from this bill. It is for the benefit of the people of California." [13]

In the Senate, Senator Thomas, a member of the Committee reporting the Bill, said:

". . . San Francisco needs electric power, and California needs development in electric power just as much as she needs ownership in water, . . .

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[12] House Reports, Vol. 1, Nos. 17–92, 63rd Cong., 1st Sess., 1913, p. 25.

[13] 50 Cong. Rec., Part 4, p. 3991. See also 69 Cong. Rec., Part 9, pp. 9239 *et seq.*

". . . She is anxious to extend her spheres of municipal usefulness, but she is in the grip of a power monopoly as well as that of the Spring Valley Co.

". . . This scheme appeals to me, Mr. President, so far as the power is concerned, because the city of San Francisco as a municipality will be the owner of it, the manufacturer, the distributor of it." [14]

And the words of Senator Norris, also a Member of the reporting Committee and a leading sponsor of the Bill, on the day of its final passage through the Senate, illuminate just what the Raker Act was intended to accomplish:

". . . I said that I was in favor of this bill to a great extent for the reason that it developed this power. This power will come into competition with the various water-power companies of California, and there are lots of them there.

". . . this proposition is to harness that power and to put it to public use not to give it to a private corporation. . . .

"Here is an instance where we are going to give it directly to the people, if we pass this bill. It is going to come into competition with power companies and corporations that have, or will have, if this bill is defeated, almost a monopoly not only in San Francisco but throughout the greater portion of California.

". . .

"These make in all, as I have counted them, 18 corporations controlling the power in the vicinity of San Francisco that are under the control of this one corporation. [Pacific Gas & Electric Company.]

". . . When you sum them all up you will find that they own practically all of the hydroelectric power of the State of California, and this bill, if passed, will bring

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[14] 51 Cong. Rec., Part 1, pp. 126, 136.

into competition with them one of the greatest units for the development of power that has ever been developed in the history of the world. It means competition.

". . . Conservation does not mean dealing out these resources to private capital for gain. It is not necessary to accuse those corporations of doing any wrong; but here will be an instance where the cheapest power on earth will be developed and where it will be sold at cost." [15]

Opponents of the Bill themselves recognized that its regulatory conditions were designed to insure distribution of power from Hetch-Hetchy through a municipal system in San Francisco. Before final passage in the Senate, opposition had practically narrowed down to the power provisions of the measure,[16] and these provisions contemplated a publicly owned and operated power system.[17]

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[15] 51 Cong. Rec., Part 1, pp. 343, 344, 347. Senator Pittman, one of the Bill's sponsors and a Member of the reporting Committee, stated that the Bill provided "absolutely that neither this water nor this power can ever fall into the hands of a monopoly." 50 Cong. Rec., Part 6, p. 5473.

[16] See, e. g., views of Senator Smoot, who opposed the measure: ". . . I was opposed to the regulations that were put in this bill, and that is what I was opposed to more than any other thing. I wanted the question of regulations taken out of the controversy and the bill reported to the Senate without those regulations in it.

". . .

"Mr. President, I do not think there ought to be any misunderstanding about this matter. The Senator himself, I think, will admit that the principal object of this bill is to provide for the creation of power, . . ."

". . . I will, moreover, say that it is my opinion that the reason San Francisco wants this particular dam site is for the power that she thinks can be developed cheaper than from any other source, and at the same time get a large supply of water. That is my personal opinion." 51 Cong. Rec., Part 1, pp. 304, 314, 360.

[17] "The people who ride on street cars, the people who use electric lights, the people who are now using gas, those who eventually will

Immediately before the vote in the Senate, Senator McCumber, opposed to the power provisions of § 6, offered a sweeping amendment which would have omitted that section and all other provisions relating to the generation, sale and distribution of Hetch-Hetchy power.[18] But his amendment was defeated.[19] And despite this articulate opposition to the policy embodied in its power features, the Act was passed.

To limit the prohibitions of § 6 of the Act narrowly to sales of power for resale without more, as the City asks, would permit evasion and frustration of the purpose of the lawmakers. Congress clearly intended to require—as a condition of its grant—sale and distribution of Hetch-Hetchy power exclusively by San Francisco and municipal agencies directly to consumers in the belief that consumers would thus be afforded power at cheap rates in competition with private power companies, particularly Pacific Gas & Electric Company. It is not the office of the courts to pass upon the justification for that belief or the efficacy of the measures chosen for putting it into effect. Selection of the emphatically expressed purpose embodied in this Act was the appropriate business of the legislative body.

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use coal for purposes of heat, and those who use water for washing purposes will all receive all the benefit there is in this legislation without any rake-off by any corporation or monopoly." Senator Norris, 51 Cong. Rec., Part 1, p. 347.

[18] Senator Clark, of Wyoming, also opposed to the power provision of the Bill, said with reference to Senator McCumber's amendment: ". . . The Senator from North Dakota [Mr. McCumber] has prepared an amendment to the bill which accomplishes all the purposes which the proponents of the bill claim are desired, leaving out the objectionable features, which have nothing whatever to do with the water supply of the city of San Francisco." 51 Cong. Rec., Part 1, p. 184.

[19] *Id.*, pp. 383, 384, 385.

The admitted facts shown by this record required the District Court to find—as it did—that the City was violating § 6 in permitting sale and distribution of Hetch-Hetchy power by the Pacific Gas & Electric Company. Now, as it has been doing since contracting with the City in 1925, the Company sells and distributes that power as follows:

Power generated in the City's plant is transmitted to the Company at Newark, about thirty-five miles from San Francisco. There the power is delivered to the Company's sub-station and thereafter is under the Company's complete control. The Company distributes and sells this power to its customers in San Francisco and elsewhere exactly as it handles other power which it generates, buys or owns. Consumers of the power are billed by and pay the Company. The City buys Hetch-Hetchy power from the Company exactly as do other consumers. The City receives monthly payments from the Company on a fixed basis set out in the contract. The price received by the City has remained constant from 1925 to date although rates to the consumers have varied in the interim. In the event of the refusal, failure or inability of the Company to take the available output of the City's plant in accordance with the agreement, the amount of energy which the City could have delivered is the basis of making the monthly payment, and the Company must pay for power delivered to it whether actually disposed of by resale or not. The rate paid by consumers for the Hetch-Hetchy power is not fixed by the City, as it could be under the Constitution of California,[20] but is fixed by the State Railroad Commission just as the price of

[20] Under Art. XII, § 23 of the California Constitution municipalities are exempt from rate regulation by the State Commission. See *Pasadena* v. *Railroad Commission*, 183 Cal. 526; 192 P. 25; *Water Users Assn.* v. *Railroad Commission*, 188 Cal. 437; 205 P. 682.

all other power sold by the Pacific Gas & Electric Company in California is fixed.

Thus, in brief, the City does not itself distribute and sell the power directly to consumers; it has not provided competition with the private power company; and it has transferred the right to sell and distribute the power to a private power company in violation of the express prohibition of § 6 of the Act.

Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of § 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by § 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power Company to what was actually done, we see that the City has—contrary to the terms of § 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy power. There remain only the determinations whether the prohibitions of § 6 are constitutional and can be enforced in equity.

Second. The prohibitions of § 6 are challenged by the City as an unconstitutional invasion of the rights of the State of California on the ground that they attempt to regulate the manner in which electricity shall be disposed of in San Francisco. And the City therefore insists that these prohibitions must be considered only as covenants in a contract between the City and the United States. Upon this premise, the City has argued here, as it did in

the Court of Appeals, that alleged equitable defenses render the covenants unenforceable.

When the Raker Bill was before Congress, the City filed with the Public Lands Committee of the House a brief and argument in support of the Bill. Citing authorities, including this Court's opinions, and legislative precedents, the City submitted to Congress that as grantee it would be bound by and as grantor Congress was empowered to impose "the conditions set forth in the Hetch-Hetchy bill." [21] After passage of the Bill the City accepted the grant by formal ordinance, assented to all the conditions contained in the grant, constructed the required power and water facilities, and up to date has utilized the rights, privileges and benefits granted by Congress. Now, the City seeks to retain the benefits of the Act while attacking the constitutionality of one of its important conditions.[22]

Article 4, § 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations.[23] "And it is not for the courts to say how that trust shall be administered. That is for Con-

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[21] H. R. No. 41, 63rd Cong., 1st Sess., p. 41. Similar views were entertained in Congress upon the effect of the conditions. See, e. g., Senator Walsh of Montana: "We are making a grant of rights in the public lands to the city of San Francisco, and we may impose just exactly such conditions as we see fit, and San Francisco can take the grant with all those conditions or it can let it alone." 51 Cong. Rec., Part 1, p. 69.

[22] Cf. *Daniels* v. *Tearney,* 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17, 29; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469, 473; *Booth Fisheries* v. *Industrial Commission,* 271 U. S. 208, 211.

[23] *United States* v. *Gratiot,* 14 Pet. 526, 537.

gress to determine." [24] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it.[25]

Third. Finally, on the basis of numerous objections to the District Court's judgment, assigned as errors in the court below and pressed here, the City denies the Government's right—upon a balancing of equities—to relief by injunction even if the present disposition of Hetch-Hetchy power be in violation of the Act.

However, after consideration of all these objections, we are satisfied that this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued. The City is availing itself of valuable rights and privileges granted by the Government and yet persists in violating the very conditions upon which those benefits were granted. Congress provided "That the grantee [City] shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United

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[24] *Light* v. *United States*, 220 U. S. 523, 537.

[25] Cf. *Ellis* v. *United States*, 206 U. S. 246, 256; see *Ruddy* v. *Rossi*, 248 U. S. 104.

States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act." Pursuant to this legislative mandate, the present suit was instituted to enforce covenants exacted from a grantee of rights in the public domain by a Congress sympathetic with the local needs of San Francisco but also jealous of its own responsibility to dispose of such rights in a manner deemed by it most likely to render their benefits widespread. The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use—in violation of that policy—of property granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.[26]

A substantial part of the City's argument rests upon its claim that the Department of the Interior in the period from 1913 to 1937 construed § 6 to forbid no more than sale of power for resale. We are asked to accept these administrative interpretations. And in addition the City suggests that conduct of the Department, of which these interpretations were a part, is sufficient to create an estoppel against the Government. Whether the Department at any time ever did more than merely to tolerate sale and distribution of Hetch-Hetchy power by the Company as a temporary expedient is doubtful. Certain it is, however, that in 1935 the Secretary of the Interior declared the City's disposition of the power through the Company to be a violation of § 6, demanded discontinuance of this violation without success and thereafter instigated this proceeding. We cannot accept the contention that administrative rulings—such as those here

[26] Cf. *Oregon & California R. Co.* v. *United States*, 238 U. S. 393, 436, 438.

relied on—can thwart the plain purpose of a valid law. As to estoppel, it is enough to repeat that " . . . the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." [27]

The judgment of the Circuit Court is reversed. The judgment of the District Court is affirmed and we remand the case to it.

Reversed.

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

VEIX *v.* SIXTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 567. Argued March 6, 1940.—Decided April 22, 1940.

1. On appeal under Jud. Code § 237 (a) from a judgment of a state court sustaining the constitutionality of a state statute, this Court does not consider the application of later amendatory statutes which were not considered by the state court in its opinion. P. 36.
2. For the sake of safeguarding the solvency of building and loan associations in the public interest, a state legislature may, independently of emergency and consistently with the contract clause of the Constitution, restrict the rights of certificate holders, existing under statutory regulations in force when they acquired their certificates, to withdraw or recover by suit the amounts of their certificates. P. 38.
3. When the plaintiff purchased his certificates, the statutes of New Jersey permitted him to withdraw upon written notice and provided that withdrawals should be paid in the order in which notices were received, at least one-half of the receipts in any

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[27] *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409.

month being assigned to this purpose; if not paid in six months, the shareholder could recover withdrawal value by suit. The amendatory Act, here sustained, defined the receipts from one-half of which withdrawals were to be satisfied; provided that if in any month the funds payable for withdrawals were insufficient to pay all withdrawing members, they were to receive $500 each in the order of priority until the fund for withdrawals was exhausted; withdrawal payments were subordinated to payment of matured shares; and so long as the funds of an association were applied as required by the amendment, no member could sue for the withdrawal value of his shares. Pp. 34–36.

123 N. J. L. 356; 8 A. 2d 350, affirmed.

APPEAL from the affirmance of a judgment dismissing the complaint in the suit brought by Veix against the Building & Loan Association to recover the amount of his paid up shares with interest.

Messrs. Walter P. Reilly and *James L. Handford* for appellant.

When a right has arisen under a contract of which a statute is an integral part, the repeal of the statute does not affect that contract, or affect an action for its enforcement. *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189; *Coombes* v. *Getz,* 285 U. S. 434; *Ettor* v. *Tacoma,* 228 U. S. 148; *Pacific Mail S. S. Co.* v. *Joliffe,* 69 U. S. 450; *Bedford* v. *Eastern Building & Loan Assn.,* 181 U. S. 227.

Executory as well as executed contracts are protected from impairment. *Fletcher* v. *Peck,* 6 Cranch 87; *Farrington* v. *Tennessee,* 95 U. S. 679.

It is the duty of courts to determine whether exercise of the police power is reasonable. Legislatures may not impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398; *Treigle* v. *Acme Homestead Assn., supra; Nebbia* v. *New York,* 297 U. S. 502; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116.

The legislation in question bears no reasonable relation to the public welfare and is unjust and discriminatory, and the means adopted by the subsequent legislation are not reasonably adapted to the accomplishment of its alleged purpose.

To delegate to the board of directors discretionary power to allocate all of the income to reserves indefinitely, is unreasonable and unconstitutional.

To delegate to the board of directors discretionary power to prevent withdrawals indefinitely, is unreasonable and unconstitutional especially because the directors themselves are substantial shareholders. *Eubank* v. *Richmond*, 226 U. S. 137; *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116.

Legislation which delegates to private boards of directors of building and loan associations the unlimited discretionary power to suspend the prior laws regarding withdrawals, by means of an artificial definition of "net receipts," is unreasonable and unconstitutional.

Messrs. Fred G. Stickel, Jr. and *Louis J. Cohen* argued the cause, and with the former *Messrs. George D. Mulligan* and *William F. Delaney* were on the brief, for appellee.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. David T. Wilentz,* Attorney General of New Jersey, and *Louis J. Cohen,* Assistant Attorney General, on behalf of Louis A. Reilly, Commissioner of Banking and Insurance of that State; and by *Messrs. Horace Russell* and *David A. Bridewell,* on behalf of the U. S. Savings & Loan League,—urging affirmance.

Mr. Justice Reed delivered the opinion of the Court.

In 1928 and 1929 appellant purchased prepaid shares of the appellee, a New Jersey building and loan association, paying the par value of $200 per share. At that

time the applicable New Jersey statutes provided that shares in such an association could be withdrawn by giving such written notice as the constitution or by-laws of the association provided, not to exceed 30 days; that withdrawals should be paid in the order in which notices were received, with not more than one-half of the receipts of any month being required to be used for payment of withdrawals, without the consent of the board of directors, until the oldest unpaid claim of withdrawal had been on file for six months; that no payment should be postponed for longer than six months from the date of notice; and that any member who had given notice could sue and recover the withdrawal value if it was not paid within six months of the notice.[1]

On April 22, 1932, these statutes were amended in four respects: (1) "total receipts" of an association, one-half of which were required to be used for the payment of withdrawals and which had not been previously defined, were defined as income on authorized investments, dues on shares of the association which were pledged with it to secure loans, and repayments from loans; (2) if in any one month the funds required to be payable for withdrawals were insufficient to pay all requested withdrawals, withdrawing members were to receive $500 each in the order of priority until the fund for withdrawals was exhausted; (3) no withdrawals were to be paid if the funds available for payment of matured shares were insufficient to pay all matured shares, the payment of which had been requested within thirty days after maturity; (4) so long as the funds of an association were applied as required by the amendment, no member who had filed his withdrawal notice should have a right to sue for the withdrawal value of his shares.[2]

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[1] Laws of N. J., 1925, c. 65, § 52.

[2] Laws of N. J., 1932, c. 102.

In 1935 another amendment was passed providing that one-third of the "net receipts" of an association were to be payable for withdrawals, with "net receipts" defined as monies, other than borrowed monies, received by the association less operating expenses, payments on creditor obligations, payments for protecting the property of the association and reserves for any of these purposes. At the same time payment of withdrawals in the order in which notices had been received was continued but the payments were limited to $50 per member.

Minor amendments, not pertinent here, were added in 1936 and in 1937 the statutes, as they stood in 1936 with some immaterial changes, were carried into a general revision of New Jersey's statute law.

On August 17, 1932, after the passage of the 1932 amendment, appellant filed a written notice of withdrawal with respondent. In 1939, he brought this suit against respondent for the withdrawal value of his shares, claiming that, in so far as any of the amendments referred to altered the statutes in existence at the time of purchase of the shares, the amendments were unconstitutional violations of the contracts clause of Article I and the due process clause of the Fourteenth Amendment. The allegations show that the Association was solvent at the time of notice of withdrawal and has remained solvent. The trial court dismissed appellant's complaint. The Court of Errors and Appeals affirmed. 123 N. J. L. 356; 8 A. 2d 350.

The ruling was based squarely on the constitutionality of the Act of 1932. The later acts were not referred to in the opinion except by pointing out that the Act of 1932 would be found in the 1937 revision. The case is here on appeal under § 237 (a) of the Judical Code. As this section gives a review to this Court only of state statutes held valid by the highest court of a State against an attack for repugnancy to the Constitution of the United States, we

deem ourselves limited to the Act of 1932.[3] The question of the applicability to withdrawals of statutes on the subject which were passed subsequent to the notice of withdrawal is not considered in this opinion.[4]

The New Jersey statutes concerning the regulation of building and loan associations reach back many years prior to the purchase of these shares. Beginning in 1903 general regulatory acts were passed at intervals with sections directed at the mode of withdrawal.[5] The form of these statutes and the judicial notice by the Court of Errors and Appeals in the *Bucsi* case of the importance to the State of New Jersey of building and loan associations makes clear that in dealing in 1932 with the problem of withdrawals the legislature was faced with the threat of wrecked associations and the consequent further depression of real estate values throughout its area. While the Act of 1932 now under review was not emergency legislation, the dangers of unrestricted withdrawals then became apparent. It was passed in the public interest to protect the activities of the associations for the economic welfare of the State. It is also plain that the 1932 act was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations. We are dealing here with financial institutions of major importance to the credit system of the State.[6]

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[3] Cf. *Bucsi* v. *Longworth B. & L. Assn.*, 119 N. J. L. 120; 194 A. 857, where the same court dealt with statutes enacted after notice of withdrawal.

[4] Cf. *Carpenter* v. *Wabash Ry. Co., ante,* p. 23.

[5] *Bucsi* v. *Longworth B. & L. Assn.*, 119 N. J. L. 120, 124; 194 A. 857; Laws of N. J., 1903, c. 218, § 38; Laws of N. J., 1925, c. 65, § 49; Laws of N. J., 1932, c. 102; Revised Statutes of N. J., 1937, 17:12–49, 12–53.

[6] *Hopkins Federal Savings Assn.* v. *Cleary,* 296 U. S. 315, 328; cf. Piquet, Building & Loan Associations in New Jersey, cc. II, VI and X.

With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares.[7] Unquestionably for the future, the provisions of the 1932 act would be effective.[8] We think they were equally effective as to shares bought prior to the enactment of the statute, notwithstanding the provisions of Article I, § 10 of the Constitution that "No State shall . . . pass any . . . Law impairing the obligation of contracts . . ." This is so because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power. Beginning with the 1903 act the State of New Jersey has laid down specifically by statute the requirements for withdrawal. The charter, by-laws and membership certificate ceased to determine withdrawal rights. (See Note 5, *supra.*) It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.[9]

In *Home Building & Loan Association* v. *Blaisdell*[10] this Court considered the authority retained by the State over contracts "to safeguard the vital interests of its people." The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety.[11]

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[7] *Dillingham* v. *McLaughlin,* 264 U. S. 370; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Doty* v. *Love,* 295 U. S. 64.

[8] *Stockholders* v. *Sterling,* 300 U. S. 175, and cases cited.

[9] *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 363; *Semler* v. *Dental Examiners,* 294 U. S. 608, 610.

[10] 290 U. S. 398, 434 *et seq.*

[11] *Stone* v. *Mississippi,* 101 U. S. 814, 819; *Douglas* v. *Kentucky,* 168 U. S. 488, 497–99; *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 32, 33; *Mugler* v. *Kansas,* 123 U. S. 623, 664, 665; *Fertilizing Co.* v. *Hyde*

It extends to economic needs as well.[12] Utility rate contracts give way to this power,[13] as do contractual arrangements between landlords and tenants.[14]

The cases cited in the preceding paragraph make repeated reference to the emergency existing at the time of the enactment of the questioned statutes. Many of the enactments were temporary in character. We are here considering a permanent piece of legislation. So far as the contract clause is concerned, is this significant? We think not. "Emergency does not create [constitutional] power, emergency may furnish the occasion for the exercise of power." [15] We think of emergencies as suddenly arising and quickly passing. The emergency of the Depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. When the 1932 act was passed commercial and savings banks, insurance companies and building and loan associations were suffering heavy withdrawals. The liquid portion of their assets were being rapidly drained off by their customers, leaving the long term investments and depreciated assets as an inadequate source for pay-

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Park, 97 U. S. 659, 667; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 750; *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57, 70, 74; *Texas & N. O. R. Co.* v. *Miller*, 221 U. S. 408, 414; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Manigault* v. *Springs*, 199 U. S. 473.

[12] *Sproles* v. *Binford*, 286 U. S. 374, 390; *Stephenson* v. *Binford*, 287 U. S. 251, 276; *Henderson Co.* v. *Thompson*, 300 U. S. 258, 266; *Patterson* v. *Stanolind Co.*, 305 U. S. 376.

[13] *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 372; *Midland Realty Co.* v. *Kansas City Power Co.*, 300 U. S. 109.

[14] *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

[15] *Home Bldg. & L. Assn.* v. *Blaisdell, supra*, 426.

ment of the remaining liabilities. An acceleration or a continuance of this tendency to withdraw available funds threatened a quick end to the ability of the institutions to meet even normal demands. Such threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary.[16]

This power of the State to protect its citizens by statutory enactments affecting contract rights, without a violation of the contract clause of the Constitution, is analogous to the power often reserved to amend charters. Under this reserved power, it is held that the relations between a stockholder or certificate holder and the corporation may be varied without impairing the contract existing between the corporation and its stockholder or member.[17] The contract rights considered in *Coombes* v. *Getz*[18] arose from a contract between a third party and the corporation. And the power reserved against the corporation and its members was deemed to be ineffective against a stranger to the reservation.

Appellant relies upon *Treigle* v. *Acme Homestead Association*[19] as a determinative precedent in support of his argument that the withdrawal arrangements between the association and appellant were contractual and secure from impairment by the statutory exercise of the paramount police power of the State. In that case statutory changes as to the right of withdrawal, similar to these involved here, had been made after the purchase of the shares. The enactment in the *Treigle* case occurred after notice of

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[16] Cf. *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 432.

[17] *Wright* v. *Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 663; *Polk* v. *Mutual Reserve Fund Life Assn.*, 207 U. S. 310, 325; *Stockholders* v. *Sterling*, 300 U. S. 175, 183.

[18] 285 U. S. 434.

[19] 297 U. S. 189.

withdrawal. From all the circumstances of the Louisiana building and loan situation at the time of the legislation attacked in the *Treigle* case this Court reached the factual conclusion that the withdrawal amendment to the building and loan statutes was directed merely toward a private right and not deemed in the public interest.

It is to be noted that this Court was careful to point out in the *Treigle* case [20] that where the police power is exercised "for an end which is in fact public" contracts must yield to the accomplishment of that end.[21]

Certainly the protection of building and loan associations against the catastrophe of excessive withdrawal is, today, within legislative power.

Separate consideration of the objection to the legislation under the due process and equal protection clauses of the Fourteenth Amendment seems wholly unnecessary.

Affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

COLORADO NATIONAL BANK OF DENVER *v.* BEDFORD.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 719. Argued April 2, 3, 1940.—Decided April 22, 1940.

1. This case is appealable under Jud. Code § 237 (a), because a state statute affecting national banks was upheld by a state court over the objection of conflict with the federal law and Constitution. P. 47.
2. National banks are authorized to conduct a safe-deposit business. Pp. 49–50.
3. In the absence of contrary legislation by Congress, a state law laying a percentage tax on the users of the safety-deposit

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[20] *Id.*, 197.

[21] Cf. *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 108.

services of banks measured by the banks' charges for the services, and requiring the banks to collect the taxes, account for them to the State and include them in their bills for the services, but allowing them credit on future taxes for taxes paid on accounts eventually found worthless, *held* valid as applied to a national bank. P. 52.

4. Requiring a national bank to collect and remit the tax does not impose an unconstitutional burden on a federal instrumentality. P. 53.

105 Colo. 373; 98 P. 2d 1120, affirmed.

APPEAL from the affirmance of a declaratory judgment entered in a suit by Bedford, Treasurer, against the Bank.

Mr. Walter W. Blood, with whom *Mr. Frank N. Bancroft* was on the brief, for appellant.

National banks may be taxed only as permitted by Congress, and R. S. § 5219, as amended, measures that permission. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Bank* v. *Bennett,* 284 U. S. 239.

The safe-deposit business of a national bank is a part of its nationally chartered banking business, and is a banking function. *Bank* v. *Dearing,* 91 U. S. 29; R. S. § 5136, as amended; R. S. § 5228; *National Bank* v. *Graham,* 100 U. S. 699; *Bank of California* v. *Portland,* 157 Ore. 203.

The congressional grant of tax immunity extends not only to the tangible property, shares, and income of a national bank, but also to all of its nationally chartered functions, including its safe-deposit business. The case is entirely different from those in which an implied immunity may be claimed or asserted; and the tax is prohibited even though it be paid or payable by the user of the bank's services. *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21; *Baltimore National Bank* v. *Commission,* 297 U. S. 209; *State Tax Commission* v. *Baltimore National Bank,* 174 Md. 403.

The express exemption in § 7 (a) of the tax Act from taxation of safe-deposit services, should be applied so as to avoid unconstitutionality, because by the Act and decisional law the bank is the "taxpayer." *New Orleans* v. *Houston,* 119 U. S. 265; *Opinion of the Justices,* 88 N. H. 500; *In re Atlas Television Co.,* 273 N. Y. 51; *Doby* v. *Tax Commission,* 234 Ala. 150; *Covington* v. *Tax Commission,* 257 Ky. 84.

Assuming that the bank is not the taxpayer and the tax burden is not unlawful, nevertheless the other burdens which the Act then imposes upon the bank, as the performer of national banking functions, render the Act unconstitutional. The Act should therefore be construed as making the performer of services the taxpayer, and as exempting all *intra vires* national banking services from taxation. *In re Opinion of the Justices, supra; Allgeyer* v. *Louisiana,* 165 U. S. 578; *Clement National Bank* v. *Vermont,* 231 U. S. 120.

The treasurer's application of the Act is discriminatory. *Bedford* v. *Johnson,* 102 Colo. 203.

Messrs. George K. Thomas, Assistant Attorney General of Colorado, and *Henry E. Lutz,* Deputy Attorney General, with whom *Messrs. Byron G. Rogers,* Attorney General, and *Elmer P. Cogburn,* Assistant Attorney General, were on the brief, for appellee.

Mr. Justice Reed delivered the opinion of the Court.

This appeal involves the validity of the Public Revenue Service Tax Act of Colorado.[1] The act, § 5, imposes upon the services specified in the act, a percentage tax based upon the value of the services rendered or performed by any person subject to its provisions.

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[1] Session Laws of Colorado, 1937, c. 240, p. 1144. The act was amended and reënacted May 1, 1939. Session Laws of Colorado, 1939, c. 158, p. 526. This later act is not material in this appeal.

Section 5 (c) imposes a tax equivalent to two per cent of the value of services rendered by "banks, finance companies, trust companies and depositories . . ." The person rendering the services "shall be liable and responsible for the payment of the entire amount . . ." § 6. He is required to remit all taxes collected and due the state from him to the treasurer less three per cent to cover the expense of the service. Under § 6 (B) persons rendering or performing the services are required "as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item and when added such tax shall constitute a part of such value of service or charge, shall be a debt from the user to the person rendering or performing service until paid, and shall be recoverable at law in the same manner as other debts." By subsection (d) the person rendering the service is forbidden to hold out directly or indirectly that he will assume or absorb the tax. By § 7 the user may recover illegally collected taxes. Where services are rendered which become a part of an article subject to a sales tax, the services are exempt and the person performing the service recovers where they are illegally assessed. § 3. By § 12, all sums paid by the user as taxes are public money and trust funds of the State of Colorado. It is made a misdemeanor, § 17, for any person rendering or performing services to refuse to make the returns required. The state treasurer is made administrator of the act and given authority to issue regulations. § 19. The usual separability clause is contained in the act. § 22.

The definitions of the act appear in § 2. By its subsection (c) the term "services rendered or performed" is defined as those rendered for a valuable consideration by a person covered by the act for the ultimate user thereof.

"The term 'user' shall mean the person for whom or for whose benefit services are rendered or performed."

By subsection (e) taxpayer is defined as "any person obligated to account to the state treasurer for taxes collected or to be collected or due the state under the terms of this act." Subsection (h) provides for a credit on future taxes of a tax paid on accounts eventually found worthless.

Under the rules and regulations issued by the treasurer on the Public Revenue Service Tax Act, the service tax is construed as invalid as applied to so-called banking services.[2]

Under rule 27, however, such service as the furnishing of safety vaults by depositories or banks is held to come within the act, and the two per cent tax applies to the charges made for this service. These regulations were approved by the judgment and decree of the trial court and that judgment was affirmed in all particulars by the Supreme Court of Colorado.

While § 4 (a) makes it unlawful for any person to render the defined services without "first having obtained a license therefor," the treasurer demands no license fees from a national bank. Such exception was held proper by the lower court.[3]

The appellant here, the Colorado National Bank, was a national banking corporation duly organized and existing under the national banking act. The bank operated a safe-deposit service under its own name and in the building and vaults used for its other banking activities. The rentals received for the use of that portion of its vaults utilized for safe-deposit boxes were reported to the Comptroller of the Currency as income in the bank; the fixtures employed in the business are part of the assets of the bank and are supervised by the Comptroller of the Currency.

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[2] Rules and Regulations, Public Revenue Service Tax Act of 1937, No. 10, republished October 27, 1937.

[3] *Bedford* v. *Colorado Bank*, 104 Colo. 311, 315; 91 P. 2d 469.

The appellee Bedford, as treasurer of the State of Colorado and administrator of the Service Tax Act, demanded payment from appellant bank of two per cent of the value of the services rendered by the bank to its safe deposit box customers. The bank refused payment and the treasurer brought this action under the Uniform Declaratory Judgments Act (Colorado Stat. Anno., 1935, c. 93, §§ 78–79) for a declaration of rights to the effect that the services performed by the bank are taxable pursuant to the Service Tax Act. The bank answered claiming the state statute as applied to it was repugnant to the Constitution and laws of the United States; setting up the immunity of national banks from state taxation except as permitted by R. S. § 5219; [4] claiming that the safe-deposit business of national banks was authorized by Congress and therefore was part of its federally authorized business, immune from taxation whether the bank or the user of its services is the taxpayer. The bank further contended that even though it is not the taxpayer and the tax burden as such is not unlawful, the burden of collection, report and visitation materially interfere with the performance of its national banking functions. A general demurrer to the answer was filed.

The trial court sustained the bank. The supreme court first affirmed by an equally divided court and then on re-

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[4] 12 U. S. C. § 548.

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause,"

hearing reversed [5] and remanded the case to the district court. The trial court entered a second judgment declaring as prayed by the treasurer which judgment was affirmed by the supreme court on the authority of the former decision.

(1) This appeal is here under § 237 (a) of the Judicial Code. The treasurer makes the point that as the federal question raised was the immunity to the exaction of the bank as a federal instrumentality withdrawn from state taxation by congressional action, the determination that the tax was on a non-banking activity foreign to its federal character and on the user of the services eliminated the necessity of a decision on the federal question. As the statute was held valid after the conclusion of the Supreme Court of Colorado that the manner of state taxation of national banks must accord with R. S. § 5219 and must not interfere with federal functions,[6] it seems clear the federal question as to the validity of the statute as tested by the Constitution and laws of the United States was necessarily involved and decided. This gives this Court jurisdiction of the appeal.[7]

Gully v. *First National Bank,*[8] relied upon by the treasurer, dealt with the right to remove to a federal court [9] because the cause of action arose under the federal laws,[10] but the issue here is the right to appeal where a state statute is held valid against a defense of repugnancy to the same laws.[11] The difference is brought out

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[5] *Bedford* v. *Colorado Bank, supra.*

[6] *Ibid.*

[7] *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 98; cf. *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664; *Clement National Bank* v. *Vermont,* 231 U. S. 120; *Federal Land Bank* v. *Crosland,* 261 U. S. 374.

[8] 299 U. S. 109.

[9] Judicial Code, § 28.

[10] Judicial Code, § 24.

[11] Judicial Code, 237(a).

in the *Gully* case, where it is said: "If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense." [12]

(2) The genesis of the present system of national banks is the National Bank Act of June 3, 1864.[13] It was called "An Act to provide a National Currency, secured by a Pledge of United States Bonds and to provide for the Circulation and Redemption thereof." From this act, correlated with the Federal Reserve Act,[14] there has developed the present nationwide banking facilities. R. S. § 5153 makes these associations the depositories of public money. Though the national banks' usefulness as an agency to provide for currency has diminished markedly, their importance as general bankers shows a constant growth.[15] We may assume that national banks possess only the powers conferred by Congress.[16] These are set out in R. S. § 5136 as frequently amended and include "all such incidental powers as shall be necessary to carry on the business of banking," with the proviso "that in carrying on the business commonly known as the safe-

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[12] 299 U. S. at 115.

[13] 13 Stat. 99, 100.

[14] 38 Stat. 251.

[15] April 6, 1940, Treasury Daily Statement shows $172,081,172 in national bank notes outstanding on March 1, 1940. Compare with $1,122,452,661 outstanding October 31, 1914. Report of the Comptroller of Currency, 1935, p. 833. On March 1, 1940, there was outstanding over $5,000,000,000 in Federal Reserve notes.

The number of national banks as of October 31, 1938, is 5247, capital accounts (capital surplus and undivided profits) $3,305,575,000, and deposits $27,103,881,000. Report of the Comptroller of the Currency, 1938.

[16] *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 253; *Marion* v. *Sneeden*, 291 U. S. 262.

deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus." [17] We have recently found the authority to secure federal funds within these incidental powers, coupled with a long continued practice recognized by the Comptroller of the Currency.[18] The right to accept special deposits is recognized by the banking act.[19] These are monies and other valuables the identical deposits of which are kept, preserved and returned in kind. It differs little if at all from a safe-deposit business. The language of the proviso of § 24, just quoted, is the language suitable to impose restrictions on a recognized power, not the language that would be used in creating a new power. As the limitation on the power to invest in real estate protected in a measure customers and stockholders from risky investments,[20] the banks' own investment in safety deposit facilities evidently did not seem to Congress to require the same regulation as the purchase of stock in a safe-deposit corporation. A subsidiary safe-deposit corporation would give priority to the creditors of the subsidiary over the depositors and other creditors of the bank itself. The obvious fact, known to all, is that national banks do and for many years have carried on a safe-deposit business. State banks, quite usually, are given the power to

[17] 12 U. S. C. § 24.

[18] *Inland Waterways Corporation* v. *Young*, 309 U. S. 517.

[19] R. S. 5228, 12 U. S. C. § 133.

[20] 12 U. S. C. § 29:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business."

conduct a safe-deposit business.[21] We agree with the appellant bank that such a generally adopted method of safeguarding valuables must be considered a banking function authorized by Congress.[22]

(3) We may assume, as did the Supreme Court of Colorado, that the tax is invalid if laid upon the bank as an instrumentality of government in the incidents referred to in the preceding section;[23] that its banking operations are free from state taxation except as Congress may permit;[24] that Congress permits the taxation only of shares and real estate;[25] and that Congress may inter-

[21] Paton's Digest, 1926, Vol. 2, p. 2246, lists 24 states and territories which authorize their banks to conduct a safe-deposit business. For example, Maine, Act of 1923, c. 144, § 6, (V), authorizes savings banks to "own, maintain and let safe deposit boxes and vaults." Ohio, Gen. Code (1921), § 710–109, empowers banks to let out safe-deposit boxes. California, Gen. Laws (1923), Act 652, § 30, any bank may conduct a safe-deposit department, but shall not invest more than one tenth of its capital and surplus in such safe-deposit department.

[22] The language of the proviso first appeared in an act to further amend the national banking laws of the Federal Reserve Act enacted February 25, 1927, 44 Stat. 1224, § 2 (b). Only immaterial verbal changes have occurred since the first adoption.

Referring to this proviso the House report said: "The second proviso regulates the safe-deposit business of national banks and prohibits them from investing an amount in excess of 15 per cent of capital and surplus in a corporation organized to conduct a safe-deposit business in connection with the bank. This is a business which is regularly carried on by national banks and the effect of this provision is also primarily regulative." H. Rep. No. 83, 69th Cong., 1st Sess., p. 4.

[23] Cf. *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 862; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *Bank of California* v. *Richardson*, 248 U. S. 476, 483. Also *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 212.

[24] *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29; *Easton* v. *Iowa*, 188 U. S. 220; *First National Bank* v. *California*, 262 U. S. 366

[25] R. S. § 5219; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668, 676.

vene to protect its instrumentalities from any other tax which threatens their usefulness.[26]

Congress has not legislated against taxation of the customers of national banks. This Court has approved a tax assessed upon the deposits of customers of national banks.[27] By § 6 of the Colorado act the "person rendering or performing services shall be liable" for the payment of the tax imposed. But as subsection (b) of that same section requires the tax paid to be added to the charges for service "as a separate and distinct item" and makes it a debt from the user of the services until paid, the tax is upon the user of the safe-deposit boxes, not upon the bank. Furthermore, as by § 2 (h) credit is given to the bank for taxes paid on accounts subsequently found worthless and the bank is in a position to require payment of box rentals and taxes in advance, there is no occasion for a bank ever to have saddled upon it any part of the tax burden.

In *National Bank* v. *Commonwealth* [28] this Court determined a similar question in favor of the validity of the state tax. The case was decided in 1869. At that time the applicable federal statute [29] read: "Sec. 41. . . . *Provided,* That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person . . . from being included in the valuation of the personal property of such person . . . in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere. . . ."

The statute of Kentucky laid a tax of fifty cents on each share. The same statute enacted: "The cashier of

[26] *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, and cases cited; *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160; *First National Bank* v. *Missouri,* 263 U. S. 640, 656.

[27] *Clement National Bank* v. *Vermont,* 231 U. S. 120, 133

[28] 9 Wall. 353.

[29] 13 Stat. 111.

a bank, whose stock is taxed, shall, on the first day in July of each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent. upon the amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

A national bank refused payment on the ground that it as a bank was not subject to state taxation. It was decided that this was a tax on shares, that the state in a legal proceeding against the shareholder could have garnisheed the bank and that because the bank was a federal instrumentality was no reason for not requiring it to collect and pay over the money from the shareholder. A similar tax was upheld in *Des Moines Bank* v. *Fairweather*.[30]

The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself.[31] The funds which were received by the State came from the assets of the user, not from those of the federal instrumentality, the bank.[32] The Colorado Supreme Court holds the user is the taxpayer.[33] The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling.[34] As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by § 12 of the act as the responsible obligor, we conclude the tax is upon

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[30] 263 U. S. 103, 111; cf. *Gully* v. *First National Bank*, 299 U. S. 109, 116.

[31] *Stahmann* v. *Vidal*, 305 U. S. 61.

[32] *Helvering* v. *Therrell*, 303 U. S. 218, 225.

[33] *Bedford* v. *Colorado Bank*, 104 Colo. 311, 319; 91 P. 2d 469; cf. *Bedford* v. *Hartman Brothers*, 104 Colo. 190, 194; 89 P. 2d 584.

[34] *Clement National Bank* v. *Vermont*, 231 U. S. 120, 134.

him, not upon the bank. The Constitution or laws of the United States do not forbid such a tax.

(4) The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality.[35] Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect.

Affirmed.

OSBORN ET AL. *v.* OZLIN ET AL.

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

No. 592. Argued March 27, 1940.—Decided April 22, 1940.

As to casualty and surety risks in Virginia, insured against by corporations authorized to do business in that State, a Virginia law requires that the insurance shall be "through regularly constituted and registered resident agents or agencies of such companies"; and that such resident agents shall receive "the usual and customary commissions allowed on such contracts," and may not share more than one-half of a commission with a non-resident licensed broker. *Held:*

1. That the regulation is constitutionally within the power of the State, even though one effect of it may be to increase the cost of "master" policies negotiated by brokers in other States, through which an assured may obtain a reduced rate and commission by pooling all of his risks, in and out of Virginia, in one contract. Pp. 62–65.

2. As a basis for this legislation, the legislature was entitled to act on the belief,

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[35] *National Bank* v. *Commonwealth*, 9 Wall. 353; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 111; cf. *Waite* v. *Dowley*, 94 U. S. 527; *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93; Code of Iowa, 1931, § 5093a(5); *Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62, 68; *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33.

(1) That, by requiring participation by responsible resident agents, it would lessen the difficulty of enforcing the Virginia system of insurance regulation and detect unlawful rebating. P. 63.

(2) That the limitation on sharing of agents' commissions would assure the use of resident agents for the procuring and "servicing" of policies covering local risks—functions which, when adequately performed, benefit the company, the producer, and the assured, and, by minimizing the risks of casualty and loss, redound to the benefit of the community. P. 64.

(3) That the agency system in view is better calculated to further these ends than other modes of "production." P. 64.

3. The regulations are well within the power of the State over insurance against local risks. P. 66.

29 F. Supp. 71, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill to enjoin the enforcement of a statute regulating insurance in Virginia.

Mr. John Lord O'Brian, with whom *Mr. Andrew D. Christian* was on the brief, for appellants.

A State constitutionally may not regulate or penalize the making, beyond its borders, of contracts of insurance or surety upon persons or property located within the State. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U. S. 143; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Allgeyer* v. *Louisiana,* 165 U. S. 578. See, also, *Boseman* v. *Connecticut General Life Ins. Co.,* 301 U. S. 196; *Home Ins. Co.* v. *Dick,* 281 U. S. 397; *New York Life Ins. Co.* v. *Head,* 234 U. S. 149. Distinguishing *Bothwell* v. *Buckbee, Mears Co.,* 275 U. S. 274.

Under this statute no contract of insurance covering risks in other States and including Virginia risks can be made anywhere except within the State of Virginia. § 4226–a.

The contracts do not require or contemplate any illegal act within the State. Virginia has not attempted either to regulate or prohibit the performance of such

contracts. The plaintiffs are licensed to do business in Virginia, and no act of performing or servicing a contract of insurance therein is prohibited to them by any Virginia statute.

Many of the contracts are accident policies and fidelity bonds similar to the contracts considered in the *Boseman* and *Delta & Pine Land* cases, *supra.* These neither require nor contemplate performance or service in Virginia. Yet the statute makes no distinction between these and others, such as workmen's compensation policies, which do call for service within the State. It is not performance and service within the State which Virginia attempts to regulate and the statute is not to be justified on the asserted basis of assistance of such regulation.

Distinguishing tax cases: *Equitable Life Assur. Society* v. *Pennsylvania,* 238 U. S. 143 and *Compañia General de Tabacos* v. *Collector,* 275 U. S. 87. Cf., *Great Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412.

It is apparent from §§ 4226 (a) and 4222 (a) that plaintiffs' agents who are non-residents of Virginia and who are compensated by commissions fall within the statutory definition of non-resident brokers, and that, taken together, these sections of the statute attempt to prohibit the plaintiffs from issuing contracts produced outside the State by the plaintiffs' agents duly authorized and appointed in the State where licensed, unless such agent be also licensed by Virginia after the payment of a tax.

In thus regulating and prescribing the persons whom the plaintiffs may select and appoint to represent them in other States, and in prohibiting the plaintiffs from making contracts of insurance or surety produced by their agents in other States unless such agents shall have been licensed by Virginia, that State is giving to its laws extra-territorial operation, and is denying to the plaintiffs due process of law. *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426.

If the business has been produced by an out-of-state agent or broker who has been licensed by the State of Virginia, the resident agent may, in his discretion, pay to the actual producer an amount not exceeding 50% of the compensation received by him. It follows that if the out-of-state producer has not been licensed by the State of Virginia, the resident agent can not make any payment to him. Thus the question of whether the resident agent is to receive the full commissions or only 50% of them is to be determined not by the amount or value of his services, but by the adventitious and unrelated question of whether the out-of-state producer who brought the business to the company was or was not licensed by the State of Virginia. In the absence of a statutory provision imposing any duties or responsibilities upon the resident agent, this requirement is unconstitutional. There is no relationship between the amount of the required compensation and the value of the services certain to be rendered by the recipient to the corporation which is required to make the payments. Cf., *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 396; *Morehead* v. *New York,* 298 U. S. 587, 622–623; *New York Life Ins. Co.* v. *Dodge,* 246 U. S. 357, 382. For the simple task of countersigning—writing his name— he receives the statutory compensation. And the task which he must perform the court below characterized—and the characterization can hardly be disputed—as perfunctory.

The uncontradicted testimony shows that the amount of compensation which the statute requires will be grossly excessive.

There can be no justification for such a statute arbitrarily requiring excessive payments to be made in return for the possibility of some services being rendered, highly speculative in character and wholly undesired.

Nothing in *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, supports a statute requiring large

payments, arbitrary in amount, to be paid by the corporate plaintiffs to agents for problematical services,—particularly where the payments, as the court below found, will inevitably increase the expenses of the insurance companies and the cost of insurance to the public. The Fourteenth Amendment operates to prohibit the bold expropriation of property by a State.

The prohibition of § 4222 (a) against salaried agents countersigning deprives the corporate plaintiffs of their property and the individual plaintiffs of their liberty and property without due process of law and denies the individual plaintiffs the equal protection of the laws and is therefore unconstitutional and void. *Smith* v. *Texas,* 233 U. S. 630; *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32.

The individual plaintiffs were, prior to June 21, 1938, licensed insurance agents in Virginia and the only reason they are not now so licensed is because they are salaried employees.

Mr. Abram P. Staples, Attorney General of Virginia, for appellees.

The regulations are restricted to acts of the insurance company and its agents performed within the State, pursuant to and as a consequence of the negotiation of the contract outside of the State.

The fact that a Virginia contract is negotiated and made outside the State does not impair Virginia's jurisdiction to regulate the insurance company's acts and transactions within the State in connection with or pursuant to such contract.

All casualty and surety policies and contracts covering Virginia risks require or contemplate acts of performance in Virginia.

The making outside of Virginia of an insurance contract which contemplates, requires, or permits the doing

by the insurance company of acts in Virginia, constitutes, as a matter of law, an exercise of the privilege of doing an insurance business in Virginia.

The making outside of Virginia of a contract of insurance involving an exercise of a foreign insurance company's license right or privilege of doing business in Virginia, brings the contract within the jurisdiction and regulatory police power of Virgnia.

Virginia may prohibit the doing in Virginia by an insurance company licensee of any act in connection with or in the performance of a Virgnia contract made by it outside the State in violation of Virginia laws, by the imposition of a fine or by revocation of said company's license to do business in the State because of making such contract in violation of her laws.

The objects and purposes sought to be attained by the challenged legislation are legitimate and proper, and the means employed to that end are not arbitrary or capricious but are reasonable and appropriately adapted thereto.

The branch manager appellants have no standing in court to complain of the statutory regulation requiring insurance companies to make insurance contracts through regularly constituted Virginia resident agents, have them countersign the policies and pay them the usual producer's commission.

The statutory classification of agents and employees of stock insurance companies is reasonable.

This case is not controlled by *Hartford Steam Boiler Co.* v. *Harrison,* 301 U. S. 459.

Mr. Justice Frankfurter delivered the opinion of the Court.

Appellants have challenged the validity of a Virginia statute regulating the insurance of Virginia risks and have brought this suit to enjoin state officers from enforcing

it. Its relevant provisions, copied in the margin,[1] forbid contracts of insurance or surety by companies authorized to do business within that Commonwealth "except through regularly constituted and registered resident agents or agencies of such companies." § 4222, c. 218, Acts of 1938. Such resident agents "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts," and may not share more than half of this commission with a non-resident broker. § 4226–a. Disobedience of these provisions (from which life, title and marine companies are exempted) may entail a fine or revocation of the corporate license in Virginia, or both. A district court of three judges, convened under § 266 of the Judicial Code as amended, 28 U. S. C. § 380, dismissed appellants' bill on the basis of elaborate findings of fact and conclusions of law, set forth in an opinion by Circuit Judge Soper. 29 F. Supp. 71. From this

[1] The relevant portions of the Virginia statute are as follows: "Section 4222. . . . (a) Insurance companies, legally authorized to do business in this State, except life, title and ocean marine insurance companies, shall not make contracts of insurance or surety on persons or property herein, except through regularly constituted and registered resident agents or agencies of such companies; no contract of insurance or surety covering persons or property in this State, except contracts of life, title and ocean marine insurance and except temporary binders covering other forms of insurance shall be written, issued or delivered by any such authorized insurance company, or any of its representatives, unless such contract is duly countersigned in writing by a resident agent or agency of such company; provided, however, that the countersignature of an insurance agency shall not be considered valid unless such countersignature be attested to in writing by a regularly constituted and registered resident agent of such company.

"No State agent, special agent, company representative, salaried officer, manager or other salaried representative of any legally authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety, or any renewal thereof, covering persons or property in this State, except contracts of life, title and ocean marine insurance; provided that this section

decree the case comes here on appeal under § 238 of the Judicial Code as amended, 28 U. S. C. § 345.

The bill was brought by foreign corporations authorized to do casualty and surety business in Virginia, and by some of their salaried employees. It is their claim that the statute deprives them of rights protected by the Fourteenth Amendment of the Constitution. The exact nature of these claims will appear more clearly in the setting of the illuminating findings below which may here be abbreviated.

The "production" of insurance—"production" being insurance jargon for obtaining business—is, in the main, carried on by two groups, agents and brokers. Though both are paid by commission, the different ways in which the two groups perform their functions have important practical consequences in the conduct of the insurance business, and hence in its regulation. The agent is tied to

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shall not apply to railroad companies and other common carriers engaged in interstate commerce.

. . . . . .

"Section 4226–a. . . . No resident agent or agency may write, countersign, issue or deliver any contract of insurance or surety upon persons or property in this State unless there shall be collected at the time the contract is written, issued or delivered, or within a reasonable time thereafter, the full premium on such contract, and the resident agent or agency shall be entitled to and shall receive the usual and customary commissions allowed on such contracts, provided that such resident agent or agency may write such contracts at the request only of such other resident agents or agencies, when such agent or agencies are properly licensed to transact the class of business involved in such exchange, and licensed non-resident insurance brokers who may be authorized by law to broker such contracts, and on exchange of business between resident agents or agencies in Virginia and licensed non-resident insurance brokers in other states the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding fifty per centum of the resident agent's or agency's commission allowed on such business."

his company. But his ability to "produce" business depends upon the confidence of the community in him. He must therefore cultivate the good will and sense of dependence of his clients. He may finance the payment of premiums; he frequently assists in the filing and prosecution of claims; he acts as mediator between insurer and assured in the diverse situations which arise. The broker, on the other hand, is an independent middleman, not tied to a particular company. He meets more specially the needs of large customers, using their concentrated bargaining power to obtain the most favorable terms from competing companies. His activities, being largely confined to the big commercial centers, take place mostly outside Virginia.

A policy, whether "produced" by broker or agent, must be "serviced"—an insurance term for assistance rendered a customer in minimizing his risks. To this end the companies exert themselves directly, but the "producer" may render additional service. Only to a limited extent can risks be minimized at long range; local activity is essential. When the contract is "produced" by a non-resident broker the "servicing" function is normally performed by the company exclusively. When the "producer" is a resident agent, the case is ordinarily otherwise. For this, as well as for other reasons, it is obvious that non-resident brokers prefer to negotiate their contracts covering Virginia risks with companies authorized to do business in that Commonwealth.

These basic elements in the insurance business attain special significance in the case of enterprises operating not only in Virginia but in other states as well. For them the brokerage system offers the attractions of large-scale production. Through what is known as a master or "hotchpotch" policy, the assured may obtain a cheaper rate by pooling all his risks, whether in or out of Virginia. This wholesale insurance may furnish not only a reduced rate

but a reduced commission to the customer. These are advantages which naturally draw the Virginia business of interstate enterprises away from local agents in Virginia to the great insurance centers.

In affecting the cost of these master policies, say the appellants, Virginia is intruding upon business transactions beyond its borders. Not only is a licensed company forbidden to write insurance except through a resident agent, but the agent cannot retain less than one-half of the customary commission allowed on such a contract for what may, so far as the requirements of the law are concerned, be no more than the perfunctory service of countersigning the policy.

But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Assn.* v. *Comm'n,* 294 U. S. 532; *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412. Compare *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace* v. *Hines,* 253 U. S. 66, 69.

Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here

imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it.

A network of legislation controls the surety and casualty business in Virginia. Insolvent companies may not engage in it. Virginia Code, § 4180. Neither companies nor agents may give rebates. § 4222–c. Rates for workmen's compensation, automobile liability and surety contracts are determined by its Corporation Commission. §§ 1887 (75), 4326–a–1, 4350–3. The difficulty of enforcing these regulations, so the District Court found, may be increased if policies covering Virginia risks are "produced" without participation by responsible local agents. Rebates evading local restriction may be granted under cover of business done outside the state. Contrariwise, if resident Virginia agents are made necessary conduits for insurance on Virginia risks now included in master policies, the state may have better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests.[2]

[2] Where out-of-state "production" actually leads to rebating in defiance of § 4222–c, there would seem little doubt of a substantial basis for Virginia's contention that the requirement of participation by a resident agent will make the illegal practices more susceptible of detection and control. Cf. *La Tourette* v. *McMaster,* 248 U. S. 465. Virginia has also contended that the master policy makes it possible for the companies to reduce their rates below the requirements of state law, and to attribute the reductions to risks in other states with requirements less stringent than those of Virginia. Appellants strenuously contend that no law of Virginia prohibits the reduction of rates for out-of-state risks to compensate for the higher rates which might be required by Virginia and, therefore, there is no illegal practice in this connection which the existence of a resident agent could aid in uncovering. This argument, if met on the merits, would lead us into the particularities of Virginia's rate laws. It is enough to say that even if these practices are not illegal, Virginia

It is claimed that the requirement that not less than one-half of the customary commission be retained by the resident agent is a bald exaction for what may be no more than the perfunctory service of countersigning policies. The short answer to this is that the state may rely on this exaction as a mode of assuring the active use of resident agents for procuring and "servicing" policies covering Virginia risks. These functions, when adequately performed, benefit not only the company, the producer, and the assured. By minimizing the risks of casualty and loss, they redound in a pervasive way to the benefit of the community.[3] At least Virginia may so have believed. And she may also have concluded that an agency system, such as this legislation was designed to promote, is better calculated to further these desirable ends than other modes of "production." [4] When

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may have a legitimate interest in discovering the extent of their prevalence in order to devise, if she so chooses, effective laws to prevent them.

[3] See Hardy, Risk and Risk-Bearing, pp. 9–28, 66–67; Kulp, Casualty Insurance, pp. 188–91, 467–68; Michelbacher, Casualty Insurance Principles, pp. 448–78, 583–84; Crobaugh and Redding, Casualty Insurance, pp. 17–20; Huebner, Foreword to Modern Insurance Tendencies, 157 Annals of the American Academy of Political and Social Science, pp. 3–4; Burns, Service of Casualty Insurance, 15th Annual Meeting, Chamber of Commerce of the United States, p. 4.

[4] "The broker is not required to render any technical service beyond the placing of business." Michelbacher, Casualty Insurance Principles, p. 403. Compare *Id.*, pp. 401–402; Huebner, Property Insurance, pp. 81–96; Proceedings, 73rd Annual Meeting, National Board of Fire Underwriters, p. 123; Clark, Ellis and Fletcher, The Service of the Broker to the Assured in Liability Insurance, Howe Readings in Insurance, No. 18. But even if the broker does "service" the contract, his activities will take place in Virginia, and will affect the welfare of those inside Virginia who may be subject to the incidence of those risks which the "servicing" function tends to reduce. If this be true, it is Virginia's concern and not ours to prefer the agency to the brokerage method of "production."

these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states,[5] it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts. Compare *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 537.

The present case, therefore, is wholly unlike those instances in which a "so-called right is used as part of a scheme to accomplish a forbidden result." *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434. For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition.[6] The state may fix insurance rates, *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; it may regulate the compensation of agents,

[5] Alabama Code, § 8379; Kansas, General Statute (Supp.), c. 40, § 246; Louisiana, Acts of 1918, No. 153; Maryland, Annotated Code, Art. 48A, § 65; Mississippi, Code, § 5205; Montana, Laws of 1937, c. 95; Oklahoma, Statutes Ann., Title 36, §§ 126, 142, 249; South Carolina, Code, § 7972; South Dakota, Code, § 31.2218; Washington, Rev. Statutes, § 7080; Wisconsin, Statutes, § 201.44; Wyoming, Rev. Statutes, c. 57, § 203.

[6] See Gephart, Principles of Insurance, pp. 233–55; Dawson, Insurance Legislation (1895); Abstract of the Laws of Virginia in Relation to Insurance Companies, etc., issued by the Auditor of Public Accounts (1878); Patterson, The Insurance Commissioner in the United States.

O'Gorman & Young v. *Hartford Fire Ins. Co.,* 282 U. S. 251; it may curtail drastically the area of free contract, *National Ins. Co.* v. *Wanberg,* 260 U. S. 71. States have controlled the expenses of insurance companies, New York Insurance Law, Consolidated Laws of New York, c. 28, § 244, and Wisconsin Statutes, § 201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (N. Y.) pp. 403–18 (1906). They have also promoted insurance through savings banks; see Berman, The Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, c. 471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, *Green* v. *Frazier,* 253 U. S. 233, or might take "the whole business of banking under its control," *Noble State Bank* v. *Haskell,* 219 U. S. 104, 113. If the state, as to local risks, could thus preëmpt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *La Tourette* v. *McMaster,* 248 U. S. 465. All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In *Allgeyer* v. *Louisiana,* 165 U. S. 578, apart from the doubts that have been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute

was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. This was followed in *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346; but see the refined distinctions drawn in *Compañia de Tabacos* v. *Collector,* 275 U. S. 87. In *Fidelity & Deposit Co.* v. *Tafoya, supra,* the Court found that New Mexico had exceeded its power by forbidding "the payment of any emolument of any nature to any [non-resident] for the obtaining, placing or writing of any policy covering risks in New Mexico." The Court was of opinion that this statute went "beyond any legitimate interest of the State, . . ." *ibid.* at 435, but carefully withheld its judgment as to the validity of a later New Mexico statute not unlike the Virginia law here under review.[7]

The decree must be

Affirmed.

MR. JUSTICE ROBERTS, dissenting:

I am unable to agree with the decision in this case. I think it sanctions an exertion of power by Virginia over transactions beyond her jurisdiction.

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[7] *Hartford Indemnity Co.* v. *Delta Co.,* 292 U. S. 143, resting on *Home Ins. Co.* v. *Dick,* 281 U. S. 397, held that the terms of a contract validly made in Tennessee could not be subsequently enlarged by Mississippi as to a condition of "substantial importance" when suit was later brought on the policy in Mississippi, simply because "the interest insured was in Mississippi when the obligation to indemnify . . . matured, and it was . . . [the company's] duty to make payment there." 292 U. S. at 149. At the time the contract was entered into Mississippi had no interest in the risk covered. The Court felt that, even at the time of suit, "performance at most involved only the casual payment of money in Mississippi," *ibid.* at 150, and that was an interest so subordinate to that of Tennessee that the latter was entitled to have the right of way. No question was thus involved touching the right of a state to regulate companies doing business within its borders as to contracts of insurance covering local risks.

Virginia may, of course, regulate the making of contracts of insurance within her borders. She may require such contracts to embody specified provisions. She may regulate the enforcement of these contracts in her courts. She may supervise and condition the activities of registered foreign insurance companies, agents or brokers within the Commonwealth. The statute in question has no such purpose.

The purpose and effect of the statute are to compel an insurance company which is a citizen of another state, and which negotiates a contract of insurance with an agent or broker within such other state, to pay a resident of Virginia for a service not rendered by him, but rendered by another in another state. By force of the statute a Virginia agent must countersign a contract negotiated outside of Virginia with an assured whose residence is outside of Virginia, which contract of insurance was negotiated by an agent or broker living outside of Virginia. The countersigning Virginia agent must be paid one-half the usual commission, even though the broker or agent who produced the business is licensed as a non-resident broker by Virginia, although the only service such Virginia agent is required to render and, in many cases all he does render, is the mere countersignature of the policy. With respect to this situation the court below said:

"We do not overlook the peculiar situation of the non-resident assured who form no part of the Virginia public which the state desires to protect. Undoubtedly their business methods will be disturbed by the enforcement of the statute. It is contended, not without merit, that they have no need for the services of the resident commission agents, and that in fact, the latter cannot assume the function of producing agents in their behalf without harmfully intruding themselves into confidential business affairs. Moreover, it is fair to say that these affairs are so important and so widespread in their scope as to be

beyond the technical knowledge and skill of the average Virginia agent, and that the interests of the non-resident assureds can be best looked after by the brokers at the great centers of population where the head offices of the insurance companies and of the assureds are located, and in Virginia by the engineering and claim personnel of the companies. It is also true that the substantial compensation required by the statute to be paid to the Virginia agents will increase the cost of the business."

The plain effort of Virginia is to compel a nonresident to pay a resident of Virginia for services which the latter does not in fact render and is not required to render. The principles underlying former decisions of this court are at war with the existence of any such asserted power.[1]

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* FULLER.

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

No. 427. Argued March 26, 1940.—Decided April 22, 1940.

In compliance with a separation agreement approved by a decree of divorce in Nevada, the husband created an irrevocable trust, of shares of stock, to continue for ten years, during which period all trust income was to be used for the maintenance and support of the wife, or in case of her prior decease, then for the

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[1] *Allgeyer* v. *Louisiana*, 165 U. S. 578; *New York Life Ins. Co.* v. *Head*, 234 U. S. 149; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Boseman* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196

children; or in case of their prior decease, then for the heirs of the wife or as she should provide in her will. At the expiration of the ten year period the trust property was to be transferred to her outright. The husband retained "exclusive voting power" of the shares during the term of the trust. Power to sell the stock vested jointly in him, the wife, and the corporate trustee, and could be exercised only in case all three agreed in writing. Those three had the power to invest and reinvest the proceeds and to disburse, withhold, and accumulate the principal of the trust at their discretion, such power over the income being vested in the wife and corporate trustee. *Held:*

1. The question whether the husband is taxable on the trust income under the Revenue Acts of 1928 and 1932 is not affected by the fact that an independent undertaking on his part to make certain weekly payments to his wife, not secured by the trust, was contained in the same instrument with the trust agreement. P. 73.

2. The provisions of the Revenue Acts of 1928, § 24 (a) (1), and 1932, § 24, and Treasury regulations concerning the non-deductibility of "family expenses" and of "alimony" imply the necessity for an examination of the local law to determine the marital status and the obligations which have survived a divorce. P. 74.

3. Under the law of Nevada, the decree and the trust agreement, no power of modification having been reserved, operated to discharge, *pro tanto,* the husband's duty of support; and under the Revenue Acts *supra,* he was not taxable on the trust income. P. 75.

4. Whether the trust agreement left the husband sufficient interest in or control over the shares to make him the owner of the corpus for the purposes of the federal income tax, is a question not raised or passed upon in this case. P. 76.

105 F. 2d 903, affirmed.

CERTIORARI, 309 U. S. 644, to review the reversal of a decision of the Board of Tax Appeals, 37 B. T. A. 1333, sustaining a determination of a deficiency in income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Francis W. Cole, with whom *Messrs. John C. Parsons* and *Lucius F. Robinson* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case raises the question of the circumstances under which income paid to the taxpayer's divorced wife under a trust, the provisions of which have been approved in the divorce decree, is taxable to him. We granted certiorari because of the asserted misapplication by the Circuit Court of Appeals of the rule of *Douglas* v. *Willcuts,* 296 U. S. 1, to these facts:

On July 25, 1930, respondent and his wife, residing in Connecticut, entered into an agreement in contemplation of divorce which provided, *inter alia,* for the creation by him of a trust of 60,380 shares of Class A common stock of the Fuller Brush Co. The trust was irrevocable and was to continue for ten years. During that period all trust income was to be used for the maintenance and support of the wife, or in case of her prior decease, then for the children; or in case of their prior decease, then for the heirs of the wife or as she should provide in her will. At the expiration of the ten year period the trust property was to be transferred to her outright. The agreement provided for other property settlements, for control and custody of the children, and for waiver by respondent and his wife of all claims against each other arising out of the marital relation. It also contained an agreement on the part of respondent to pay the wife $40 per week for five years, and, if at the end of that period his annual net income exceeded by the amount of the weekly payments the sum of $60,000, to continue those weekly payments for an additional five years or for such portion thereof as his annual net income exceeded the above sum.

The wife repaired to Reno, Nevada, and obtained a divorce decree on November 12, 1930, which "ordered, adjudged, and decreed that said agreement entered into between the plaintiff and the defendant on or about the twenty-fifth day of July, 1930, be and the same hereby is approved." On December 22, 1930, respondent created the trust provided for in the agreement.[1] The corporate trustee thereunder received from the Fuller Brush Co. all the dividends and income from the trusteed shares during 1931, 1932 and 1933 and disbursed them all for the benefit of the divorced wife. On the failure of respondent to include those amounts in his tax returns for the years in question, the Commissioner assessed deficiencies. The decisions of the Board of Tax Appeals, 37 B. T. A. 1333, sustaining the action of the Commissioner, were reversed by the Circuit Court of Appeals. 105 F. 2d 903.

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[1] The trust agreement provided that he was to transfer the 60,380 shares of stock on the books of the company from himself personally to himself as trustee and then to deliver the certificate for such shares to the corporate trustee. This was done. Also in accordance with the provisions of the trust respondent executed a dividend order against the shares directing the Fuller Brush Co. to pay all dividends to the corporate trustee. Respondent was the founder of the company and during the years in question was its president. It had outstanding only one class of voting stock, viz. Class A common. The amount outstanding during these years varied between 172,000 and 186,000 shares. Respondent owned 60,380 shares which together with the 60,380 shares under the trust constituted more than a majority of that class of stock. By terms of the trust respondent retained "exclusive voting power" of the trusteed shares during the term of the trust. If he died before its termination, the voting power would pass to the wife. During that period power to sell the stock was vested jointly in him, the wife, and the corporate trustee and could be exercised only in case all three agreed in writing. In case of such a sale, those three had the power to invest and reinvest the proceeds. They also were given the power to disburse, withhold, and accumulate the principal of the trust at their sole discretion, such power over the income being vested in the wife and the corporate trustee.

I. There can be no doubt but that respondent is taxable on the $40 weekly payment to the wife. That is a continuing personal obligation falling within the rule of *Douglas* v. *Willcuts, supra,* as a result of which those payments are taxable to him, not to the wife. *Gould* v. *Gould,* 245 U. S. 151. But that fact does not make the income from the trust also taxable to him. Although the provisions for the weekly payments and for the trust agreement were embodied in the same separation agreement, they were not so interrelated or interdependent as to make the trust a security for the weekly payments. Functionally they were as independent of each other as were the other property settlements from either of them.

II. Petitioner does not challenge the conclusion of the Circuit Court of Appeals that, so far as the trust agreement is concerned, the Nevada court retained no power to alter or modify the divorce decree. It seems to be admitted that under Nevada law the wife's allowance once made is final, *Sweeney* v. *Sweeney,* 42 Nev. 431; 179 P. 638, unless the decree itself expressly reserves the power to modify it, *Lewis* v. *Lewis,* 53 Nev. 398; 2 P. 2d 131, or unless the decree approves a settlement which in turn provides for a modification. *Aseltine* v. *Second Judicial District Court,* 57 Nev. 269; 62 P. 2d 701. Here no such power was reserved in the decree or in the trust agreement approved by the decree. Nor did respondent underwrite the principal or income from the trust or any part thereof or make any commitments, contingent or otherwise, respecting them, beyond his promise to transfer the securities to a trustee. But petitioner argues that the rule of *Douglas* v. *Willcuts, supra,* should nonetheless apply since the decree recognized the husband's preëxisting duty to support and defined that duty as coextensive with what the parties had themselves arranged, and since the husband simply carved out future income from property

which he then owned and devoted it in advance to the discharge of his obligation.

We take a different view. If respondent had not placed the shares of stock in trust but had transferred them outright to his wife as part of the property settlement, there seems to be no doubt that income subsequently accrued and paid thereon would be taxable to the wife, not to him. Under the present statutory scheme that case would be no different from one where any debtor, voluntarily or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like, to his creditor in whole or partial payment of his debt. Certainly it could not be claimed that income thereafter accruing from the transferred property must be included in the debtor's income tax return. If the debtor retained no right or interest in and to the property, he would cease to be the owner for purposes of the federal revenue acts. See *Helvering* v. *Clifford,* 309 U. S. 331. To hold that a different result necessarily obtains where the transfer is made or the trust is created as part of a property settlement attendant on a divorce would be to hold that for purposes of the federal income tax the marital obligation of the husband to support his wife cannot be discharged. But whether or not it can be depends on state law. For other purposes, local law determines the status of the parties and their property after a decree dissolving the matrimonial bonds. See *Barrett* v. *Failing,* 111 U. S. 523. And while the federal income tax is to be given a uniform construction of national application, Congress frequently has made it dependent on state law. See *Thomas* v. *Perkins,* 301 U. S. 655, 659, and cases cited. In the instant situation, an inquiry into state law seems inescapable. For the provisions in the revenue acts [2]

[2] Revenue Act of 1928 (45 Stat. 791) § 24 (a) (1). The same provision appears in § 24 of the 1932 Act (47 Stat. 169).

and regulations [3] concerning the non-deductibility of "family expenses" and of "alimony" do not illuminate the problem beyond implying the necessity for an examination of local law to determine the marital status and the obligations which have survived a divorce. The Nevada cases tell us that under such a decree as was entered here the obligation to support was *pro tanto* discharged and ended. And the trust agreement contains no contractual undertaking by respondent, contingent or otherwise, for support of the wife. Hence we can only conclude that respondent's personal obligation is not a continuing one but has been discharged *pro tanto*. To hold that it was not would be to find substantial differences between this irrevocable trust and an outright transfer of the shares to the wife, where in terms of local divorce law we can see only attenuated ones. This is not to imply that Congress lacks authority to design a different statutory scheme applying uniform standards for the taxation of income of the so-called alimony trusts. A somewhat comparable statute taxing to the grantor income from a trust applied to the payment of premiums upon insurance policies on his life was upheld in *Burnet* v. *Wells*, 289 U. S. 670. But the reach of Congressional power is one thing; an interpretation of a federal revenue act based on local divorce law, quite another.

For the reasons we have stated, it seems clear that local law and the trust have given the respondent *pro tanto* a full discharge from his duty to support his divorced wife and leave no continuing obligation, contingent or otherwise. Hence under *Helvering* v. *Fitch*, 309 U. S. 149, income to the wife from this trust is to be treated the same as income accruing from property after a debtor

[3] Treasury Reg. 74, Arts. 83, 281, promulgated under the 1928 Act. The same provisions appear in Treasury Reg. 77, Arts. 83, 281, promulgated under the 1932 Act.

has transferred that property to his creditor in full satisfaction of his obligations.[4]

III. One other observation is pertinent. Though the divorce decree extinguishes the husband's preëxisting duty to support the wife, and though no provision of the trust agreement places such obligation on him, that agreement may nevertheless leave him with sufficient interest in or control over the trust as to make him the owner of the corpus for purposes of the federal income tax. *Helvering* v. *Clifford, supra.*

As we have seen, respondent did retain considerable control over the trusteed shares. But that was not the basis for the assessment of the deficiency by the Commissioner. It was not passed upon by the Board of Tax Appeals or the Circuit Court of Appeals. It was not included in the petition for certiorari among the errors to be urged or the reasons for granting the writ. Nor did petitioner brief or argue the point here. Hence we do not pass on the applicability of the rule of *Helvering* v. *Clifford, supra,* to these facts. Cf. *Helvering v. Wood,* 309 U. S. 344.

Affirmed.

MR. JUSTICE REED, dissenting:

The opinion of the Court in this case is made to turn upon the question whether the law of the taxpayer's residence withdraws divorce settlements from the continuing supervision and subsequent modification of the courts. Two trusts, both irrevocable, in words precisely the same, drawn for the purpose of providing maintenance for a former wife, recognized or approved by divorce decrees identical in form, are to have different tax results upon the settlor. If income taxes are predominantly important, prospective divorcés must locate in the

[4] See Paul, Five Years with *Douglas* v. *Willcuts,* 53 Harv. L. Rev. 1.

states where the finality of the settlement is clearly established. Compare *Douglas* v. *Willcuts*,[1] *Helvering* v. *Fitch*[2] and *Helvering* v. *Leonard*[3] with this case. The reason given to support such a conclusion is that the liability of the settlor for taxes on trust income is based on the possibility that the settlor may be called upon for additional sums in the future. If the obligation continues, the tax liability continues. If the obligation is ended, the tax liability is ended. In *Douglas* v. *Willcuts* continued liability existed. It does not seem to me, however, that this continuing liability was the real basis for the *Douglas* decision. The basis for that decision was the prior appropriation, by the creation of the trust, of future income to meet an obligation of the taxpayer. The following excerpts from pages eight and nine show the foundation for the conclusion:

"Within the limits prescribed by the statute (and there is no suggestion that the provision here went beyond those limits) the court had full authority to make an allowance to the wife out of her husband's property and to set up a trust to give effect to that allowance."

. . . . . .

"Upon the preëxisting duty of the husband the decree placed a particular and adequate sanction, and imposed upon petitioner the obligation to devote the income in question, through the medium of the trust, to the use of his divorced wife."

. . . . . .

"The creation of a trust by the taxpayer as the channel for the application of the income to the discharge of his obligation leaves the nature of the transaction unaltered. . . . In the present case, the net income of the

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[1] 296 U. S. 1.

[2] 309 U. S. 149.

[3] *Post*, p. 80.

trust fund, which was paid to the wife under the decree, stands substantially on the same footing as though he had received the income personally and had been required by the decree to make the payment directly."

The *Fitch* case was the first to rely explicitly upon the finality of the settlement. It pushed the idea to the point that the burden was upon the settlor to demonstrate the clear finality of the local settlement. This Court there refused to draw its own conclusion as to what the local law was, even though numerous state cases touched upon the subject. In *Helvering* v. *Leonard,* this Court continues to apply the finality rule. It interprets the local law and finds that while "mere property settlements . . . may not be modified" the state judicial reserve power may be exercised where "the provision in the separate agreement, approved by the decree" is for support and maintenance. We are now at the point where the taxability of the settlor depends not only on the "clear and convincing proof" of the finality of the decree but the ability to produce that proof depends upon the skill of the draftsman of the settlement. Fine distinctions are necessary in reasoning but most undesirable in a national tax system.

It is no answer to the problem to say that if the stock had been transferred outright to the wife the husband would not be liable for the tax. If the stock had been kept by the husband and dividends paid as alimony, he would have been liable.[4] Either analogy might be logically followed in the trust situation but the choice of taxability of trust income was made in *Douglas* v. *Willcuts.* That case determines the "general rule." [5]

It may be assumed that the original obligation of the husband to support a divorced wife depends upon state law and to that extent that the state law is applicable to

[4] *Gould* v. *Gould,* 245 U. S. 151.

[5] *Helvering* v. *Fitch,* 309 U. S. 149, 156.

the determination of liability under the federal income tax act. But that necessary reliance upon local law need be carried no farther than the determination of obligation to support. Once that is determined the applicability of the theory of constructive receipt of income to discharge the obligation would come into play and would be nationwide in extent.

The obligation to support exists prior to the divorce decree. It is ended in Nevada only upon getting the court's approval to an arrangement which permits the creation of a fund to meet from year to year the obligation from which the Nevada law then and only then releases the settlor husband.[6] It is by the court's approval that the continuing obligation is discharged. Granting that a lump sum payment would terminate both the marital and the tax liability, the creation of a trust, approved by the court, for continuous payments in lieu of alimony seems to bring the trust income much closer to alimony than to the situation of a final settlement by lump sum payment.

This is particularly true in this present case where the settlement agreement shows that the husband retained voting power over the stock placed in trust. 60,380 shares of Class A Common Stock of the Fuller Brush Company, the only class of voting stock, was placed in the trust. An equal amount was retained by the taxpayer. The aggregate was a majority of the total of voting stock outstanding. This power, retained to the settlor, is of weight in determining that the present trust is more nearly akin to an agreement to pay alimony than it is to a satisfaction of an obligation by an unrestricted transfer.

The judgment should be reversed.

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[6] Nevada Compiled Laws, 1929, §§ 9463 and 9465.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* LEONARD.

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

No. 426. Argued March 26, 1940.—Decided April 22, 1940.

A separation agreement providing for the support of a wife embraced a trust agreement whereby the husband contributed to the corpus securities and cash, including corporate bonds the payment of the principal and interest of which he guaranteed. The trust could be amended by the husband and wife jointly, and the husband retained a limited power of substitution in respect of certain bank stock which was part of the corpus. Otherwise the trust was irrevocable and the husband retained no right to either the corpus or the income. A specified amount of the trust income was to be paid to each of three children; the remainder to the wife; and upon her death, the corpus was to be held for the children. The separation agreement also obligated the husband to pay to the wife annually a certain additional sum for the support of herself and the children, subject to reduction upon application to a court of competent jurisdiction. The arrangement was approved by a decree of divorce in New York. *Held:*

1. The portion of the trust income which was received from the guaranteed bonds was taxable income of the husband, under the Revenue Act of 1928. P. 84.

By the husband's guarantee of payment of the principal and interest of the bonds, a personal obligation, though contingent, continued to exist *pro tanto;* and the rule of *Douglas* v. *Willcuts,* 296 U. S. 1, is applicable.

2. Other trust income also was taxable to the husband, for the reason that he did not sustain the burden of showing by clear and convincing proof that the New York court lacked power after the divorce to add to his personal obligations in any eventuality. *Helvering* v. *Fitch,* 309 U. S. 149. P. 85.

105 F. 2d 900, reversed.

CERTIORARI, 309 U. S. 644, to review a judgment reversing a decision of the Board of Tax Appeals, 36 B. T. A. 563, assessing a deficiency in income tax.

Mr. Arnold Raum, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. J. Donald Duncan, with whom *Mr. James B. Alley* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves the question of the taxability to the grantor under the Revenue Act of 1928 (45 Stat. 791) of income from a so-called alimony trust which is payable to his divorced wife. We granted certiorari because of the probable conflict of the decision below with *Douglas* v. *Willcuts,* 296 U. S. 1, and *Helvering* v. *Fitch,* 309 U. S. 149.

In 1928 respondent's wife instituted suit in New York for an absolute divorce. On June 4, 1929, while that suit was pending, respondent and his wife entered into a separation agreement and, together with a corporate trustee, executed a trust agreement. Under the latter respondent contributed securities and cash of $650,000, which included $400,000 principal amount of 6% first mortgage bonds of an oil company. Respondent guaranteed the "payment when due of the principal and interest" on those bonds; and on notice of any default in the payment of any interest on or principal of them, he agreed to substitute cash or securities with a "market value equal to" the principal, and cash sufficient to cover any accrued interest.[1] The trust was irrevocable [2] except that

[1] No extension of the time of payment of principal or interest on these bonds was to be made without the consent of the wife and without the extension of the guarantee of respondent or his personal representative.

[2] Except on discontinuance or dismissal of the divorce action.

(1) it could be amended by respondent and his wife; [3] and (2) respondent retained a limited power of substitution as respects certain bank stock which was part of the corpus. The trustee agreed to use "reasonable efforts to consult" with respondent with respect to "the character of the investments" though it was not bound to follow his advice. Respondent retained no right to either the corpus or the income, or any part thereof, except as indicated above. The net income was to be paid as follows: $5000 a year to each of three children; the remaining amount to the wife during her life for her maintenance and support, and in her sole discretion for the support, maintenance and education of the children. On death of the wife, the corpus was to be held for the children.

The separation agreement incorporated the trust agreement by reference; stated that the wife's income from the trust and from other property received from the husband would aggregate $30,000 a year; provided that respondent would pay his wife an additional $35,000 each year during her life so that her aggregate net income for the maintenance and support of herself and the children would approximate $65,000 a year, and would further pay any "extraordinary medical or surgical expenses" incurred by the wife or on behalf of the children until they attained the age of twenty-five years; stated that in the event that respondent's ability to pay the above $35,000 became impaired, he might apply to any court of competent jurisdiction for a reduction of his obligation to not less than $10,000 a year; made other property settlements; provided for care and custody of the children; released dower, etc.

The decree of divorce became final in October 1929. It "approved and affirmed and made a part of the judgment herein" the separation agreement (which as we

[3] It was so amended three times but in respects not material here.

have said incorporated the trust agreement) "providing for the support and maintenance of the plaintiff," and in addition directed respondent to pay her $35,000 a year for the rest of her life. From June 4, 1929 to December 31, 1929, the trustee received $16,191.34 as dividends and interest from the trust property. It distributed $5200 to the wife and $2083.33 to each of three children, leaving an undistributed balance for that period of about $4700. Respondent did not include any of that income in his return for 1929. The Commissioner determined a deficiency. The Board of Tax Appeals held that only the amounts actually distributed to respondent's wife and minor children were taxable to him. 36 B. T. A. 563. The Circuit Court of Appeals reversed, holding that respondent, though taxable on income payable to his minor children, was not taxable on income payable to the wife. 105 F. 2d 900.

Here, as in the Circuit Court of Appeals, it was urged by the petitioner that this alimony trust was merely security for respondent's continuing obligation to support his wife and, therefore, that the trust income payable to her was taxable to him under the rule of *Douglas* v. *Willcuts, supra.* In support of that position it was urged, *inter alia,* that under New York law respondent's obligation was not discharged since the New York court retained the power to modify the decree; and that the promise by respondent to pay the wife $35,000 (or in no event less than $10,000) a year converted the trust into at least partial security for the total allowance to her. In either of such events the rule of *Douglas* v. *Willcuts, supra,* would apply. See *Helvering* v. *Fitch, supra.* The Circuit Court of Appeals, however, decided these two questions adversely to petitioner. But there is one matter not touched on by that court which we think is determinative of one phase of the case.

The trust agreement contains an express personal obligation of respondent in the form of a guarantee of payment of the principal and interest on $400,000 of the 6% bonds which were part of the trust corpus. To be sure, that personal obligation was contingent. But we do not deem that to be material. We recently stated in *Helvering* v. *Fitch, supra,* p. 156, that under this statutory scheme escape from the rule of *Douglas* v. *Willcuts, supra,* may be had only on "clear and convincing proof" that "local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent." Whatever may be the correct view on the other aspects of the case, the guarantee was such a continuing obligation. The fact that the wife or other beneficiaries looked primarily to the trust and only secondarily to respondent for payment of $24,000 annually, the fact that respondent's obligation might be enforceable by the trustee, the fact that respondent might never have to make good on his promise are beside the point. The existence of wholly contingent obligations, whether contractual or otherwise, is adequate to support the results reached in *Douglas* v. *Willcuts, supra.* For in that case it was manifest that at the time of the creation and approval of the trust the divorce court might never exercise its reserved power to revise or alter the decree and the husband might never have to make good on his promise to make up deficiencies in the estimated trust income. Likewise in the instant case, it cannot be said that the divorce decree and the alimony trust gave respondent an absolute discharge from his prior obligation. So far as the guarantee alone is concerned, they permitted his preëxisting unconditional duty to be transformed into a limited contingent one. But nonetheless they placed a specific and adequate sanction on that duty, so that respondent's personal obligation would not be fully discharged at least until complete payment

of the principal and interest on the 6% bonds had been made. Thus in effect, if not in form, the trust agreement was security for his continuing obligation which would be discharged at least *pro tanto* as income from those bonds was received by the trustee. Hence the case in substance is the same as those where pursuant to contract or arrangement an obligation is discharged by another for the taxpayer's benefit; see *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine Railroad,* 279 U. S. 732; or where the taxpayer creates a trust, the income of which is applied to the discharge of his debt. See *Helvering* v. *Blumenthal,* 296 U. S. 552. Here, as there, the taxpayer received a benefit by the payments. The catalogue of benefits is not depleted when primary obligations are discharged. For these reasons that portion of the trust income which was received from the guaranteed bonds was clearly taxable to respondent.

Apparently, however, a portion of that income was received from other trust property. But we think that was also taxable to respondent though for another reason.

As we have seen, the divorce decree approved, affirmed and made part of the judgment the separation agreement providing for the "support and maintenance" of the wife. Her maintenance and support were secured not only by the trust agreement and other property settlements but also by the personal obligation of the husband to contribute an annual sum. The Circuit Court of Appeals held that under New York law the terms of the trust would not be changed "unless the wife can disaffirm it for fraud, overreaching, or the like," citing *Galusha* v. *Galusha,* 116 N. Y. 635; 22 N. E. 1114; 138 N. Y. 272; 33 N. E. 1062; *Cain* v. *Cain,* 188 App. Div. 780; 177 N. Y. S. 178; *Hamlin* v. *Hamlin,* 224 App. Div. 168; 230 N. Y. S. 51. If the case was here on application of local law under the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, we would not be

inclined to disturb that finding. But it is not. Here respondent is seeking to escape one of the normal incidents of the federal income tax. For that purpose he invokes the aid of New York law. In *Helvering* v. *Fitch, supra,* we stated that where the divorced husband desires to avoid the general rule expressed in *Douglas* v. *Willcuts, supra,* he carries a distinct burden of establishing not by mere inference and conjecture but by "clear and convincing proof" that local law and the alimony trust have given him a full discharge. We do not think that respondent has sustained that burden.

As stated by the Circuit Court of Appeals, it does seem clear that mere property settlements, though incorporated into the decree, may not be modified pursuant to the reserved statutory powers of the court, contained in N. Y. Civil Prac. Act §§ 1155, 1170. See *Cain* v. *Cain, supra; Goldfish* v. *Goldfish,* 193 App. Div. 686; 184 N. Y. S. 512. *Schnitzer* v. *Buerger,* 237 App. Div. 622; 262 N. Y. S. 385. Nevertheless these settlements may be remade by the court not only where an ordinary contract may be set aside but also where they are unfair, inequitable and unjust. *Hamlin* v. *Hamlin, supra.* Cf. *Tirrell* v. *Tirrell,* 232 N. Y. 224; 133 N. E. 569. As stated by the court in the *Hamlin* case (224 App. Div. at p. 171) the requirement is that "such contracts be not only free from taint of actual fraud or coercion but also fair and reasonably sufficient having regard to the station in life and circumstances of the parties." More important to this case, however, are *Kunker* v. *Kunker,* 230 App. Div. 641; 246 N. Y. S. 118 and *Holahan* v. *Holahan,* 234 App. Div. 572; 255 N. Y. S. 693. They make it plain that the covenants of a separation agreement are not "an insuperable obstacle to obtaining relief by modification of the allowances." *Holahan* v. *Holahan, supra,* p. 574. Cf. *Severance* v. *Severance,* 260 N. Y. 432; 183 N. E. 909. The reserved power apparently may be exercised where

the provision in the separate agreement, approved by the decree, is for support and maintenance (*Kunker* v. *Kunker* and *Holahan* v. *Holahan, supra*) but not where it is in settlement of claims of ownership to specified property. *Goldfish* v. *Goldfish* and *Schnitzer* v. *Buerger, supra.* The provisions of the separation agreement and the trust agreement here in question specifically relate to and were designed to afford support and maintenance for the wife. Unlike the purpose of the trust agreement in *Schnitzer* v. *Buerger, supra,* the purpose here apparently was not to compose any controversies over the securities. We need not decide whether the court retained the power to require respondent to make additional payments to the wife in case, say, all the securities in trust turned out to be worthless. All we do hold is that respondent has not shown by "clear and convincing proof" that the court lacks the power to add to his personal obligations in any such circumstances.

Reversed.

MR. JUSTICE REED concurs in the result for the reasons stated in the dissent in *Helvering* v. *Fuller, ante,* p. 76.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE ROBERTS are of the opinion that the judgment of the Circuit Court of Appeals should be affirmed.

THORNHILL *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 514. Argued February 29, 1940.—Decided April 22, 1940.

A statute of Alabama makes it unlawful for any person, "without a just cause or legal excuse," to go near to or "loiter" about any place of lawful business, for the purpose of, or with the intention of, influencing or inducing other persons not to buy from, deal with, or be employed at such place of business; or to "picket" a place of lawful business for the purpose of impeding, interfering with, or injuring such business. As construed by the courts of the State, the statute forbids the publicizing of facts concerning a labor dispute, whether by printed sign, by pamphlet, by word of mouth, or otherwise, in the vicinity of the business involved; and this, without regard to the number of persons engaged in such activity, the peaceful character of their conduct, the nature of the dispute, or the accuracy or restraint of the language used in imparting the information. Upon a complaint substantially in the words of the statute, and upon evidence of activities related to picketing of a place of business in connection with a labor dispute, petitioner was convicted of "loitering and picketing as charged in the complaint." The statute was challenged as violative of freedom of speech and of the press. *Held:*

1. Freedom of speech and of the press, secured by the First Amendment against abridgment by the United States, is secured to all persons by the Fourteenth Amendment against abridgment by the States. P. 95.

2. When abridgment of the effective exercise of the rights of freedom of speech and of the press is claimed, it is incumbent on the courts to "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. P. 96.

3. The statute must be judged upon its face. P. 96.

(a) The charges were framed in the words of the statute and the finding was general; it is not necessary to consider whether the evidence would have supported a conviction based upon different and more precise charges. P. 96.

(b) The very existence of a penal statute such as that here, which does not aim specifically at evils within the allowable area of state control, but sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of

speech or of the press, results in a continuous and pervasive restraint of all freedom of discussion that might reasonably be regarded as within its purview. One convicted under such a statute does not have to sustain the burden of showing that the State could not constitutionally have written a different and specific statute covering the particular activities in which he is shown to have been engaged. P. 97.

(c) Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. P. 98.

4. The statute is invalid on its face. P. 101.

(a) Freedom of speech and of the press embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. P. 101.

(b) The dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion which is guaranteed by the Constitution. P. 102.

(c) Although the rights of employers and employees are subject to modification or qualification in the public interest, it does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. P. 103.

(d) While the State may take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its people, yet no clear and present danger of destruction of life or property, or invasion of the right of privacy, can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute. P. 105.

(e) There is not here involved any question of picketing *en masse*, or otherwise conducted, which might occasion such imminent and aggravated danger to the community interests as to justify a statute narrowly drawn to cover the precise situation out of which the danger arises. P. 105.

(f) That it applies only when the proscribed activities are engaged in at the scene of a labor dispute, can not justify the statute. P. 106.

28 Ala. App. 527; 189 So. 913, reversed.

CERTIORARI, 308 U. S. 547, to review the affirmance of a conviction under a penal statute of Alabama. The state Supreme Court denied a petition for certiorari.

Messrs. James J. Mayfield and *Joseph A. Padway* for petitioner.

Mr. William H. Loeb, Assistant Attorney General of Alabama, with whom *Mr. Thos. S. Lawson,* Attorney General, was on the brief, for respondent.

Freedom of speech and of assembly is not an absolute right. *Gitlow* v. *New York,* 268 U. S. 652.

Petitioner was not convicted for his words alone. His conviction rested upon the fact that he had gathered with others in a picket line for the purpose, not of advancing the picketers' interests, but of wilfully injuring the company.

If a person speaks in support of his own rights and for the purpose of advancing his own cause, there is no offense under § 3448. Nor is assembly for the lawful purpose of peaceful action prohibited. If, on the other hand, a member of a picket speaks for the purpose of injuring another or if the picket assembles unlawfully and in a threatening manner, the speaking and assembling become unlawful. See *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 439.

Whether petitioner was denied the liberties guaranteed him by the Fourteenth Amendment must be construed in the light of the facts which appear of record. *Schenck* v. *United States,* 249 U. S. 47, 52; *Aikers* v. *Wisconsin,* 195 U. S. 194, 205, 206.

Petitioner was a member of a picket line located very close to the place of business of his former employer and was a member of a group of picketers consisting of a relatively large number—considering the location of the picket and the number of employees of the plant. It

was not a "peaceful picket" but an offensive and unjustifiable annoyance calculated to bring about public disturbance and breaches of the peace. Petitioner, being the champion of only his own rights, can not be heard to assail as unconstitutional a statute which did not prohibit him from striking, or from presenting to others his side of the controversy, but barred him only from acts inherently wrong.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Petitioner, Byron Thornhill, was convicted in the Circuit Court of Tuscaloosa County, Alabama, of the violation of § 3448 of the State Code of 1923.[1] The Code section reads as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a

[1] Petitioner was first charged and convicted in the Inferior Court of Tuscaloosa County and sentenced to imprisonment for fifty-nine days in default of payment of a fine of one hundred dollars and costs. Upon appeal to the Circuit Court, another complaint was filed and a trial *de novo* was had pursuant to the local practice. The Circuit Court sentenced petitioner, upon his conviction, to imprisonment for seventy-three days in default of payment of a fine of one hundred dollars and costs.

misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The complaint against petitioner, which is set out in the margin,[2] is phrased substantially in the very words of the statute. The first and second counts charge that petitioner, without just cause or legal excuse, did "go near to or loiter about the premises" of the Brown Wood Preserving Company with the intent or purpose of influencing others to adopt one of enumerated courses of conduct. In the third count, the charge is that petitioner "did picket" the works of the Company "for the purpose of hindering, delaying or interfering with or injuring [its]lawful business." Petitioner demurred to the complaint on the grounds, among others, that § 3448 was repugnant to the Constitution of the United States in

[2] "1. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did without just cause or legal excuse therefor, go near to or loiter about the premises or place of business of another person, firm, corporation, or association of people, to-wit: the Brown Wood Preserving Company, Inc., a corporation, engaged in a lawful business, for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by the said Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation.

"2. [The second count is identical with the first, except that the last clause, charging a purpose to hinder, delay, or interfere, etc., with the lawful business of the Preserving Company, is omitted.]

"3. The State of Alabama, by its Solicitor, complains of Byron Thornhill that, within twelve months before the commencement of this prosecution he did picket the works or place of business of another person, firm, corporation, or association of people, to-wit, the Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the said Brown Wood Preserving Company, Inc., a corporation."

that it deprived him of "the right of peaceful assemblage," "the right of freedom of speech," and "the right to petition for redress." The demurrer, so far as the record shows, was not ruled upon, and petitioner pleaded not guilty. The Circuit Court then proceeded to try the case without a jury, one not being asked for or demanded. At the close of the case for the State, petitioner moved to exclude all the testimony taken at the trial on the ground that § 3448 was violative of the Constitution of the United States.[3] The Circuit Court overruled the motion, found petitioner "guilty of Loitering and Picketing as charged in the complaint," and entered judgment accordingly. The judgment was affirmed by the Court of Appeals, which considered the constitutional question and sustained the section on the authority of two previous decisions in the Alabama courts.[4] *O'Rourke* v. *Birmingham*, 27 Ala. App. 133; 168 So. 206, cert. denied, 232 Ala. 355; 168 So. 209; *Hardie-Tynes Mfg. Co.* v. *Cruise*, 189 Ala. 66; 66 So. 657. A petition for certiorari was denied by the Supreme Court of the State. The case is here on certiorari granted because of the importance of the questions presented. 308 U. S. 547.

The proofs consist of the testimony of two witnesses for the prosecution.[5] It appears that petitioner on the morn-

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[3] The petitioner also moved to exclude the testimony on the ground that it was insufficient to sustain a conviction. Upon being asked by the Court whether he insisted on this ground, however, counsel for petitioner stated that the only question he wanted to raise was the constitutionality of the statute.

[4] The Court of Appeals stated: "It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

"So, as conceded by able counsel here representing appellant, 'the only question involved in this appeal is the constitutionality *vel non* of Section 3448 of the Code of Alabama of 1923.'"

[5] No evidence was offered on behalf of petitioner.

ing of his arrest was seen "in company with six or eight other men" "on the picket line" at the plant of the Brown Wood Preserving Company. Some weeks previously a strike order had been issued by a Union, apparently affiliated with the American Federation of Labor, which had as members all but four of the approximately one hundred employees of the plant. Since that time a picket line with two picket posts of six to eight men each had been maintained around the plant twenty-four hours a day. The picket posts appear to have been on Company property, "on a private entrance for employees, and not on any public road." One witness explained that practically all of the employees live on Company property and get their mail from a post office on Company property and that the Union holds its meetings on Company property. No demand was ever made upon the men not to come on the property. There is no testimony indicating the nature of the dispute between the Union and the Preserving Company, or the course of events which led to the issuance of the strike order, or the nature of the efforts for conciliation.

The Company scheduled a day for the plant to resume operations. One of the witnesses, Clarence Simpson, who was not a member of the Union, on reporting to the plant on the day indicated, was approached by petitioner who told him that "they were on strike and did not want anybody to go up there to work." None of the other employees said anything to Simpson, who testified: "Neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceful manner, and did not put me in fear; he did not appear to be mad." "I then turned and went back to the house, and did not go to work." The other witness, J. M. Walden, testified: "At the time Mr. Thornhill and Clarence Simpson were talking to each other, there was no one else present, and I heard no harsh words and saw

nothing threatening in the manner of either man." [6] For engaging in some or all of these activities, petitioner was arrested, charged, and convicted as described.

First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.[7]

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153n. Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inade-

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[6] Simpson and Walden are not in entire accord with respect to the number of persons present during the conversation between Simpson and petitioner. A possible inference from Simpson's testimony, considered by itself, is that petitioner was in the company of six or eight others when the conversation took place. This difference is not material in our view of the case.

[7] *Schneider* v. *State*, 308 U. S. 147, 160; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *De Jonge* v. *Oregon*, 299 U. S. 353; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Gitlow* v. *New York*, 268 U. S. 652, 666. See *Palko* v. *Connecticut*, 302 U. S. 319, 326–327.

quate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should "weigh the circumstances" and "appraise the substantiality of the reasons advanced" in support of the challenged regulations. *Schneider* v. *State,* 308 U. S. 147, 161, 162.

Second. The section in question must be judged upon its face.

The finding against petitioner was a general one. It did not specify the testimony upon which it rested.[8] The charges were framed in the words of the statute and so must be given a like construction. The courts below expressed no intention of narrowing the construction put upon the statute by prior state decisions.[9] In these circumstance, there is no occasion to go behind the face of the statute or of the complaint for the purpose of determining whether the evidence, together with the permissible inferences to be drawn from it, could ever support a conviction founded upon different and more precise charges. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon,* 299 U. S. 353, 362; *Stromberg* v. *California,* 283 U. S. 359, 367–368. The State urges that petitioner may not complain of the deprivation of any rights but his own. It would not follow that on this record petitioner could not complain of the sweeping regulations here challenged.

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[8] The trial court merely found petitioner "guilty of Loitering and Picketing as charged in the complaint."

[9] The Court of Appeals determined merely that the evidence was sufficient to support the conviction under § 3448. See note 4, *supra.* It then sustained the judgment in reliance upon *O'Rourke* v. *Birmingham,* 27 Ala. App. 133; 168 So. 206, cert. denied, 232 Ala. 355; 168 So. 209; and *Hardie-Tynes Mfg. Co.* v. *Cruise,* 189 Ala. 66; 66 So. 657.

There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State,* 308 U. S. 147, 162–165; *Hague* v. *C. I. O.,* 307 U. S. 496, 516; *Lovell* v. *Griffin,* 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations.[10] Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota,* 283 U. S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prose-

[10] Compare *Electric Bond Co.* v. *Comm'n,* 303 U. S. 419; *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Gundling* v. *Chicago,* 177 U. S. 183, 186; *Lehon* v. *Atlanta,* 242 U. S. 53, 55, 56; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 553, 554.

cuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[11] It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship.[12] An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State,* 308 U. S. 147, 155, 162–163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California,* 283 U. S. 359, 368; *Schneider* v. *State,* 308 U. S. 147, 155, 162–163. Compare *Lanzetta* v. *New Jersey,* 306 U. S. 451.

Third. Section 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in

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[11] The record in the case at bar permits the inference that, while picketing had been carried on for several weeks, with six to eight men at each of two picket posts, § 3448 was not enforced against anyone other than petitioner, the Union President, and then only after his conversation with Simpson who thereupon returned home rather than report for work.

[12] A distinguished commentator has observed that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. See Madison's Report on the Virginia Resolutions, 4 Ell. Deb., 2d ed., 1876, p. 569; Address on the Conduct of the Maryland Convention of 1788, 2 *id.*, p. 552.

front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; [13] the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. *O'Rourke* v. *Birmingham,* 27 Ala. App. 133; 168 So. 206, cert. denied, 232 Ala. 355; 168 So. 209.[14] The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

The numerous forms of conduct proscribed by § 3448 are subsumed under two offenses: the first embraces the activities of all who "without just cause or legal excuse" "go near to or loiter about the premises" of any person engaged in a lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who "picket" the place of business of any such person "for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another." [15] It is apparent

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[13] The employer in fact had locked out its union stagehands and was working others not regularly employed as stagehands in admitted violation of the National Industrial Recovery Act.

[14] Accused there asserted that the application of § 3448 to the particular facts of his case deprived him of rights guaranteed to him by the Fourteenth Amendment. The Court of Appeals passed upon this constitutional question and decided it adversely to the contentions of accused.

[15] There is a proviso that "nothing herein shall prevent any person from soliciting trade or business for a competitive business."

that one or the other of the offenses comprehends every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase "without just cause or legal excuse" does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453–455.[16] The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute.[17] The vague contours of the

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[16] So far as the phrase may have been given meaning by the state courts it apparently grants authority to the court and the jury to consider defensive matter brought forward by the accused, depending for its sufficiency not upon rules of general application but upon the peculiar facts of each case. See *Owens* v. *State*, 74 Ala. 401; *Bailey* v. *State*, 161 Ala. 75; 49 So. 886; *Folmar* v. *State*, 19 Ala. App. 435; 97 So. 768. Compare *O'Rourke* v. *Birmingham*, 27 Ala. App. 133; 168 So. 206, cert. denied, 232 Ala. 355; 168 So. 209.

[17] The only direct evidence in the case at bar to show that the activity of petitioner was accompanied by the necessary intent or purpose is the fact that one other employee, after talking with petitioner, refrained from reporting for work as planned. There is evidence here that the other employee was acquainted with the facts prior to his conversation with petitioner. The State concedes, however, that under § 3448 everyone must be deemed to intend the natural and probable consequences of his acts. See *Jacobs* v. *State*, 17 Ala. App. 396; 85 So. 837; *Reed* v. *State*, 18 Ala. App. 371; 92 So. 513; *Weeks* v. *State*, 24 Ala. App. 198; 132 So. 870, cert. denied, 222 Ala. 442; 132 So. 871; *Worrell* v. *State*, 24 Ala. App. 313; 136 So. 737, cert. denied, 223 Ala. 425; 136 So. 738.

term "picket" are nowhere delineated.[18] Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute.

Fourth. We think that § 3448 is invalid on its face. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent

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[18] See Hellerstein, *Picketing Legislation and the Courts* (1931), 10 No. Car. L. Rev. 158, 186n.: "A picketer may: (1) Merely observe workers or customers. (2) Communicate information, e. g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and profanity, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab," (iii) a trade or employees' boycott, i. e., preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

"The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both."

punishment.[19] The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times.[20] The Continental Congress in its letter sent to the Inhabitants of Quebec (October 26, 1774) referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are ashamed or intimidated, into more honourable and just modes of conducting affairs." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108. Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147, 155, 162–63. See *Senn* v. *Tile Layers Union*, 301 U. S. 468,

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[19] *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147.

[20] See Duniway, *The Development of Freedom of the Press in Massachusetts*, p. 123 *et seq.*; Tyler, *Literary History of the American Revolution, passim*; 2 Bancroft, *History of the United States*, p. 261; Schofield, *Freedom of the Press in the United States* (1914), 9 Proc. Am. Sociol. Soc. 67, 76, 80.

478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.[21] This is but an instance

[21] See, e. g., *Senn* v. *Tile Layers Union,* 301 U. S. 468; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *National Labor Relations Board* v. *Newport News Co.,* 308 U. S. 241; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Nebbia* v. *New York,* 291 U. S. 502; *Dorchy* v.

of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.

The range of activities proscribed by § 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the

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Kansas, 272 U. S. 306; *Eastern States Retail Lumber Dealers Assn.* v. *United States*, 234 U. S. 600; *Aikens* v. *Wisconsin*, 195 U. S. 194; *Holden* v. *Hardy*, 169 U. S. 366.

clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.[22] We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448.

The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.

It is not enough to say that § 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute. "[The] streets are

[22] See Mr. Justice Holmes in 249 U. S. at 52; 250 U. S. at 630.

natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U. S. 147, 161, 163; *Hague* v. *C. I. O.,* 307 U. S. 496, 515–16.[23] The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by § 3448.

Reversed.

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

CARLSON *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA.

No. 667. Argued February 29, March 1, 1940.—Decided April 22, 1940.

A municipal ordinance making it unlawful for any person to carry or display any sign, banner or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there, or for any person to "loiter" or "picket" in the vicinity of any place of business for such purpose, *held* unconstitutional upon the authority of *Thornhill* v. *Alabama, ante,* p. 88.

Reversed.

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[23] The fact that the activities for which petitioner was arrested and convicted took place on the private property of the Preserving Company is without significance. Petitioner and the other employees were never treated as trespassers, assuming that they could be where the Company owns such a substantial part of the town. See p. 94, *supra.* And § 3448, in any event, must be tested upon its face.

APPEAL from the affirmance of a conviction and sentence under an anti-picketing ordinance.

Mr. Lee Pressman, with whom *Messrs. Joseph Kovner* and *Anthony Wayne Smith* were on the brief, for appellant.

Mr. Laurence W. Carr, pro hac vice, by special leave of Court, for appellee.

The ordinance does not abridge freedom of speech or of the press. A State may, in the exercise of its police power, place reasonable regulations and restrictions upon specific constitutional guarantees in the interest of public peace. *Whitney* v. *California,* 274 U. S. 357; *Gitlow* v. *New York,* 268 U. S. 652; *Schenck* v. *United States,* 249 U. S. 47. The limited regulation imposed by this ordinance is reasonably calculated to promote the public welfare.

Picketing in its very nature is inimical to the public welfare, as tending to breaches of the peace. *Elkind & Sons* v. *Retail Clerks International Protective Assn.,* 169 A. 494; *Pierce* v. *Stablemen's Union,* 156 Cal. 70; *Local Union* v. *Stathakis,* 135 Ark. 86; *St. Germain* v. *Bakery Union,* 97 Wash. 282; *Lyle* v. *Local 452,* 174 Tenn. 222; *Keith Theatre* v. *Vachon,* 187 A. 692; *Truax* v. *Corrigan,* 257 U. S. 312; *Thomas* v. *Indianapolis,* 195 Ind. 440. See, also, *Thornhill* v. *Alabama,* 189 So. 913; *Hardie-Tynes Mfg. Co.* v. *Cruise,* 189 Ala. 66; *Watters* v. *Indianapolis,* 191 Ind. 671; *Ex parte Stout,* 82 Tex. Cr. Rep. 316; *People* v. *Gidaly,* 3 Cal. Supp. 125.

Public benefits result from the ordinance: Removal of obstructions from the public sidewalks, streets and highways. *Fifth Avenue Coach Co.* v. *City of New York,* 221 U. S. 467; *Davis* v. *Massachusetts,* 167 U. S. 43; *Frend* v. *United States,* 100 F. 2d 691.

Also, by preventing the congregation of partisans under tense circumstances at the scene of a labor dispute, openly

declaring their partisanship and disapproval of the conduct of others, an occasion of violence is removed.

And the ordinance protects business and those rightfully employed. Public tranquility is preserved. There is no constitutional guarantee of the right to picket. The only right guaranteed is a right to disseminate the facts concerning a labor dispute without abusive and arbitrary restriction.

Appellant must make an affirmative showing that the ordinance in some way has caused an arbitrary and unreasonable restriction on the exercise of his individual right.

The constitutional guarantee of freedom of assemblage is not abridged. *Hague* v. *C. I. O.*, 307 U. S. 496; *Presser* v. *Illinois*, 116 U. S. 282.

Defendant is charged with, and admitted, "carrying signs and banners" in violation of the ordinance. This is a specific act clearly defined. Even if the term "picketing" were too broad or too vague, nevertheless under the saving clause in § 3, the use of such term will not invalidate the part defining the specific act of which appellant was convicted. Distinguishing *Schneider* v. *Irvington*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Herndon* v. *Lowry*, 301 U. S. 242; *DeJonge* v. *Oregon*, 299 U. S. 355; *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357; *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Crandall* v. *Nevada*, 73 U. S. 35; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Reno* v. *Second Judicial District Court*, 95 P. 2d 994; *People* v. *Harris*, 91 P. 2d 989.

By leave of Court, *Mr. Osmond K. Fraenkel* filed a brief on behalf of the American Civil Liberties Union, as *amicus curiae*, urging reversal.

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case presents the question whether regulations embodied in a municipal ordinance abridge the freedom of speech or of the press secured against state invasion by the Fourteenth Amendment.[1]

Section 2 of an ordinance of Shasta County, California, provides:

"It shall be unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of, or in the vicinity of, or to picket in front of, or in the vicinity of, or to carry, show or display any banner, transparency, badge or sign in front of, or in the vicinity of, any works, or factory, or any place of business or employment, for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from purchasing or using any goods, wares, merchandise, or other articles, manufactured, made or kept for sale therein, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from doing or performing any service or labor in any works, factory, place of business or employment, or for the purpose of intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce any person who is performing, seeking or obtaining service or labor in any such works, factory, place of business or employment."[2]

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[1] "It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment." *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Schneider* v. *State,* 308 U. S. 147.

[2] Section 1 declares that it shall be unlawful for any person "to make any loud or unusual noise, or to speak in a loud or unusual

Appellant was one of a group of twenty-nine men engaged in "picketing" on U. S. Highway 99 in front of the Delta Tunnel Project in Shasta County. "The picketing consisted of walking [on the edge of the highway nearest the project] a distance of 50 to 100 feet in a general northerly direction, then turning around and retracing steps and continuing as before . . . all of the walking in connection with the picketing . . . was done off the paved portion of the highway and on the gravelled portion of the right-of-way, that is, on public property." Some of the pickets carried signs, similar to those described in the margin,[3] in such a manner that workers on the project and persons going along the highway in either direction could read them. The sign carried by appellant bore the legend: "This job is unfair to CIO." These activities occurred between the hours of 7:30 and 9:00 a. m. During this period vehicles and persons passed freely without any molestation or interference through the picket line from the highway to the project and from the project to the highway, and the traffic of persons and automobiles along the highway was not obstructed. Appellant did not threaten or intimidate or coerce anyone, did not make any loud noises at any time, and was peaceful and orderly in his demeanor. The

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tone, or to cry out or proclaim, for the purposes of inducing or influencing, or attempting to induce or influence, any person" to refrain from entering, or purchasing merchandise from, or performing any service in, any place of business. The State did not charge that this section was violated.

[3] Four signs were admitted in evidence as typical. They were of white card board, approximately 14 x 22 inches in size, and were tacked upon a stick some 34 inches long, 1½ inches wide and ¼ inch thick. Black painted letters, ranging in size from 1½ inches to 5 inches in height, spelled out one of the following legends on each sign: "Don't be a scab," "Shasta Tunnel and Construction Workers Local #260," "CIO Picket Line," "This job unfair to CIO."

pickets committed no acts of violence, and there was no breach of the peace.

The county officers arrested appellant and charged that he did "loiter, picket, and display signs and banners in a public place and in and upon a public highway in front of, and in the vicinity of the Delta Tunnel Project . . . for the purpose of inducing and influencing persons to refrain from doing and performing services and labor" at the project in violation of the ordinance. The Justice's Court of Township Number Nine found him "guilty of violating the Shasta County Anti-Picketing Law," rendered judgment accordingly, and imposed sentence. The Superior Court of Shasta County affirmed the judgment. That court upheld the ordinance, over appellant's claim of unconstitutionality, on the authority of a prior decision.[4] The case comes here on appeal.[5]

Our decision in *Thornhill* v. *Alabama, ante,* p. 88, goes far toward settling the issues presented here. Under that decision, § 2 of the ordinance in question is to be judged upon its face.[6]

Section 2 on its face declares it unlawful for any person to carry or display any sign or banner or badge in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. It likewise makes it unlawful for any person to loiter or

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[4] Appellant, prior to trial, moved to dismiss the complaint upon a number of grounds, among which was the contention that § 2 of the ordinance violated the Fourteenth Amendment in abridging his "freedom of speech, freedom of press, and freedom of assembly." The same objections were raised by demurrer, by further motions to dismiss the complaint, and by motion in arrest of judgment.

[5] There is no further appeal allowed in the state courts.

[6] We do not decide whether, in view of the separability provision (§ 3), the state courts might cull out from § 2 particular clauses which. standing alone, could be sustained.

picket in the vicinity of any place of business for a similar purpose. The terms "loiter" and "picket" are not defined either in the ordinance or in authoritative state decisions. Therefore, they must be judged as covering all the activities embraced by the prohibition against the carrying of signs in the vicinity of a labor dispute for the purpose mentioned.[7] The ordinance does not proscribe the carrying of signs in other places or for the purpose of inducing or attempting to induce others to adopt courses of action not related to labor disputes. It contains no exceptions with respect to the truthfulness and restraint of the information conveyed or the number of persons engaged in the activity. It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception.[8] In brief, the ordinance does not regulate all carrying of signs, but, on the contrary, proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about the dispute.

The sweeping and inexact terms of the ordinance disclose the threat to freedom of speech inherent in its existence. It cannot be thought to differ in any material respect from the statute held void in *Thornhill's* case. The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of convey-

[7] See *Thornhill* v. *Alabama, ante,* p. 101, n. 18.

[8] Even they would be covered under a construction making purpose synonymous with intent. See *Thornhill* v. *Alabama, ante,* p. 100, n. 17.

ing information on matters of public concern. *Stromberg* v. *California,* 283 U. S. 359. For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra,* publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State.

The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted. But the ordinance in question here abridges liberty of discussion under circumstances presenting no clear and present danger of substantive evils within the allowable area of state control.

Reversed.

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

PERKINS, SECRETARY OF LABOR, ET AL. *v.* LUKENS STEEL CO. ET AL.

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

No. 593. Argued April 3, 1940.—Decided April 29, 1940.

The Public Contracts Act of June 30, 1936, requires that all contracts with the United States for the manufacture or furnishing of materials (in amounts exceeding $10,000) shall include a stipulation that all persons employed by the contractor in the manufacture or furnishing of such materials will be paid not less than the prevailing minimum wages "as determined by the Secretary of Labor . . . for persons employed . . . in the particular or similar industries . . . in the locality." Producers of iron and steel sought to enjoin the Secretary of Labor, and other officials and agents authorized to make purchases for the Government, from con-

tinuing in effect a wage determination made by the Secretary for that industry. Complainants asserted that the construction given by the Secretary to the term "locality" was arbitrary, capricious, and unauthorized by law; and that if in order to bid on Government contracts they must abide by the wage determination thus made, they would suffer irreparable loss and damage, for which there was no plain, adequate and complete remedy at law. *Held*, that the complainants were without standing to maintain the suit. P. 125.

1. The bill failed to show that any legal rights of the complainants were invaded or threatened. P. 125.

2. In the absence of statute, damage resulting from action by the Government which does not invade any recognized legal right is irremediable. P. 125.

3. That the Secretary of Labor is charged with an erroneous interpretation of the term "locality" in making the wage determination, is no basis for the suit. P. 125.

4. Complainants are not entitled to vindicate any general interest which the public may have in the Secretary's construction or administration of the Act. P. 125.

5. Neither R. S. § 3709, requiring advertising for proposals in respect of Government purchases and contracts, nor the Public Contracts Act itself, affords any basis for the suit. P. 126.

6. The Act does not provide for judicial review of wage determinations. P. 128.

7. The Act vests no right in prospective bidders. P. 127.

8. Congress has not by the Act exercised any regulatory power over private business or employment; and cases involving governmental regulation of private business are distinguishable. P. 128.

9. The defendants have not tortiously invaded private rights. P. 129.

10. Complainants were not entitled to a declaratory judgment. P. 132.

11. The conclusion that the complainants lack standing to sue is based upon principles implicit in the constitutional division of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a possible injury to the public. P. 132.

70 App. D. C. 354; 107 F. 2d 627, reversed.

CERTIORARI, 309 U. S. 643, to review the reversal of an order of the District Court dismissing a bill in equity.

Solicitor General Biddle, with whom *Assistant Attorney General Shea* and *Messrs. Telford Taylor, Paul A. Sweeney, Warner W. Gardner, Gerard D. Reilly,* and *David Ziskind* were on the brief, for petitioners.

Mr. Wm. Clarke Mason, with whom *Messrs. O. Max Gardner, Frederick H. Knight, Harold F. McGuire,* and *Roberts B. Thomas* were on the brief, for respondents.

Respondents' right to bid and negotiate for government contracts and to conduct their business relations with the Government free from illegal interference has been unlawfully invaded, and is further threatened, by the unlawful action of petitioners. They have standing to sue to protect such right and such business relations.

The right asserted is subject to conditions imposed or authorized by Congress; but not to unlawful interference by third parties, including public officers acting outside the scope of their authority.

Every person has the right to conduct a legitimate business and to seek to sell the products or services of that business, free from unjustifiable interference, restraint or coercion by others. The law has sedulously protected that right for centuries.

The Government has been a customer for many years of all respondents save one, and, at the date of institution of suit, was not only a party to contracts with several, but a prospective customer of all.

The right asserted by respondents is recognized by R. S. § 3709. The Public Contracts Act emphasizes the implications of R. S. § 3709. By that Act, Congress so preëmpted the field of wage provisions in government supply contracts as clearly to prohibit officers from inserting in such contracts any wage provisions unauthorized by the Act.

Respondents do not assert the right to government contracts if lowest responsible bidders. They do assert

the right to bid without being required to agree that they will comply with the determination.

Whether the determination be reviewable under § 5 of the Act or on general equitable principles, the court may determine whether petitioners are exceeding their statutory authority in attempting to enforce the determination against respondents and whether the determination is arbitrary and capricious.

It is immaterial whether the acts of petitioners involve "regulatory" or "non-regulatory" functions, since in either case the suit is not one against the United States.

In a suit for injunctive relief to prevent unlawful interference with business relations or prospective customers, it has never been supposed that the plaintiff must show of a certainty that, except for the unlawful interference, the business relations would ripen into profitable contracts or the prospective customers would become certain purchasers at profitable prices. It is sufficient that the plaintiff show a reasonable probability of irreparable injury from the unlawful interference.

The court below correctly held that respondents are entitled to a declaratory judgment declaring the invalidity of the determination.

MR. JUSTICE BLACK delivered the opinion of the Court.

In exercise of its authority to determine conditions under which purchases of Government supplies shall be made, Congress passed the Public Contracts Act of June 30, 1936.[1] By virtue of that Act, sellers must agree to pay employees engaged in producing goods so purchased "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular

[1] 49 Stat. 2036.

or similar industries or groups of industries currently operating in the locality in which . . . the supplies . . . are to be manufactured or furnished under said contract." The Court of Appeals for the District of Columbia has held that the Secretary erroneously construed the term "locality" to include a larger geographical area than the Act contemplates, and has ordered six Members of the Cabinet including the Secretary of Labor, the Director of Procurement and all other officials responsible for purchases necessary in the operation of the Federal Government, not to abide by or give effect to the wage determination made by the Secretary for the iron and steel industry either as to the complaining companies or any others. In this vital industry, by action of the Court of Appeals for the District of Columbia, the Act has been suspended and inoperative for more than a year.

We must, therefore, decide whether a federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry. Involving, as it does, the marking of boundaries of permissible judicial inquiry into administrative and executive responsibilities, this problem can best be understood against the background of what took place before the Court of Appeals for the District acted:

July 11, 1938, all the iron and steel companies in the United States were given notice that the Secretary contemplated proceedings for determining the minimum prevailing wage for their industry. On the 25th and 26th of that month, hearings were had before the Public Contracts Board also functioning under the Act. Many companies, and all of those involved here, were represented in the hearings. Companies from the entire United

States filed briefs and submitted information and suggestions, and these producers who are parties here had notice of and actively participated in the various stages of the proceedings. After the hearing, time for filing of briefs was allowed. Following investigation of testimony, exhibits, letters, telegrams, briefs, data from the Bureau of Labor Statistics, and arguments of representatives of both labor and industry itself, the Board, October 27, 1938, made its findings of fact, conclusions and recommendations: (a), Accepting recommendations of industry and labor, the Board adopted—with minor exceptions—the definition of the steel industry previously in effect under the National Industrial Recovery Act; (b), "the base rates paid to the workers classified as common laborers" were utilized as a basis for finding the minimum wage prevailing in the industry and a common laborer was defined as "one who performs physical or manual labor of a general character and simple nature, requiring no special training, judgment nor skill"; (c), the view that municipalities be treated as the geographical limit of a "locality" and that different minimum prevailing wage standards be adopted for small as distinguished from larger companies, was rejected. The Board pointed out that "the main channels of trade in the industry take their course far beyond the confines of local producing areas"; that "conventional measurement of miles on the map to outline the marketing areas of the iron and steel producers" was unsuitable; that "geographic location does not limit the efforts of iron and steel manufacturers to secure Government business"; that "the workers being paid wages below the base rates are employed in large, medium and small size companies and in plants located in all parts of the country"; and that in fixing a "locality" all these factors as well as geographic and economic considerations were relevant.

The majority of the Board suggested two localities, one for the Southern States and another for the remainder of the steel producing States. One member disagreed and insisted upon four localities throughout the nation, but noted that "the Board is agreed on all the essential facts before it in the case." He recognized that "the law . . . permits the division of the country into localities for the purpose of determining minimum wages. No rule is laid down to define the extent of any localities . . . A too minute concept of locality would obviously nullify the law, for each plant must necessarily occupy a different locale or site from every other. To reduce the interpretation of locality to its most minute point would be to find a minimum wage prevailing in each plant . . . When we depart from this interpretation we are immediately thrown upon judgment. . . . Obviously we must look for wage patterns or uniformities. . . . Again judgment must be relied upon for the answer." Excepting to the Board's recommendations, the companies now before this Court urged that the Secretary make a finding of minimum prevailing wages with "locality" given the connotation of a subdivision of the respective States as originally provided in the Bacon-Davis Act.[2]

On December 20, 1938, the Assistant Secretary of Labor, acting for the Secretary, heard arguments and received briefs both from industry and labor organizations. He did not adopt the recommendations of the Board in full, but instead divided the industry of the entire country into six "localities," proceeding, however, upon the view that to construe "locality" to mean small political divisions of the States, as the Bacon-Davis Act had done in express terms, would render "effective administration of the Act . . . almost impossible." It was pointed out that

[2] 46 Stat. 1494.

"this narrowly restricted construction of the word 'locality' . . . is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act," and that while Congress had closely followed the language of the Davis-Bacon Act in some respects, it had "carefully avoided the use of the more narrowly restrictive language of 'city, town, village or other civil subdivision.' " In the twenty-two preceding wage determinations under this Act the Secretary's administrative construction of the term had been—with a sole exception—that of geographic areas no smaller than those determined for the steel industry.[3] The determination in question was made January 16, 1939, but was not made operative until March 1, 1939, "in order that industry may make necessary readjustments to comply with the decision."

In their bill for an injunction and a declaratory judgment, these seven producers of iron and steel (respondents here) sought to enjoin as individuals and in their official capacities, the Secretaries of the Labor, Treasury, War, Navy, and Interior Departments, the Postmaster General, the Director of Procurement of the Treasury Department, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts of the Department of Labor and their "officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them, or any of them, and their successors in office and each of them, and their officers," etc. The seven companies named as complainants by the bill did not merely pray relief for themselves against the Secretary's wage determination but insisted that all these

[3] 2 Fed. Reg. 233, 1333, 1335, 1336, 1337, 1338, 1339, 2960, 2976; 3 Fed. Reg. 64, 224, 257, 889, 1613, 895, 901, 1612, 1153, 2371, 2370, 2537, 3043; 4 Fed. Reg. 4005.

Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States.

The District Court declined to interfere so sweepingly with the administration of the Act, even in the temporary restraining order which it granted. Its order ran only against the Secretaries of Labor and the Navy, and specifically limited its benefits to but three of the complaining companies. Recitals in the order indicate that only the Secretary of the Navy had actually solicited bids and that only those three companies were "desirous of bidding." After hearing, this order was dissolved and the Court granted a motion to dismiss the complaint for lack of jurisdiction, inadequacy of the complaint, lack of standing to sue, and because the suit was one against the United States without its consent.[4] A stay pending appeal was denied by the District Court, but the Court of Appeals for the District of Columbia, Justice Edgerton dissenting, by temporary injunction granted the sweeping prayer that all the Government officials and agents designated in the bill be restrained from continuing in effect the Determination made by the Secretary of Labor. By motion for reargument, the restrained officials, represented by attorneys of the Government, asked that the injunction be clarified so as to be "restricted to enjoining enforcement of the Determination against parties to this proceeding . . . and . . . not be extended to other bidders, not parties to this action, and who, for all that appears, may desire to abide by the Determination." In the same motion, the Government asked that employees who might be irreparably injured be protected by "a bond or other security to pay the minimum wages if the appel-

[4] The District Court's judgment was rendered without opinion.

lants do not eventually succeed in this case." [5] The record discloses no action by the Court of Appeals on this motion or on a subsequent motion to dissolve the temporary injunction.[6] But the temporary injunction, rendering the Act wholly inoperative as to the iron and steel industry was kept in effect and, reversing the District Court, the Court of Appeals, Justice Edgerton again dissenting, remanded with instructions that relief as prayed in the bill be granted.[7]

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[5] Sections of the Public Contracts Act provide that "breach or violation of any of the representations and stipulations in any contract for the purposes set forth . . . shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, . . . a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; . . . Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in Section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered; . . ."

[6] The Government's motion to clarify and restrict the temporary injunction and for security was filed March 29, 1939; the motion to dissolve the temporary injunction was filed April 13, 1939. No specific consideration of these motions by the Court of Appeals for the District of Columbia is disclosed in the record. August 4, 1939, after argument on the merits, that Court of Appeals, *per curiam*, Justice Edgerton dissenting, announced that the temporary injunction would be kept in effect, that the judgment of the District Court would be reversed and that the grounds for enjoining the administration of the Act would be set out in an opinion "to be filed shortly." The opinion of the Court of Appeals came down October 3, 1939; Justice Edgerton filed a separate opinion in dissent.

[7] 107 F. 2d 627.

In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the "locality," however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief.

As a result of this judicial action, federal officials had no feasible alternative except to make contracts for imperatively needed supplies for the War and Navy Departments without inclusion of the stipulation which Congress had required. The Public Contracts Act, so far as the steel industry is concerned, has been suspended for more than a year, with no bond or security to protect the public's interest in the maintenance of wage standards contemplated by Congress, should the suspension ultimately appear unwarranted or unauthorized. Here, and below, the Government has challenged the right of the judiciary to take such action, alleging that it constitutes an unwarranted interference with deliberate legislative policy and with executive administration vital to the achievement of governmental ends, at the instance of parties whose rights the Government has not invaded and who have no standing in court to attack the Secretary's determination. The manifestly far-reaching importance of the questions thus raised prompted us to grant certiorari.[8]

Of the six "localities" into which the Secretary's determination divided the steel industry, respondents do business in that consisting of Ohio, Pennsylvania, Delaware,

[8] 309 U. S. 643.

Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, the District of Columbia, and a part of West Virginia.[9] Their stated grievance was that the construction given to the term "locality" by the Secretary amounted to "a plain error of law in interpreting the Act, . . . and, consequently, in purporting . . . to determine the prevailing minimum wages for persons employed in the manufacture . . . of the iron and steel industry in the six so-called 'localities' set forth in this determination [the Secretary] acted arbitrarily and capriciously and wholly without warrant or authority in law." In particular the complaint alleged—

Respondents had been selling their products to agents of the United States for many years; they wished to continue to bid on Government contracts; their minimum wages had ranged from 53¢ to 56½¢ per hour; if required to pay the 62½¢ per hour minimum rate determined by the Secretary there was grave danger that they would be unable successfully to compete with others for Government contracts; they had a legal right to bid for Government contracts free from any obligation to abide by the minimum wage determination because of alleged illegal administrative construction of "locality"; and if denied the right to bid without paying their employees this minimum wage they would suffer "irreparable and irrecoverable damages" for which the law provided no "plain, adequate or complete remedy."

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[9] The remaining five localities are: 1, Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia, and a part of West Virginia; 2, Washington, Oregon and California; 3, Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona; 4, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri and the area in and about East Saint Louis, Illinois; 5, Wisconsin, Illinois (except the area in and about East Saint Louis, Illinois), Michigan and Indiana.

In staying the effect of the administrative wage determination, the Court of Appeals for the District was of the opinion that "the word locality is one of somewhat indefinite meaning" requiring the Secretary to exercise judgment and discretion "within the proper limits of the meaning of locality," but held that the Secretary's determination in this case went "so far beyond any possible proper application of the words as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate."

We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such.[10] It is not enough that the Secretary of Labor is charged with an erroneous interpretation of the term "locality" as an element in her wage determination. Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.[11] They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination

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[10] *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 137–8; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Massachusetts* v. *Mellon*, 262 U. S. 447.

[11] *Stearns* v. *Wood*, 236 U. S. 75, 78; *Fairchild* v. *Hughes*, 258 U. S. 126, 129.

made by the Secretary of Labor for their industry. Respondents point to § 3709 of the Revised Statutes and to the Public Contracts Act itself.

Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising.[12] It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.[13] "The United States needs the protection of publicity, form, regularity of returns and affidavit (Revised Stats., §§ 3709, 3718–3724, 3745–3747), in order to prevent possible frauds upon it by others. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government and not upon him." [14] That duty is owing to the Government and to no one else.

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[12] R. S. 3709 (41 U. S. C. 5) provides: "Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government, and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

[13] Cf. *Goldberg* v. *Daniels*, 231 U. S. 218.

[14] *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88, 92, 93; *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78. Cf. *Colorado Paving Co.* v. *Murphy*, 78 F. 28 (C. C. A. 8th). See 38 Op. Att. Gen. 555, 557. Bidders have not been able to contest the award of contracts as bidders or in their capacity as citizens generally. *O'Brien* v. *Carney*, 6 F. Supp. 761; *B. F. Cummings Co.* v. *Burleson*, 40 App. D. C. 500; *Champion Coated Paper Co.* v. *Joint Committee on Printing*, 47 App. D. C. 141; cf. *Strong* v. *United States*, 6 Ct. Cls. 135. And the view that bidders have no standing in the courts has been generally recognized by the Comptroller General, the Inter-Departmental Board on Contracts of the Bureau of the Budget as well as the Senate Judiciary Committee.

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.[15] Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain. Thus, a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept.[16] Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law."[17] Judicial restraint of those who administer the

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Hearing before the Comm. on the Judiciary, House of Representatives, 71st Cong., 2nd Sess., on H. R. 5568, Serial 4, Part 1, pp. 16–22, 26–27; Senate Report 433, 74th Cong., 1st Sess.

[15] *Atkin* v. *Kansas*, 191 U. S. 207; *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175; cf. *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565.

[16] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 319, 320.

[17] *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; cf. *Butte, A. & P. Ry. Co.* v. *United States*, 290 U. S. 127, 136, 142, 143.

Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary on the Bill,[18] "The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. The Committee Hearings and Reports and the construction of the measure by its sponsors disclose no purpose to invoke judicial supervision over agents chosen by Congress to perform these duties. And §§ 4 and 5 do not subject a wage determination to such review. Provision for hearings and findings by the Secretary with respect to decisions upon breaches of stipulations by contractors, once purchases have been made, is indicative of a lack of intention to create any rights for prospective bidders before a purchase is concluded.

The Act does not represent an exercise by Congress of regulatory power over private business or employment.[19]

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[18] House Report No. 2946, 74th Cong., 2nd Sess.

[19] Cf. *Ex parte Williams,* 277 U. S. 267, 269, 272; *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 180.

In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act.[20] That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted.

The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of the injunction granted they cite many cases involving contested Government regulation of the conduct of private business.[21] Their cited cases, however, all relate to problems different from those

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[20] Cf. *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228, 230. See also Note 10.

[21] See, e. g., *Utah Fuel Co.* v. *Coal Comm'n*, 306 U. S. 56, 58; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Waite* v. *Macy*, 246 U. S. 606; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Gegiow* v. *Uhl*, 239 U. S. 3; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies.

The Government can supply its needs by its own manufacturing or by purchase. And Congress can as it always has, either do the purchasing of the Government's goods and supplies itself, or it can entrust its agents with final power to do so and make these agents responsible only to it.[22] Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered. The Constitution prohibits appropriations for the Army for more than two years,[23] and by statute contracts for the purchase of departmental supplies are in general limited to one year.[24] These prohibitions emphasize the grave importance of leaving the restraint of the Government's purchasing agents to Congress and their executive superiors.

The record here discloses the "confusion and disorder" [25] that can result from the delays necessarily incident to

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[22] *Great Northern Ry. Co.* v. *United States,* 277 U. S. 172, 182; *Work* v. *Rives,* 267 U. S. 175; *Butte, A. & P. Ry. Co.* v. *United States,* 290 U. S. 127; *United States* v. *Babcock,* 250 U. S. 328; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Adams* v. *Nagle,* 303 U. S. 532, 540–1.

[23] Art. I, § 8, cl. 12.

[24] 41 U. S. C. 13.

[25] Cf. Mr. Chief Justice Taney in *Decatur* v. *Paulding,* 14 Pet. 497, 516.

judicial supervision of administrative procedure developed to meet present day needs of Government and capable of operating efficiently and fairly to both private and public interests. In the appropriate words of Mr. Justice Sutherland, "The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained." [26] For more than a year, Cabinet officers and their subordinates have been enjoined from making the Secretary's determination of minimum wages effective. Meanwhile, iron and steel were needed for the Army and Navy. In order that the military program could proceed, the declared policy of the Congress was abandoned under judicial compulsion and contracts without a minimum wage stipulation have been awarded for more than $65,000,000.00 worth of iron and steel products since the injunction issued.[27] If the general law permits prospective bidders to challenge each wage determination of the Secretary in the courts, by a like token all employees affected could obtain judicial review. Such a possibility places in bold relief those conditions which led Congress to proceed in this Act upon the belief, to which we have recently alluded,[28] that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." [29]

The case before us makes it fitting to remember that "The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mis-

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[26] *Massachusetts* v. *Mellon*, 262 U. S. 447, 487.

[27] Bulletins Nos. 75 to 176, inclusive, of the Division of Public Contracts of the Department of Labor.

[28] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 146.

[29] *Missouri, K. & T. Ry. Co.* v. *May*, 194 U. S. 267, 270.

chief; and we are quite satisfied that such a power was never intended to be given to them." [30]

The District Court properly dismissed the bill and the Court of Appeals for the District of Columbia was in error in finding respondents with standing to bring this action, in ordering the Secretary's determination restrained and in holding respondents entitled to declaratory judgment.[31]

Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public. The judgment of the Court of Appeals is reversed, and that of the District Court dismissing the bill is affirmed.

Reversed.

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

WARREN ET AL., TRUSTEES, *v.* PALMER ET AL., TRUSTEES.

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

No. 643. Argued March 29, April 1, 1940.—Decided April 29, 1940.

Where a railroad system, in a reorganization proceeding under § 77 of the Bankruptcy Act, includes a leased line, operated at a loss and which can not be operated by its owner, and where, by order of the court the trustees have rejected the lease but have continued to operate the leased road for the account of the lessor,

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[30] *Decatur* v. *Paulding, supra,* at 516.

[31] *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–1.

pursuant to § 77 (c) (6), the court has jurisdiction to determine the amount of the deficit chargeable to the lessor and to impose a first lien on the leased property to secure it, and to do this after proceedings for reorganization of the lessor company under § 77 have been instituted in another district where the leased line is situate. P. 140.

108 F. 2d 164, affirmed.

CERTIORARI, 309 U. S. 645, to review the affirmance of an order of the District Court in a railroad reorganization proceeding under § 77 of the Bankruptcy Act. The order fixed the amount of a deficit arising from the operation of a leased line and declared it a first lien on the leased property. Only the question of the bankruptcy court's jurisdiction to do this was brought here.

Mr. Erwin N. Griswold, with whom *Messrs. John Noble, Jr.,* and *Paul E. Troy* were on the brief, for petitioners.

The property of the Boston & Providence was not subject to administration within the Connecticut court's bankruptcy jurisdiction. Even though that court may have had possession of the property, and even though § 77 still turns upon possession in part, the jurisdiction resulting from possession is not broad enough to sustain the relief sought in this case.

Property which does not belong to the debtor is not subject to administration in the debtor's bankruptcy. This applies to the lessor's interest in the leased property.

There is nothing in § 77 which extends the jurisdiction of the bankruptcy court to administer property in the possession of a debtor which the debtor does not own. The Boston & Providence could not be reorganized by the Connecticut court.

Section 77 did not impose any duty on the New Haven Road which would serve as the foundation for implying that the Connecticut court would have correlative jurisdiction to determine the consequences of the

performance of that duty. The duty to operate the railroad existed independently of § 77. That section gave the New Haven a means of escaping the existing burden, but on terms which the New Haven has not seen fit to follow. There is nothing in § 77 (c) (6) which suggests that the adjudication of the account in this case is the exclusive prerogative of the Connecticut court.

The jurisdiction of the Connecticut court is not aided by its status as a receivership court. A receivership court does not have jurisdiction over property beyond its territorial limits. The Massachusetts court here is not a mere ancillary court in the New Haven reorganization of the Boston & Providence.

The claim is one which has grown up wholly in equity proceedings. The respondents must take it subject to the territorial limitations on the Connecticut court's jurisdiction to act as an equity receivership court.

Exclusive jurisdiction over the Boston & Providence and its property is now vested in the District Court in Massachusetts. This would seem to follow from the plain language of § 77 (a) of the Bankruptcy Act which gives the Massachusetts court exclusive jurisdiction of the debtor and its property wherever located.

Congress did not provide for the unified reorganization of railroad systems.

If the New Haven claim can properly be liquidated by the Connecticut court, and the rank of the lien fixed by the Connecticut court, then the Massachusetts court has only a perfunctory jurisdiction over "the new allocation of interests in" the Boston & Providence property. It must dispose of all its debtor's property on the say-so of another court.

The jurisdiction of the Connecticut court can not be sustained on the ground that it first took over the *res*. There are many cases in which it has been held that a bankruptcy court supersedes a jurisdiction which has

already been obtained by another court. Only by recognizing the paramount jurisdiction of the Massachusetts court can the purpose of Congress to achieve a unified disposition of the debtor's estate be obtained.

Mr. Hermon J. Wells for respondents.

MR. JUSTICE REED delivered the opinion of the Court.

The Boston and Providence Railroad Corporation in 1888 leased its property, a line of road running between Boston and Providence, for 99 years to the Old Colony Railroad. It has continued as a separate corporation, receiving and distributing its rent, and is not a subsidiary or affiliate of the New Haven or the Old Colony. In 1899 the Old Colony leased its lines, including its leasehold in the Boston and Providence, to the New York, New Haven and Hartford Railroad for 99 years. The New Haven operated its own and the leased property until it was put into reorganization under § 77 of the Bankruptcy Act[1] in the District Court of Connecticut on October 23, 1935. The trustees of the New Haven operated the Old Colony under the lease until they rejected the lease by order of the court on June 2, 1936. Next day the Old Colony filed under § 77 in the same Connecticut court as a subsidiary debtor, the court appointed the trustees of the New Haven trustees of the Old Colony, and on June 18, 1936, the court ordered the New Haven trustees to continue to operate the Old Colony as an integral part of the New Haven, the operation being for the account of the Old Colony. The order provided that, in the event leases of the Old Colony were later rejected, payments for operating the leased property and payments of rent under the lease would be deemed to have been for the account of the lessor and could be recovered from the

[1] 11 U. S. C. § 205.

leased property prior to any mortgage or lien thereon. On July 19, 1938, the court directed the trustees of the Old Colony to reject the lease of the Boston and Providence and to continue operation of the road for the account of the Boston and Providence pursuant to § 77 (c) (6). On August 4, 1938, the Boston and Providence was put into reorganization in the District Court of Massachusetts. Previously the system had been operating at a loss and the trustees of the New Haven and the Old Colony asked the Connecticut court to determine the amount of the deficit attributable to the Boston and Providence for the period from June 4, 1936, to December 31, 1937, and to declare that amount a lien on the Boston and Providence in favor of the New Haven and the Old Colony. On January 16, 1939, the Connecticut court decided that it had jurisdiction to grant the requested lien on the Boston and Providence, although that road was under reorganization in another bankruptcy court, and on April 20, 1939, the court entered an order fixing the amount of the deficit and declaring it a first lien on the property of the Boston and Providence. The Circuit Court of Appeals, holding that the Connecticut court had jurisdiction to determine the lien, affirmed the order of January 16, 1939, but concluded that the Boston and Providence had been given no chance to be heard on the merits of the question and remanded the later order for a determination of the "existence and amount of the obligation." [2]

The obligation on which the claimed lien is based arises, so the trustees of the New Haven and the Old Colony contend, from the operation of the Boston and Providence under § 77 (c) (6) by the Old Colony for the account of the Boston and Providence. Petitioners deny that 77 (c) (6) was properly invoked and claim that the deficit is not chargeable to them. This phase of the contro-

[2] 108 F. 2d 164.

versy is not before us, for petitioners have brought here only the question of the Connecticut court's jurisdiction to determine the amount of the deficit chargeable to the Boston and Providence and to impose a lien on its property to secure it. If the Connecticut court has that jurisdiction, it will determine whether the deficit is chargeable to the Boston and Providence when it determines the "existence and extent of the obligation" pursuant to the order of remand of the Court of Appeals.

The controversy has substance because of the contention of the trustees for the Boston and Providence that, as the court charged with the reorganization of that road (the Massachusetts District Court) has "exclusive jurisdiction" under § 77 (a) "of the debtor and its property wherever located," the Connecticut court cannot consider the claims of the New Haven and Old Colony trustees for operating deficits or impose a lien on the Boston and Providence property to secure them.

The lease of the Boston and Providence to the Old Colony is the type of lease covered by the order of June 18, 1936, by which the trustees of Old Colony were authorized to charge operating deficits against the lessor in the event of subsequent disaffirmance of the lease.

Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress.[3] Under the commerce clause of the Constitution Congress likewise has exercised its power to provide for the continued operation of interstate railroads such as petitioner.[4] The fact that the operator operates under a

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[3] *Continental Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 667–675.

[4] Interstate Commerce Act, § 1 (18), as amended 49 U. S. C. § 1 (18):

"Extension or abandonment of lines; certificate required.— . . . and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof,

lease does not affect the force of the requirement that the operation must continue until a certificate permitting abandonment is issued by the Interstate Commerce Commission.[5] The judicial functions of the bankruptcy court and the administrative functions of the Commission work coöperatively in reorganizations.[6] Provision is made by the Bankruptcy Act [7] for the operation of leased property on surrender. It is under this subsection that respondent claims to have become entitled to the amount sought in the motion for allowance and lien. This subsection modifies *pro tanto* the rule of the Interstate Commerce Act for operation.

The property of the Boston and Providence came into the possession of the trustees of the New Haven and the Old Colony and remained there during the entire time covered by the claim. These roads were lessees of the property and debtors under § 77 in the Connecticut court. It is immaterial what title the debtors had, whether a lease or a fee. The physical property covered by the lease

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unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

[5] Cf. Seaboard Air Line Railways Receivers Proposed Abandonment, 202 I. C. C. 543; Norfolk Southern R. Co. Receivers Abandonment, 221 I. C. C. 258; Meck and Masten, Railroad Leases and Reorganization: I, 49 Yale L. J. 626.

[6] *Palmer* v. *Massachusetts,* 308 U. S. 79, 87, note 14.

[7] § 77 (c) (6). "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

was in the custody of the Connecticut court by virtue of the provision of § 77 (a).[8] By virtue of subdivisions 77 (c) (10) and 77 (c) (6) [9] it is clear that leaseholds are in some instances to be operated by the lessee's trustees.

This Court has held "upon principles of general application" that courts having custody of property or a fund have the power "to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general disposition among those entitled to receive it." [10] Such a power reposes in any court charged with custody of property. It is an *in rem* jurisdiction springing from possession of the property which is necessary in order that the court may adequately care for the property. Thus a court having custody of a ship is able to secure wharfage by virtue of its power to decree a preferential payment.[11] And here the court is able to carry out the operation of the Boston and Providence by promising or granting a lien to those who carry out the operation.

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[8] *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478; *Ex parte Baldwin*, 291 U. S. 610; cf. *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734; *Green* v. *Finnegan Realty Co.*, 70 F. 2d 465, 466 (C. C. A. 5th); *In re Chambers, Calder & Co.*, 98 F. 865 (D. R. I.).

[9] § 77 (c) (10). "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate." See note 7.

[10] *New York Dock Co.* v. *The Poznan*, 274 U. S. 117, 120, 121.

[11] *Ibid.*

If the Connecticut court has possession of the property and operated it under § 77 (c) (6) for its owners, could it fix a lien on the property after another bankruptcy court took the administration of the property? By § 77 (c) (6) railroads in reorganization which had been operating lines under lease were allowed to reject the lease but required to continue operation of the leased lines if the lessor had no ability to operate. Thus Congress recognized the possible occurrence of the situation now before us and evinced a desire that rail service should not in such a case be interrupted. In view of the public importance of rail service, we think this subsection represents an intention to give the court charged with operation the fullest ability to secure the necessities of operation—an intention to give the operating court power to promise those having the materials, men and equipment needed for operation a first lien on the road to secure payment for the operation.[12] This in no way impairs the operation of § 77 (a) which grants to the Massachusetts court, "during the pendency of the proceedings under this section and for the purposes thereof," "exclusive jurisdiction of the debtor and its property wherever located." The "purposes" of § 77 include the development of a "fair and equitable" [13] plan of reorganization. The Massachusetts court is left with jurisdiction to accomplish this, but is bound to recognize the priority of the lien declared by the Connecticut court. By § 77 (c) (6) the Connecticut court was given jurisdic-

[12] It may be noted that Congress did not adopt the rule of *Gross* v. *Irving Trust Co.*, 289 U. S. 342, in this situation. In the *Gross* case property of a debtor had been in the custody of a state receivership court prior to the debtor's adjudication in ordinary bankruptcy. It was held that because of the bankruptcy court's paramount jurisdiction the administrative expenses of the receivership had to be proved in bankruptcy and could not be declared a lien by the receivership court on property in its custody.

[13] § 77 (e).

tion so long as it continued to operate the road to grant a lien for operating expenses prior to any existing claims against the road. The decision of the Court of Appeals that the Connecticut court had jurisdiction to grant the lien sought by respondent is

Affirmed.

TIGNER *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 635. Argued March 29, 1940.—Decided May 6, 1940.

1. Since farmers and stockmen are widely scattered and inured to habits of individualism and economically are in large measure dependent upon contingencies beyond their control, a legislature may reasonably believe that combinations of farmers and stockmen restraining trade in their agricultural products and livestock present no threat to the community, or, at least, that the threat is of a different order from that of combinations of industrialists and middlemen. P. 145.
2. Since *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, was decided, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. P. 145.
3. The "laws" meant by the equal protection clause of the Fourteenth Amendment are not abstractions but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. P. 147.
4. A Texas penal statute punishing conspiracies in restraint of trade but expressly inapplicable to "agricultural products or livestock while in the hands of the producer or raiser," *held* consistent with the equal protection clause of the Fourteenth Amendment. P. 149.
5. In effectuating its policy with respect to combinations in restraint of trade, the Texas legislature, though exempting farmers and stockmen from penal remedies applicable to others, subjected them like others to civil penalties. *Held*, within legislative discretion and consistent with equal protection of the laws. P. 149.

132 S. W. 2d 885, affirmed.

APPEAL from a judgment which affirmed a judgment denying a petition for a writ of *habeas corpus* and remanding the petitioner to custody under an indictment for conspiracy.

Mr. Charles I. Francis, with whom *Mr. William A. Vinson* was on the brief, for appellant.

The exemption provision in the Illinois statute involved in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, was practically identical, and that case is decisive here. See also *Barbier* v. *Connolly,* 113 U. S. 27, 32; *Hayes* v. *Missouri,* 120 U. S. 68, 71. The decisions relied on by the court below do not sustain its conclusion that "in view of the supervening economic conditions since 1902" the rule of the *Connolly* case is not controlling.

The object of the Texas antitrust laws is to encourage competition and prevent the evils incident to price fixing etc. Under the civil statutes, price-fixing agreements of farmers are illegal, just as are those made by others. *State* v. *Standard Oil Co.,* 130 Tex. 313. Thus, the State recognizes that it is not in the public interest to permit monopolies, trusts and conspiracies in restraint of trade by any class of citizens. Yet, this politically powerful class is exempted from penalties prescribed by the criminal antitrust statutes, while all other classes are subjected thereto.

What justification in logic or in law can be offered for making an act criminal if committed by a merchant or a manufacturer but not if committed by a ranchman or farmer? No grand jury could indict these ranchmen for a criminal offense, because they are exempt from criminal prosecution. And no action under the civil antitrust statutes could be taken against them for price fixing, unless the Attorney General, an elected official, consented that such a suit be instituted. Art. 7436, Tit. 126, Vernon's Texas Civil Stats. Vol. 20, p. 638. Such a proceeding has never occurred and probably never will occur in Texas.

Economic considerations do not justify the exception of farmers and stockmen from the criminal antitrust laws. They are not excepted from the civil antitrust laws. There exists no such difference between the classes in their relation to the ultimate object of the statute as would justify the discrimination. The object of the statute is punishment for price-fixing and other forbidden acts. Ranchmen and farmers have the same relationship towards this object as appellant. The only difference is in occupations, in each of which price-fixing agreements are illegal under the civil laws.

Many business men have as little opportunity to suppress competition as farmers and stockmen, and many people are as poor. The mere fact that more farmers and stockmen live in the country than in the city, and the mere fact that as a group they may not have the same opportunities and facilities for restricting competition and controlling prices as other businessmen, are differences insufficient to justify the classification. *Truax* v. *Corrigan,* 257 U. S. 312; *Hartford Steam Boiler Co.* v. *Harrison,* 301 U. S. 459; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Liggett Co.* v. *Baldridge,* 278 U. S. 105; *Smith* v. *Cahoon,* 283 U. S. 553; *Frost* v. *Corporation Comm'n,* 278 U. S. 515; *Gulf, C. & S. F. Ry. Co.* v. *Ellis,* 165 U. S. 150; *In re Opinion of Justices,* 211 Mass. 618.

Messrs. George W. Barcus, Assistant Attorney General of Texas, and *Lloyd Davidson,* with whom *Messrs. Gerald C. Mann,* Attorney General, *Dan W. Jackson,* and *C. K. Bullard* were on the brief, for appellee.

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal under § 237 (a) of the Judicial Code, as amended, 28 U. S. C. § 344, to review a judgment of the Court of Criminal Appeals of Texas sustaining the

constitutionality of a Texas anti-trust law, and therefore upholding an indictment under it. Appellant was charged with participation in a conspiracy to fix the retail price of beer. Such a conspiracy is made a criminal offense by Title 19, Chapter 3, of the Texas Penal Code. Because the provisions of this law do not "apply to agricultural products or live stock in the hands of the producer or raiser," Art. 1642, Tigner challenged the validity of the entire statute and sought release in the local courts by *habeas corpus*. His claim has been rejected by the Texas Court of Criminal Appeals. 132 S. W. 2d 885. Essentially his contention is that the exemption granted by the Texas statute falls within the condemnation of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, as offensive to "the equal protection of the laws" which the Fourteenth Amendment safeguards. If that case controls, appellant contends, the Texas Act cannot survive and he must go free.

The court below recognized that the exemption was identical with that deemed fatal to the Illinois statute involved in *Connolly's* case. But it felt that time and circumstances had drained that case of vitality, leaving it free to treat the exemption as an exercise of legislative discretion. A similar attitude has been reflected by the Supreme Court of Wisconsin, *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, 593; 197 N. W. 936, and appears to underlie much recent state and federal legislation. Dealing as we are with an appeal to the Constitution, the *Connolly* case ought not to foreclose us from considering this exemption in its own setting.

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups.[1] These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.[2]

Since *Connolly's* case was decided, nearly forty years ago, an impressive legislative movement bears witness to

[1] See 2 Beard, The Rise of American Civilization, pp. 254–343; Buck, The Granger Movement, *passim;* Hicks, The Populist Revolt, *passim;* Sheldon, Populism in the Old Dominion, pp. 17–20. Compare the letter of Mr. Justice Miller in Fairman, Mr. Justice Miller and the Supreme Court, p. 67. For the background of the Texas legislation see Finty, Anti-Trust Legislation in Texas, a collection of articles published in the Galveston News during the summer of 1916; Nutting, The Texas Anti-Trust Law: A Post-Mortem 14 Tex. L. Rev. 293.

[2] See Seager and Gulick, Trust and Corporation Problems, pp. 149–95, 339–85.

general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned coöperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. See, e. g., Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291; Clayton Act, 38 Stat. 730, 731, 15 U. S. C. § 17; § 101 (1) of the Internal Revenue Code, 53 Stat. 33. Such expressions of legislative policy have withstood challenge in the courts. *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71.[3] Congress and the states have sometimes thought it necessary to control the supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533; *Nebbia* v. *New York,* 291 U. S. 502.

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws.[4] These vari-

[3] The state court cases are collected in *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 563–64. See Hanna, Law of Cooperative Marketing Associations, pp. 26–111. Compare *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 418; *International Harvester Co.* v. *Missouri,* 234 U. S. 199; *Aero Transit Co.* v. *Georgia Comm'n,* 295 U. S. 285.

[4] See, for instance, the findings and declarations of policy embodied in the Agricultural Adjustment Act of 1938, 52 Stat. 31, 120, 202, 215, 586, 775. Compare Seager and Gulick, *op. cit. supra,* note 2, pp. 322–23; Black, Agricultural Reform in the United States, pp. 1–61, 337–49; Nourse, Davis and Black, Three Years of the Agricultural Adjustment Administration, *passim;* Nourse, Marketing Agreements Under the A.A.A., pp. 315–49. Compare, as to railroad and express consolidations, § 5 (8) of the Interstate Commerce Act as amended, 41 Stat. 456, 482, 49 U. S. C. § 5 (8); as to bituminous coal, see § 4, I (d) of the Bituminous Coal Act of 1937, 50 Stat. 72, 77.

ous measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly—the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. Title 126, Revised Civil Statutes. From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences

substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors.[5] In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, and, in the case of shipping combinations, by the Merchant Marine Act, *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies.[6] When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained

[5] See the Sherman Law, as amended, and supplementary enactments, in 15 U. S. C. §§ 1, 2, 4, 6, 9, 11, 15, 16, 21, 23, 25, 26.

[6] See Nutting *op. cit. supra*, note 1, pp. 296–97. For the remedies now prevailing, see Texas Penal Code, Art. 1635, 1637, 1638; Revised Civil Statutes, Art. 7428–7437.

the validity of the statute. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401.

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

Affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment below should be reversed.

UNITED STATES *v.* SOCONY-VACUUM OIL CO., INC. ET AL.*

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

No. 346. Argued February 5, 6, 1940.—Decided May 6, 1940.

1. Agreements to fix prices in interstate commerce are unlawful *per se* under the Sherman Act; and no showing of so-called competitive abuses or evils which the agreements were designed to eliminate or alleviate may be interposed as a defense. Pp. 210, 218.
2. Numerous oil companies and individuals were convicted under an indictment alleging that, in violation of § 1 of the Sherman Act, they conspired to raise and maintain spot market prices of gasoline, and prices to jobbers and consumers in the "Midwestern Area," embracing many States, by buying up "distress" gasoline on the spot markets and eliminating it as a market factor. In support of allegations of the indictment, there was evidence to prove that the defendants, with intent to raise and maintain prices, devised and carried out an organized program of regularly ascertaining the amounts of surplus spot market gasoline, of assigning its sellers to buyers who were in the combination, and of purchasing it at fair going market prices, and that this process, by removing part of the spot market supply, was at least a contributing factor in stabilizing the spot market and thereby causing an increase of prices, so that jobbers and consumers in the midwestern area paid more for their gasoline than they would have paid but for the conspiracy, their prices being geared to spot market prices. *Held:*

   (1) It is immaterial to the question of guilt that other factors also may have contributed to the rise and stability of the markets and that competition on the spot markets was not entirely eliminated. P. 219.

   (2) The elimination of so-called competitive evils is no legal justification for such buying programs. So far as price-fixing agreements are concerned the Act establishes one uniform rule applicable to all industries alike. P. 220.

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*Together with No. 347, *Socony-Vacuum Oil Co., Inc. et al.* v. *United States,* also on writ of certiorari (308 U. S. 540) to the Circuit Court of Appeals for the Seventh Circuit.

(3) Even though the members of the price-fixing group were in no position to control the market, yet to the extent that they raised, lowered, fixed, pegged, or stabilized prices they would be directly interfering with the free play of market forces. P. 221.

(4) There was no error in the refusal to charge that, in order to convict, the jury must find that the resultant prices were raised and maintained at "high, arbitrary and non-competitive levels." A charge in the indictment to that effect was surplusage. P. 222.

(5) Nor is it important that the prices paid by the combination were not fixed in the sense of being uniform and inflexible. P. 222.

(6) A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se* under the Act. P. 223.

(7) Where the means for price-fixing are purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the market, power to fix prices may be found to exist though the combination does not control a substantial part of the commodity. P. 224.

(8) Price-fixing agreements may have effective influence over the market, and utility to members of the conspiracy group, though the power possessed or exerted by the combination falls far short of domination and control. The Sherman Act is not concerned solely with monopoly power. P. 224.

(9) Proof that a combination was formed for the purpose of fixing prices, and that it caused them to be fixed or contributed to that result, is proof of the completion of a price-fixing conspiracy under § 1 of the Act. P. 224.

(10) A conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. P. 225n.

(11) Under the National Industrial Recovery Act, 48 Stat. 195, a price-fixing agreement could be exempted from the provisions of the Sherman Act only through the code machinery with the approval of the President as provided in §§ 3 (a) and 5; mere knowledge, acquiescence or tacit approval by government employees would not suffice. Pp. 225–227.

(12) A practice contrary to the Sherman Act, even if approved under the National Industrial Recovery Act, became unlawful when continued after the expiration of the Recovery Act. P. 227.

(13) The fact that the buying program in this case may have been consistent with the general objectives of the National Industrial Recovery Act is irrelevant to its legality under the Sherman Act, where the method provided by Congress for alleviating the penalties of the Sherman Act was not followed. P. 227.

(14) Offers of proof by defendants to show that by their buying program they had not raised spot market prices of gasoline to an artificial, non-competitive level, *held* properly denied as immaterial. P. 229.

(15) Offers of proof by defendants to establish and evaluate other contributing causes for price rise and market stability during the indictment period, *held* properly denied, as cumulative and collateral. A trial court has a wide range of discretion in the exclusion of such evidence. P. 229.

3. In a trial under the Sherman Act, where much evidence had been given of general economic conditions before and during the indictment period, the defense offered further evidence of market conditions antedating that period, introduction of which would have complicated the case, confused the jury possibly, and protracted an already lengthy trial, *held* that refusal of the offers was not ground for a new trial, matters of substance not being affected. P. 229.
4. Use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge and no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. Pp. 231, 233.
5. Grand jury testimony is ordinarily confidential. But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. Pp. 233–234.
6. Permission to use grand jury testimony to refresh the memories of witnesses in a criminal case is not ground for a new trial, even if erroneous, where it was clearly not prejudicial and did not affect substantial rights of the defendant. Jud. Code, § 269. P. 235.
7. In the absence of exceptional circumstances, improper remarks made by a prosecuting attorney in his argument to the jury in a criminal trial, are not ground for a new trial if they were not objected to at the time. Pp. 237, 238–239.

8. It is not improper in a Sherman Act case to discuss corporate power, its use and abuse, relevantly to the issues; for the subject is material to the philosophy of that Act, and its purposes and objectives are clearly legitimate subjects for discussion before the jury. P. 239.
9. Appeals to class prejudice in argument to a jury are highly improper and can not be condoned and trial courts should ever be alert to prevent them. P. 239.
10. Although some of the remarks made to the jury by government counsel in argument of this case appealed to class prejudice, were undignified and intemperate, and did not comport with the standards of propriety expected of a prosecutor, they are, in the particular circumstances, not regarded as prejudicial but as minor aberrations in a prolonged trial of a strong case which could not have influenced the minds of jurors. P. 239.
11. Statements made in argument to the jury by government counsel in a prosecution under the Sherman Act to the effect that it was the wish and desire of the highest officials in the Government to have the defendants convicted, *held* not ground for a new trial, because the defendants had sought to justify their activities as done with government approval and because the statements were but casual episodes in a long summation and not at all reflective of the quality of the argument as a whole. Pp. 241–242.
12. Assertions of personal knowledge, made in argument to the jury by government counsel, *held* not prejudicial, where they related to a matter irrelevant to the case and, upon objection, were withdrawn and the jury instructed to disregard them. P. 242.
13. The granting of a new trial to some of the defendants convicted of a conspiracy does not require that a new trial be granted to the others, where participation by the former was not necessary to the existence of the crime charged and the jury was instructed that it could convict any of the defendants found to have been members of the combination and that it need not convict all or none. Pp. 243, 246.
14. In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not *per se* reversible error. After the jury's verdict has been set aside as respects some of the alleged co-conspirators, those remaining can not seize on that action as ground for the granting of a new trial to them, unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. P. 247.

15. As a general rule, neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. P. 247.
16. A denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence is not subject to review. P. 248.
17. Where an indictment charges various means by which a conspiracy is to be effectuated, not all of them need be proved. P. 249.
18. Where a price-fixing conspiracy, violating the Sherman Act, embraced, at least by clear implication, the making of sales at advanced prices to jobbers and consumers in a wide area, *held* that prosecution would lie in a judicial district within that area and within which such sales were made by any of the conspirators, though the conspiracy was formed elsewhere. P. 250.
19. Conspiracies under the Act are not dependent on the doing of any act other than the act of conspiring, as a condition of liability. P. 252.

105 F. 2d 809, reversed.

CERTIORARI, 308 U. S. 540, on cross-petitions, to review the rulings of the court below in a case involving the indictment and conviction of corporations and individuals for a conspiracy in violation of § 1 of the Sherman Anti-Trust Act. The opinion of the District Court is reported in 23 F. Supp. 937.

Mr. John Henry Lewin and *Assistant Attorney General Arnold,* with whom *Solicitor General Jackson* and *Messrs. Charles H. Weston* and *Grant W. Kelleher* were on the brief, for the United States.

A combination formed for the purpose of controlling the market price of a commodity and possessing the power to make its control effective raises such danger of evil consequences which the Sherman Act was intended to prevent, that it falls within the direct condemnation of the statute and can not be removed by collateral considerations urged in justification of the restraint. *United States* v. *Trenton Potteries Co.,* 273 U. S. 392.

While the Act has been interpreted as forbidding only unreasonable restraints of trade and while this concept is of value in many situations where the nature of the restraint is such that the application of the statute is doubtful, the concept does not compel the conclusion that there are no restraints which *ipso facto* come within the condemnation of the Act.

Since the price control exercised by the defendants entailed the same consequences as those flowing from an agreement by a dominant group in an industry to sell at uniform minimum prices, the fact that the machinery of price control was different is immaterial.

The court below assumed that the combination was to eliminate a competitive evil, and it said that the *Trenton Potteries* case did not bar defense of the reasonableness of the restraint upon this ground. The former conclusion is inconsistent with the jury's factual determination, and the latter resulted from failure to appreciate that in the *Trenton Potteries* case defense of reasonableness upon the very ground mentioned was presented and rejected.

The belief that the present combination destroyed competition only as to the gasoline which the defendants purchased from the independent refiners is erroneous. The jury's findings, made upon ample evidence, that the defendants intended to, possessed the power to, and did, raise and fix spot market prices, establish that the purpose and effect of the combination was to render the entire spot market a rigged, artificial, and noncompetitive market, in which price was not the product of a free play of competitive forces, but was the product of purposeful control, attained through combination. The destruction of competition was therefore as wide and as broad as the market itself.

In a lengthy trial, involving a wide range of inquiry and a great mass of evidence, a new trial will not be

ordered on technical errors as to the admissibility of evidence which do not affect matters of substance.

Excluded evidence relating to conditions in the petroleum industry was merely cumulative. Excluded evidence relating to encouragement of or acquiescence in defendant's activities by government officers was indirect, remote, and circumstantial, and concerned a largely irrelevant issue. Excluded evidence offered to show that gasoline prices during the conspiracy period were not artificially high or noncompetitive was only remotely related to the real issues in the case and its admission would have raised collateral factual issues tending to confuse the jury and unduly prolong the trial.

All of the government's important witnesses were closely allied with the corporate defendants and were evasive and hostile. Over 84 per cent. of the attempts to refresh their recollection by reference to grand jury testimony failed, and no affirmative testimony of any importance was elicited in this way. Refusal to allow defense counsel to inspect the grand jury transcript was not reversible error.

Attempted refreshment by reading from a transcript not authenticated was not error. The trial court duly warned the jury to ignore the grand jury testimony and it exercised close supervision over the manner in which this testimony was used.

It is immaterial that the grand jury testimony was not strictly contemporaneous with the events to which it related.

The culling from argument of great length of the remarks most likely to appear objectionable and the assemblage of these remarks, isolated from their context, give a totally misleading impression of the effect produced upon the jury by the argument as a whole. Clearly there was not here that "pronounced and persistent" misconduct of counsel which, at least if the evidence against the

defendant was weak, will be assumed to have prejudiced the cause of the accused.

Substantially all of the remarks now alleged to be prejudicial either were not objected to at the time they were made or corrective action was taken by the trial court.

When producers agree to sell their product at uniform prices, their sales are acts in furtherance of the conspiracy and give the court in a district where sales are made jurisdiction to try the offense. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 403–404. The defendants' sales in the trial district at the artificially raised and maintained prices are likewise acts in furtherance of this conspiracy and gave the court there jurisdiction to try the offense.

The charge of the indictment against respondents is separate from, and independent of, the charge against the trade journal defendants, that they guiltily participated by publishing false spot market prices. This charge constitutes only a subordinate means for the effectuation of the conspiracy and is a nonessential allegation since several other means were alleged and proved.

The program for concerted buying by majors of gasoline of independent refiners is the principal means for effectuating the conspiracy set forth in the indictment.

There was no material variance between the indictment and the proof.

The district court's award of a new trial to another corporate defendant did not have the effect of retroactively invalidating the jury's verdict against respondents. The district court denied Standard of Indiana's motion for a directed verdict. Its motion for a new trial was granted upon the ground that there was "good reason to believe" that it had not had "an adequate separate consideration" of its defense. These rulings constituted an adjudication that the evidence was sufficient to war-

rant the jury in finding that Standard of Indiana was a party to the conspiracy. It follows, therefore, that when the jury, in passing upon the question of the power of the defendants to raise and fix prices, did so in the light of Standard of Indiana being a party to the conspiracy, the jury's determination of the issue of power was made on the basis of adequate and sufficient evidence as to all matters involved in its determination of this issue and the jury's determination was not only free from fundamental error, it was free from error of any kind.

The ground upon which Standard of Indiana was granted a new trial would seem to be a doubtful one and it was certainly one which involved exercise of the discretion vested in trial courts in passing upon motions for new trial. Since respondents' claim to a new trial rests on the fact that the district court determined that Standard of Indiana was entitled to a new trial and since this was a purely discretionary ruling, respondents' claim to a new trial, which can not be superior to the claim on which it rests, must likewise lie within the realm of discretion. Nothing is better settled than that the exercise of the trial court's discretion in passing upon a motion for a new trial will not be reviewed by an appellate court unless the trial court erroneously concluded that it did not have jurisdiction of the motion or of the grounds advanced in support thereof.

Respondents did not present to the district court this ground upon which they now urge that they are entitled to new trials. Their failure bars them from obtaining review by an appellate court.

Mr. William J. Donovan, with whom *Messrs. Ralstone R. Irvine, Herbert H. Thomas, Harry S. Ridgely, Hiram E. Wooster, Louis Mead Treadwell, Goldthwaite H. Dorr, Charles A. Frueauff, Theodore W. Brazeau, Dan Moody, William H. Zwick, James J. Cosgrove, Charles I.*

Francis, Samuel A. Mitchell, Truman Post Young, Roy T. Osborn, Thomas T. Cooke, J. C. Denton, Rayburn L. Foster, W. P. Z. German, A. F. Molony, Ralph Horween, and *Samuel Topliff* were on the brief, for respondents in No. 346 and petitioners in No. 347.

On no less than twelve different occasions the trial court instructed the jury to return verdicts of guilty if it found that the respondents had contributed in any degree to the rise in gasoline prices. It will be noted that these instructions are not concerned with whether the respondents maintained prices at controlled levels, or whether they substituted an agreed-on price for a competitive price. The sole test of legality which the instructions lay down is whether the purpose or effect of the respondents' acts was to raise prices to any extent.

The Government concedes that "The defendants . . . offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to distress material, the removal of which did not suppress normal competition on the spot markets; . . ." Obviously, the elimination of a competitive abuse such as distress gasoline may tend to stabilize the industry and to produce fairer price levels. The instructions of the trial court, therefore, required a finding of guilty even though the jury believed that the respondents' activities had been limited to the elimination of distress gasoline and that the removal of such gasoline "did not suppress normal competition on the spot markets."

This Court has repeatedly held that concerted action to eliminate abuses which distort the normal play of competition is not to be condemned merely because the purpose or effect of the agreement may be to stabilize or raise prices. *United States* v. *American Tobacco Co.,* 221 U. S. 106; *United States* v. *Union Pacific Railroad Co.,* 226 U. S. 61; *Nash* v. *United States,* 299 U. S. 373, 376;

American Column & Lumber Co. v. *United States,* 257 U. S. 377; *Charles A. Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Maple Flooring Manufacturers Assn.* v. *United States,* 268 U. S. 563; *Cement Manufacturers Protective Assn.* v. *United States,* 268 U. S. 588, 603, 604; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Window Glass Mfrs. Assn.* v. *United States,* 263 U. S. 403, 413; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 175, 179; *Appalachian Coals* v. *United States,* 288 U. S. 344.

This Court has held that the legality of a combination such as is here presented can be determined only in the light of evidence showing "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained . . ." *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238.

The trial court in this case erred repeatedly in excluding evidence offered by the respondents which was clearly relevant under the above rule. In many cases the evidence was necessary to show the background of the industry and the reasons for the respondents' acts. In others it bore directly upon the question of what was their purpose. In others it tended to prove that the price of gasoline was not, as alleged by the Government, arbitrary and noncompetitive during the indictment period. In many instances the evidence should have been submitted to the jury not only as direct proof of the matters in question, but in order to rebut inferences which the Government sought to draw from fragmentary evidence.

The Government concedes that "there was a wealth of evidence from which opposing factual inferences could be drawn." Under these circumstances it was imperative

that the jury have before it all of the surrounding facts and circumstances upon which the proper inferences depended.

The trial court committed reversible error in using and permitting Government counsel to use alleged transcripts of testimony before the grand jury in the examination of important witnesses. The witnesses upon whom the Government principally relied to establish its case were employees of various of the respondents. Government counsel endeavored consistently throughout the trial, by reading from and referring to certain "alleged grand jury minutes," to persuade the jury that these witnesses were under pressure to avoid incriminating their employers. This persistent effort had a threefold purpose and effect: (1) to magnify the significance of any testimony of these witnesses detrimental to the defendants; (2) to suggest the existence of additional facts not covered by any testimony and even more detrimental to the defendants; and (3) to prejudice the respondents by persuading the jury that they would suborn perjury to avoid discovery of their alleged unlawful acts.

The court erroneously denied respondents the right to inspect the alleged transcripts of testimony before the grand jury to determine the accuracy of the alleged quotations and the statements of Government counsel with respect thereto.

The court erroneously permitted Government counsel to read from alleged grand jury testimony and from notes alleged to have been made from grand jury testimony which were not properly authenticated nor their accuracy sufficiently established.

The court repeatedly read and permitted Government counsel to read from the alleged transcripts of testimony before the grand jury under circumstances which undoubtedly led the jury to conclude that such alleged grand jury testimony was affirmative evidence in the case. In some

instances it can be shown from the record that statements so read from the alleged transcripts were not true.

The court repeatedly permitted Government counsel to read in the presence of the jury alleged grand jury testimony for the purported purpose of refreshing the witness's recollection, although it appeared from the record that such alleged testimony was not given contemporaneously with the occurrence to which it related.

In their closings to the jury, Government counsel made arguments which plainly constituted appeals to passion and class distinction, all tending to induce the jury to disregard the record evidence and to base their verdict upon such improper appeals.

In addition Government counsel, for the purpose of demonstrating to the jury that the entire testimony of a key witness for the respondents was unworthy of belief, resorted to assertions of personal knowledge which not only were not supported by the record, but were not correct.

The granting of motions for new trials to non-appealing defendants required the granting of similar motions to respondents.

The possession of the power to raise or affect market prices arbitrarily was a fundamental issue in this case.

By their verdict of January 22, 1938, the jury found that 16 corporations and 30 individuals had conspired, as charged, and that they collectively possessed the power to execute the conspiracy. Thereafter, on July 19, 1938, the court discharged one corporation and 10 individuals and granted new trials to 3 corporations and 15 individuals. One of the corporations granted a new trial, Standard of Indiana, alone possessed such power as would make it impossible for any group to raise prices in the Midwestern area without its agreement and coöperation.

It follows that the fundamental issue of whether the respondents possessed the power to raise or affect prices arbitrarily, never received the consideration of the jury. The jury's finding that the entire group possessed such power by no means carried the implication that, if permitted, the jury would likewise have found that respondents, acting alone, possessed such power. Moreover, the error can not be cured by pointing to some evidence which would have supported such a finding, if made. There must be a jury finding, not a finding by the court, upon this issue.

There was a fatal variance between the allegations of the indictment and the proof. The Government failed completely to establish the allegation that the respondents (1) bought gasoline at prices higher than those paid by jobbers in the competitive spot market, and (2) fraudulently misrepresented and published such prices in the market journal quotations as prices paid by jobbers. The proof affirmatively showed the contrary.

The record contains no substantial, competent evidence that the combination either in purpose or effect unreasonably restrained trade within the meaning of the Sherman Law.

The record shows that for several years prior to the indictment period the distress of the oil industry was so acute as to call for remedial concerted action. It also shows that this condition was recognized not only by the industry, but by the state and federal governments. There was no dispute as to these facts.

The situation was caused primarily by two abnormal and destructive competitive practices, resulting in surplus crude oil and surplus gasoline as a distress product.

Faced with these conditions the respondents engaged in a voluntary coöperative effort to remove one of these competitive evils—distress gasoline. The substance of

what was accomplished and agreed upon was that the major companies would purchase from independent refiners the latter's surplus gasoline at going market prices.

The court below erred as a matter of law in holding that the reasonableness of the activities of the defendants was a jury question solely because the plan was "placed in operation with the results revealed." A plan or agreement which has been put into operation may be as unobjectionable as one which is still executory. In either case the question on appeal is whether the facts and circumstances are as consistent with the innocence of the defendants as with their guilt.

The record shows that the only acts done within the Western District of Wisconsin in this case were (a) the execution of contracts with jobbers whereunder the price was determined by reference to the spot tank car market quotations in the market journals; (b) delivery of gasoline to jobbers under such contracts; and (c) sales to retail dealers and consumers at prices which were affected by prices on the spot tank car market.

An overt act must be an act done within the scope of the agency created by the illegal "partnership" or conspiracy agreement.

There is nothing in the record to show that the agreement among the respondents contemplated any restriction upon their freedom in selling gasoline within the Western District of Wisconsin.

The mere removal of distress gasoline from the competitive market would obviously result in a more normal price, not because of the absence of competition, but by reason of it. The undisputed testimony is that this was all the respondents hoped to accomplish, and the record shows that in fact this was all that resulted.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondents [1] were convicted by a jury,[2] 23 F. Supp. 937, under an indictment charging violations of § 1 of the Sherman Anti-Trust Act,[3] 26 Stat. 209; 50 Stat. 693.

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[1] The indictment charged 27 corporations and 56 individuals with violations of § 1 of the Sherman Law. There were brought to trial 26 corporations and 46 individuals. Prior to submission of the case to the jury the court discharged, directed verdicts of acquittal, or dismissed the indictment as to 10 of the corporations and 16 of the individuals. The jury returned verdicts of guilty as to the remaining 16 corporations and 30 individuals. Thereafter the trial court ordered new trials as to 3 corporations and 15 individuals and granted judgment *non obstante veredicto* to one other corporation and 10 other individuals. *United States* v. *Stone*, 308 U. S. 519. For the opinions of the District Court on that phase of the case, see 23 F. Supp. 937, 938–939; 24 F. Supp. 575; and for the opinion of the Circuit Court of Appeals, 101 F. 2d 870.

The respondents are the remaining 12 corporations and 5 individuals, viz., Socony-Vacuum Oil Company, Inc., Wadhams Oil Company, Empire Oil and Refining Company, Continental Oil Company, The Pure Oil Company, Shell Petroleum Corporation, Sinclair Refining Company, Mid-Continent Petroleum Corporation, Phillips Petroleum Company, Skelly Oil Company, The Globe Oil & Refining Company (Oklahoma), The Globe Oil & Refining Company (Illinois), C. E. Arnott, vice president of Socony-Vacuum, H. T. Ashton, manager of Lubrite Division of Socony-Vacuum, R. H. McElroy, Jr., tank-car sales manager of Pure Oil, P. E. Lakin, general manager of sales of Shell, R. W. McDowell, vice president in charge of sales of Mid-Continent.

[2] Each of the corporations was fined $5,000; each individual, $1,000.

[3] Sec. 1 provides:

"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: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The Circuit Court of Appeals reversed and remanded for a new trial. 105 F. 2d 809. The case is here on a petition and cross-petition for certiorari, both of which we granted because of the public importance of the issues raised. 308 U. S. 540.

I. *The Indictment.*

The indictment was returned in December 1936 in the United States District Court for the Western District of Wisconsin. It charges that certain major oil companies,[4] selling gasoline in the Mid-Western area[5] (which includes the Western District of Wisconsin), (1) "combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline" in the "spot markets" in the East Texas[6] and Mid-Continent[7] fields; (2) "have artificially raised and fixed said spot market tank car prices of gasoline and have maintained said prices at artificially high and non-competitive levels, and at levels agreed upon among them and have thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area"; (3) "have arbitrarily," by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price, "exacted large sums of money from thousands of jobbers with

[4] The major oil companies, in the main, engage in every branch of the business—owning and operating oil wells, pipe-lines, refineries, bulk storage plants, and service stations. Those engaging in all such branches are major integrated oil companies; those lacking facilities for one or more of those branches are semi-integrated. "Independent refiners" describes companies engaged exclusively in refining.

[5] Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin.

[6] Located in the north, eastern part of Texas.

[7] Described as including Oklahoma, the northern and western portions of Texas, the southern and eastern portions of Kansas, the southern portion of Arkansas, the northern portion of Louisiana.

whom they have had such contracts in said Mid-Western area"; and (4) "in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area."

The *manner* and *means* of effectuating such conspiracy are alleged in substance as follows: Defendants, from February 1935 to December 1936 "have knowingly and unlawfully engaged and participated in two concerted gasoline buying programs" for the purchase "from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields at uniform, high, and at times progressively increased prices." The East Texas buying program is alleged to have embraced purchases of gasoline in spot transactions from most of the independent refiners in the East Texas field, who were members of the East Texas Refiners' Marketing Association, formed in February 1935 with the knowledge and approval of some of the defendants "for the purpose of selling and facilitating the sale of gasoline to defendant major oil companies." It is alleged that arrangements were made and carried out for allotting orders for gasoline received from defendants among the members of that association; and that such purchases amounted to more than 50% of all gasoline produced by those independent refiners. The Mid-Continent buying program is alleged to have included "large and increased purchases of gasoline" by defendants from independent refiners located in the Mid-Continent fields pursuant to allotments among themselves. Those purchases, it is charged, were made from independent refiners who were assigned to certain of the defendants at monthly meetings of a group representing defendants. It is alleged that the purchases in this buying program amounted to nearly 50% of all gasoline sold by those independents. As respects both the East Texas and the Mid-Continent buying programs, it is alleged that the purchases of gasoline were in excess of the amounts which defendants would have

purchased but for those programs; that at the instance of certain defendants these independent refiners curtailed their production of gasoline.

The independent refiners selling in these programs were named as co-conspirators, but not as defendants.

Certain market journals—Chicago Journal of Commerce, Platt's Oilgram, National Petroleum News—were made defendants.[8] Their participation in the conspiracy is alleged as follows: that they have been "the chief agencies and instrumentalities" through which the wrongfully raised prices "have affected the prices paid by jobbers, retail dealers, and consumers for gasoline in the Mid-Western area," that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in these buying programs, while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers."

Jurisdiction and *venue* in the Western District of Wisconsin are alleged as follows: that most of defendant major oil companies have sold large quantities of gasoline in tank car lots to jobbers in that district at the "artificially raised and fixed and non-competitive prices"; that they have "solicited and taken contracts and orders" for

[8] Two individuals connected with those journals were also made defendants. One of the individuals was not brought to trial. At the close of the government's case the indictment was dismissed, on motion of the government, as against the other four trade journal defendants.

gasoline in that district; and that they have required retail dealers and consumers therein "to pay artificially increased prices for gasoline" pursuant to the conspiracy.

The methods of marketing and selling gasoline in the Mid-Western area are set forth in the indictment in some detail. Since we hereafter develop the facts concerning them, it will suffice at this point to summarize them briefly. Each defendant major oil company owns, operates or leases retail service stations in this area. It supplies those stations, as well as independent retail stations, with gasoline from its bulk storage plants. All but one sell large quantities of gasoline to jobbers in tank car lots under term contracts. In this area these jobbers exceed 4,000 in number and distribute about 50% of all gasoline distributed to retail service stations therein, the bulk of the jobbers' purchases being made from the defendant companies. The price to the jobbers under those contracts with defendant companies is made dependent on the spot market price, pursuant to a formula hereinafter discussed. And the spot market tank car prices of gasoline directly and substantially influence the retail prices in the area. In sum, it is alleged that defendants by raising and fixing the tank car prices of gasoline in these spot markets could and did increase the tank car prices and the retail prices of gasoline sold in the Mid-Western area. The vulnerability of these spot markets to that type of manipulation or stabilization is emphasized by the allegation that spot market prices published in the journals were the result of spot sales made chiefly by independent refiners of a relatively small amount of the gasoline sold in that area—virtually all gasoline sold in tank car quantities in spot market transactions in the Mid-

Western area being sold by independent refiners, such sales amounting to less than 5% of all gasoline marketed therein.

So much for the indictment.

II. *Background of the Alleged Conspiracy.*

Evidence was introduced (or respondents made offers of proof) showing or tending to show the following conditions preceding the commencement of the alleged conspiracy in February 1935. As we shall develop later, these facts were in the main relevant to certain defenses which respondents at the trial unsuccessfully sought to interpose to the indictment.

Beginning about 1926 there commenced a period of production of crude oil in such quantities as seriously to affect crude oil and gasoline markets throughout the United States. Overproduction was wasteful, reduced the productive capacity of the oil fields and drove the price of oil down to levels below the cost of production from pumping and stripper [9] wells. When the price falls below such cost, those wells must be abandoned. Once abandoned, subsurface changes make it difficult or impossible to bring those wells back into production. Since such wells constitute about 40% of the country's known oil reserves, conservation requires that the price of crude oil be maintained at a level which will permit such wells to be operated. As Oklahoma and Kansas were attempting to remedy the situation through their proration laws, the largest oil field in history was discovered in East Texas. That was in 1930. The supply of oil from this

[9] Described by one witness as "wells that have gotten down to less than 5 barrels a day, and in some cases down to less than a barrel a day, so that they only have to be pumped, sometimes, an hour or two a day to get all the oil they will produce at that stage of the game."

field was so great that at one time crude oil sank to 10 or 15 cents a barrel, and gasoline was sold in the East Texas field for 2⅛¢ a gallon. Enforcement by Texas of its proration law was extremely difficult. Orders restricting production were violated, the oil unlawfully produced being known as "hot oil" and the gasoline manufactured therefrom, "hot gasoline." Hot oil sold for substantially lower prices than those posted for legal oil. Hot gasoline therefore cost less and at times could be sold for less than it cost to manufacture legal gasoline. The latter, deprived of its normal outlets, had to be sold at distress prices. The condition of many independent refiners using legal crude oil was precarious. In spite of their unprofitable operations they could not afford to shut down, for if they did so they would be apt to lose their oil connections in the field and their regular customers. Having little storage capacity they had to sell their gasoline as fast as they made it. As a result their gasoline became "distress" gasoline—gasoline which the refiner could not store, for which he had no regular sales outlets and which therefore he had to sell for whatever price it would bring. Such sales drove the market down.

In the spring of 1933 conditions were acute. The wholesale market was below the cost of manufacture. As the market became flooded with cheap gasoline, gasoline was dumped at whatever price it would bring. On June 1, 1933, the price of crude oil was 25¢ a barrel; the tank car price of regular gasoline was 2⅝¢ a gallon. In June 1933 Congress passed the National Industrial Recovery Act (48 Stat. 195). Sec. 9 (c) of that Act authorized the President to forbid the interstate and foreign shipment of petroleum and its products produced or withdrawn from storage in violation of state laws. By Executive Order the President on July 11, 1933, forbade such shipments. On August 19, 1933, a code of fair competi-

tion for the petroleum industry was approved.[10] The Secretary of the Interior was designated as Administrator of that Code. He established a Petroleum Administrative Board to "advise with and make recommendations" to him. A Planning and Coordination Committee was appointed, of which respondent Charles E. Arnott, a vice-president of Socony-Vacuum, was a member, to aid in the administration of the Code. In addressing that Committee in the fall of 1933 the Administrator said: "Our task is to stabilize the oil industry upon a profitable basis." Considerable progress was made. The price of crude oil was a dollar a barrel near the end of September 1933, as a result of the voluntary action of the industry,[11] but, according to respondents, in accordance with the Administrator's policy and desire. In April 1934 an amendment to the Code was adopted under which an attempt was made to balance the supply of gasoline with the demand by allocating the amount of crude oil which each refiner could process with the view of creating a firmer condition in the market and thus increasing the

[10] It provided for maximum hours of work and minimum rates of pay; forbade sales below cost; required integrated companies to conduct each branch of their business on a profitable basis; established, within certain limits, the parity between the price of a barrel of crude oil and a gallon of refined gasoline as 18.5 to 1; and authorized the fixing of certain minimum prices.

[11] An order of the Administrator fixing minimum prices never became effective. Respondents also made an offer of proof that the Petroleum Administrative Board endeavored, in the fall of 1933, to obtain voluntary action by the larger companies to acquire and hold large stocks of crude oil, said to be overhanging the market and in danger of depressing the price of refined gasoline. The offer of proof indicated that some purchases had been made but did not show the extent. Respondents offered to show, through testimony of the chairman of the Planning & Coordination Committee, that it was the desire of the Administrator that crude oil not fall below $1 a barrel.

price of gasoline.[12] This amendment also authorized the Planning and Coordination Committee, with the approval of the President, to make suitable arrangements for the purchase of gasoline from non-integrated or semi-integrated refiners and the resale of the same through orderly channels. Thereafter four buying programs were approved by the Administrator.[13] These permitted the major companies to purchase distress gasoline from the independent refiners. Standard forms of contract were provided. The evil aimed at was, in part at least, the production of hot oil and hot gasoline. The contracts (to at least one of which the Administrator was a party) were made pursuant to the provisions of the National Industrial Recovery Act and the Code and bound the purchasing company to buy fixed amounts of gasoline at designated prices [14] on condition that the seller

[12] The testimony of one of respondents' witnesses was that this policy caused the major companies to buy gasoline—in the main from small, non-integrated refiners.

[13] June 23, 1934; August 13, 1934; September 8, 1934; November 2, 1934. They apparently were short-lived, their legality having been questioned by the Department of Justice. Late in 1933 the industry proposed the formation of a National Petroleum Agency, of which twenty-three of the larger companies, including most of the corporate respondents, were to be members, "to purchase, hold and, in an orderly way, dispose of surplus gasoline which threatens the stability of the oil price structure." Subscriptions for a pool of nearly $9,000,000 were obtained. The plan was never put into operation. In May 1934 there was another voluntary plan (which was abortive), the Planning & Coordination Committee addressed a resolution to certain major companies calling upon each to purchase an amount of gasoline in May equal to 3% of their sales.

[14] Under the November 2, 1934 program the contract provided that the price to be paid for the gasoline purchased should increase ¼¢ per gallon with each 5¢ per barrel increase in the posted price of crude oil and should decrease ¼¢ per gallon with each 5¢ per barrel decrease in crude.

should abide by the provisions of the Code. According to the 1935 Annual Report of the Secretary of the Interior, these buying programs were not successful as "the production of gasoline from 'hot oil' continued, stocks of gasoline mounted, wholesale prices for gasoline remained below parity with crude-oil prices, and in the early fall of 1934 the industry approached a serious collapse of the wholesale market." [15] Restoration of the price of gasoline to parity with crude oil at one dollar per barrel was not realized.

The flow of hot oil out of East Texas continued. Refiners in the field could procure such oil for 35¢ or less a barrel and manufacture gasoline from it for 2 or 2½¢ a gallon. This competition of the cheap hot gasoline drove the price of legal gasoline down below the cost of production. The problem of distress gasoline also persisted. The disparity between the price of gasoline and the cost of crude oil which had been at $1 per barrel since September 1933 caused losses to many independent refiners, no matter how efficient they were. In October 1934 the Administrator set up a Federal Tender Board and issued an order making it illegal to ship crude oil or gasoline out of East Texas in interstate or foreign commerce unless it were accompanied by a tender issued by that Board certifying that it had been legally produced or manufactured. Prices rose sharply. But the improvement was only temporary as the enforcement of § 9 (c) of the Act was enjoined in a number of suits. On January 7, 1935, this Court held § 9 (c) to be unconstitutional. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. Following that decision there was a renewed influx of hot gasoline into the Mid-Western area and the tank car market fell.

[15] P. 37. Excerpts from this report were part of an offer of proof by respondents.

Meanwhile the retail markets had been swept by a series of price wars. These price wars affected all markets—service station, tank wagon, and tank car. Early in 1934 the Petroleum Administrative Board tried to deal with them—by negotiating agreements between marketing companies and persuading individual companies to raise the price level for a period. On July 9, 1934, that Board asked respondent Arnott, chairman of the Planning and Coordination Committee's Marketing Committee,[16] if he would head up a voluntary, coöperative movement to deal with price wars. According to Arnott, he pointed out that in order to stabilize the retail market it was necessary to stabilize the tank car market through elimination of hot oil and distress gasoline.[17] On July 20, 1934, the Administrator wrote Arnott, described the disturbance caused by price wars and said:

"Under Article VII, Section 3 of the Code it is the duty of the Planning and Coordination Committee to cooperate with the Administration as a planning and fair practice agency for the industry. I am, therefore, requesting you, as Chairman of the Marketing Committee of the Planning and Coordination Committee, to take action which we deem necessary to restore markets to their normal conditions in areas where wasteful competition has caused them to become depressed. The number and extent of these situations would make it impractical for the Petroleum Administrative Board acting alone to deal with each specific situation. Therefore, I am re-

[16] The Marketing Committee had an extensive organization of regional, state, local, or temporary committees, scattered throughout the country and representative of the various marketing elements in the industry.

[17] He also testified that the Board said that it could not tell him how to deal with the price wars but that it would authorize him to deal with "the elements [of] that conflict that cause them."

questing and authorizing you, as Chairman of the Marketing Committee, to designate committees for each locality when and as price wars develop, with authority to confer and to negotiate and to hold due public hearings with a view to ascertaining the elements of conflict that are present, and in a cooperative manner to stabilize the price level to conform to that normally prevailing in contiguous areas where marketing conditions are similar. Any activities of your Committee must, of course, be consistent with the requirements of Clause 2 of Sub-section (a) of Section III of the Act, . . ." [18]

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[18] Sec. 3 (a) of the Act read:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Section 5 provided:

"While this title is in effect (or in the case of a license, while section 4 (a) is in effect) and for sixty days thereafter, any code, agree-

After receiving that letter Arnott appointed a General Stabilization Committee with headquarters in Washington and a regional chairman in each region. Over fifty state and local committees were set up. The Petroleum Administrative Board worked closely with Arnott and the committees until the end of the Code near the middle of 1935. The effort (first local, then state-wide, and finally regional) was to eliminate price wars by negotiation and by persuading suppliers to see to it that those who bought from them sold at a fair price. In the first week of December 1934, Arnott held a meeting of the General Stabilization Committee in Chicago and a series of meetings on the next four or five days attended by hundreds of members of the industry from the middle west. These meetings were said to have been highly successful in elimination of many price wars. Arnott reported the results to members of the Petroleum Administrative Board on December 18, 1934, and stated that he was going to have a follow-up meeting in the near future. It was at that next meeting that the groundwork for the alleged conspiracy was laid.

III. *The Alleged Conspiracy.*

The alleged conspiracy is not to be found in any formal contract or agreement. It is to be pieced together from the testimony of many witnesses and the contents of over 1,000 exhibits, extending through the 3,900 printed pages of the record. What follows is based almost entirely on unequivocal testimony or undisputed contents of exhibits, only occasionally on the irresistible inferences from those facts.

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ment, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States."

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A. FORMATION OF THE MID-CONTINENT BUYING PROGRAM.

The next meeting of the General Stabilization Committee was held in Chicago on January 4, 1935, and was attended by all of the individual respondents, by representatives of the corporate respondents, and by others. Representatives of independent refiners, present at the meeting, complained of the failure of the price of refined gasoline to reach a parity with the crude oil price of $1 a barrel. And complaints by the independents of the depressing effect on the market of hot and distress gasoline were reported. Views were expressed to the effect that "if we were going to have general stabilization in retail markets, we must have some sort of a firm market in the tank car market." As a result of the discussion Arnott appointed a Tank Car Stabilization Committee [19] to study the situation and make a report, or, to use the language of one of those present, "to consider ways and means of establishing and maintaining an active and strong tank car market on gasoline." Three days after this committee was appointed, this Court decided *Panama Refining Co.* v. *Ryan, supra.* As we have said, there was evidence that following that decision there was a renewed influx of hot gasoline into the Mid-Western area with a consequent falling off of the tank car market prices.

The first meeting of the Tank Car Committee was held February 5, 1935, and the second on February 11, 1935. At these meetings the alleged conspiracy was formed, the substance of which, so far as it pertained to the Mid-Continent phase, was as follows:

It was estimated that there would be between 600 and 700 tank cars of distress gasoline produced in the Mid-

[19] This committee eventually was composed of respondents McDowell, Ashton and Lakin and five former defendants, who were either discharged or granted new trials.

Continent oil field every month by about 17 independent refiners. These refiners, not having regular outlets for the gasoline, would be unable to dispose of it except at distress prices. Accordingly, it was proposed and decided that certain major companies (including the corporate respondents) would purchase gasoline from these refiners. The Committee would assemble each month information as to the quantity and location of this distress gasoline. Each of the major companies was to select one (or more) of the independent refiners having distress gasoline as its "dancing partner," [20] and would assume responsibility for purchasing its distress supply. In this manner buying power would be coördinated, purchases would be effectively placed, and the results would be much superior to the previous haphazard purchasing. There were to be no formal contractual commitments to purchase this gasoline, either between the major companies or between the majors and the independents. Rather it was an informal gentlemen's agreement or understanding whereby each undertook to perform his share of the joint undertaking.

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[20] Respondent R. W. McDowell, a vice president of Mid-Continent, testified as follows respecting the origin and meaning of this term:

"The phrase 'dancing partners' came up right there after Mr. Ashton had gone around the room. There were these 7 or 8 small refiners whom no one had mentioned. He said this situation reminded him of the dances that he used to go to when he was a young fellow. He said, 'Here we are at a great economic ball.' He said, 'We have these major companies who have to buy gasoline and are buying gasoline, and they are the strong dancers.' And he said, 'They have asked certain people to dance with them. They are the better known independent refiners.' He said, 'Here are 7 or 8 that no one seems to know.' He said, 'They remind me of the wallflowers that always used to be present at those old country dances.' He said, 'I think it is going to be one of the jobs of this Committee to introduce some of these wallflowers to some of the strong dancers, so that everybody can dance.' And from that simile, or whatever you want to call it, the term 'dancing partner' arose."

Purchases were to be made at the "fair going market price."

A Mechanical Sub-Committee [21] was appointed to find purchasers for any new distress gasoline which might appear between the monthly meetings of the Tank Car Stabilization Committee and to handle detailed problems arising during these periods. It was agreed that any such attempt to stabilize the tank car market was hopeless until the flow of hot gasoline was stopped. But it was expected that a bill pending before Congress to prohibit interstate shipment of hot gasoline would soon be enacted which would deal effectively with that problem. Accordingly, it was decided not to put any program into operation until this bill had been enacted and became operative. It was left to respondent Arnott to give the signal for putting the program into operation after this had occurred.

The Connally Act (49 Stat. 30) became law on February 22, 1935. The enforcement agency under this Act was the Federal Tender Board which was appointed about March 1st. It issued its first tenders March 4th. On March 1st respondents Arnott and Ashton explained the buying program to a group of Mid-Continent independent refiners in Kansas City, who expressed a desire to coöperate and who appointed a committee to attend a meeting of the Tank Car Stabilization Committee in St. Louis on March 5th to learn more about the details. This meeting was held with the committee of the independents present at one of the sessions. At a later session that day the final details of the Mid-Continent buying program were worked out, including an assignment

[21] This was a committee of three of which respondent McDowell was chairman.

of the "dancing partners" among the major companies.[22] On March 6th Ashton telephoned Arnott and told him what had been accomplished at the St. Louis meeting. Later the same day Arnott told Ashton by telephone that the program should be put into operation as soon as possible, since the Federal Tender Board seemed to be cleaning up the hot oil situation in East Texas. Ashton advised McDowell, chairman of the Mechanical Sub-Committee, of Arnott's instructions. And on March 7th that committee went into action. They divided up the major companies; each communicated with those on his list, advised them that the program was launched, and suggested that they get in touch with their respective "dancing partners." Before the month was out all companies alleged to have participated in the program (except one or two) made purchases; 757 tank cars were bought from all but three of the independent refiners who were named in the indictment as sellers.

B. THE MID-CONTINENT BUYING PROGRAM IN OPERATION.

No specific term for the buying program was decided upon, beyond the first month. But it was started with the hope of its continuance from month to month. And in fact it did go on for over a year, as we shall see.

The concerted action under this program took the following form:

The Tank Car Stabilization Committee had A. V. Bourque, Secretary of the Western Petroleum Refiners'

[22] The list of the independent refiners having the distress gasoline was read and the majors made their selections—some on the basis of prior business dealings, some on the basis of personal friendships, some because of location, freight advantages, etc.

Association,[23] make a monthly survey, showing the amount of distress gasoline which each independent refiner would have during the month. From March 1935 through February 1936 that Committee met once a month. At these meetings the surveys showing the amount and location of distress gasoline were presented and discussed. They usually revealed that from 600 to 800 tank cars of distress gasoline would become available during the month. Each member of the Committee present would indicate how much his company would buy and from whom. Those companies which were not represented at the meetings were approached by the Mechanical Sub-Committee; "word was gotten to them as to the amount of gasoline that it was felt they could take in that month." Also, as we have stated, the Mechanical Sub-Committee would endeavor to find purchasers for any new distress gasoline which appeared between the meetings of the Tank Car Stabilization Committee. It would report such new surpluses to Bourque. The functions of the Mechanical Sub-Committee were apparently not restricted merely to dissemination of information to the buyers. One of its members testified that he urged the majors to buy more distress gasoline. Throughout, persuasion was apparently used to the end that all distress gasoline would be taken by the majors and so kept from the tank car markets. As the program progressed, most of the major companies continued to buy from the same "dancing partners" with whom they had started.

One of the tasks of the Mechanical Sub-Committee was to keep itself informed as to the current prices of

[23] Practically all of the independent refiners named in the indictment were members of this Association. C. M. Boggs, the president of the Association, and A. V. Bourque, its secretary, were named in the indictment as defendants. As to the former, a motion for directed verdict of acquittal was granted; as to the latter, the verdict of the jury was set aside and the indictment dismissed.

gasoline and to use its persuasion and influence to see to it that the majors paid a fair going market price and did not "chisel" on the small refiners. It did so. At its meetings during the spring of 1935 the question of the fair going market price was discussed. For example, Jacobi, a member of the Sub-Committee, testified that at the meeting of March 14, 1935, "the subcommittee . . . arrived at what we thought was a fair market price for the week following," viz. 3¾¢ and 4¾¢.[24] Jacobi termed these prices arrived at by the Sub-Committee as the "recommended prices." He made it a practice of recommending these prices to the major companies with which he communicated. According to his testimony, those "recommendations" were represented by him to be not the Sub-Committee's but his own idea. McDowell testified that he never made any such price recommendations but if asked would tell the purchasing companies what his own company was paying for gasoline.[25] Up to June 7, 1935, price "recommendations" were made five or seven times, each time the "recommended" prices constituting a price advance of ⅛¢ or ¼¢ over the previous "recommendation." No more price "recommendations" were made in 1935. In January 1936 there was an advance in the price of crude oil. The members of the Sub-Committee discussed the price situation and concluded that an advance of ½¢ a gallon of gasoline purchased under the program should be made. Jacobi made that "recommendation" to the companies on his list.

[24] On March 15, 1935, Jacobi in a letter to his superiors wrote: "The writer has been busy this week on tank car stabilization work, and thus far results are gratifying. Our Committee decided on a price of 3¾¢ for third grade, and 4¾¢ for 'Q,' for next week. Purchasing companies, including our own units, are paying these prices today." "Q" gasoline is regular gasoline with an octane rating of 68–70.

[25] What the practice of the other member of the Mechanical Sub-Committee was in this respect does not appear.

We shall discuss later the effect of this buying program on the market.

The major companies regularly reported to Bourque, the trade association representative of the Mid-Continent independent refiners, the volume of their purchases under the program and the prices paid. Representatives of one of the corporate respondents repeatedly characterized its purchases under the program as "quotas," "obligations," or "allocations." They spoke of one of its "dancing partners" under the buying program as "one of the babies placed in our lap last spring when this thing was inaugurated." And they stated that "we don't have much choice as to whose material we are to take, when we purchase outside third grade gasoline in connection with the Buying Program Committee's operations. On such purchases, we have refineries 'assigned' to us." This was doubtless laymen's, not lawyers', language. As we have said, there does not appear to have been any binding commitment to purchase; the plan was wholly voluntary; there is nothing in the record to indicate that a participant would be penalized for failure to coöperate. But though the arrangement was informal, it was nonetheless effective, as we shall see. And, as stated by the Circuit Court of Appeals, there did appear to be at least a moral obligation to purchase the amounts specified at the fair market prices "recommended." That alone would seem to explain why some of the major companies cancelled or declined to enter into profitable deals for the exchange of gasoline with other companies in order to participate in this buying program. Respondent Skelly Oil Co. apparently lost at least some of its pipe-line transportation profit of $\frac{3}{16}$¢ a gallon "on every car of gasoline" purchased by it in the buying program. And both that company and respondent Wadhams Oil Co. continued to make purchases of gasoline under the program although they were unable then to dispose of it.

Up to June 1935, the expenses incurred by the members of the Mechanical Sub-Committee were charged to and paid by the Planning and Coordination Committee of the Code of Fair Competition for the Petroleum Industry. On May 27, 1935, this Court held in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, that the code-making authority conferred by the National Industrial Recovery Act was an unconstitutional delegation of legislative power. Shortly thereafter the Tank Car Stabilization Committee held a meeting to discuss their future course of action. It was decided that the buying program should continue. Accordingly, that Committee continued to meet each month through February 1936. The procedure at these meetings was essentially the same as at the earlier ones. Gradually the buying program worked almost automatically, as contacts between buyer and seller became well established. The Mechanical Sub-Committee met at irregular intervals until December 1935. Thereafter it conducted its work on the telephone.

C. FORMATION AND NATURE OF THE EAST TEXAS BUYING PROGRAM.

In the meetings when the Mid-Continent buying program was being formulated it was recognized that it would be necessary or desirable to take the East Texas surplus gasoline off the market so that it would not be a "disturbing influence in the Standard of Indiana territory." The reason was that weakness in East Texas spot market prices might make East Texas gasoline competitive with Mid-Continent gasoline in the Mid-Western area and thus affect Mid-Continent spot market prices. The tank car rate on gasoline shipments from the East Texas field to points in the Mid-Western area was about ⅛¢ a gallon higher than from the Mid-Continent field. With East Texas spot market prices more than ⅛¢ a

gallon below Mid-Continent spot market prices, there might well be a resulting depressing effect on the Mid-Continent spot market prices.[26]

Early in 1935 the East Texas Refiners' Marketing Association was formed to dispose of the surplus gasoline manufactured by the East Texas refiners. The occasion for the formation of this Association was the stoppage of the shipment of hot oil and gasoline as a consequence of a Texas law enacted in December 1934. As long as these refiners had operated on cheap hot oil they had been able to compete for business throughout the Middle West. If they used legal crude at a dollar a barrel, their costs would increase. Their shift from a hot oil to a legal oil basis necessitated a change in their marketing methods. They were already supplying jobbers and dealers of Texas with all the gasoline they could use. Hence, their problem was to find additional markets for the surplus gasoline which they manufactured from legal crude. The Association was to act as the sales agency for those surpluses. Shipments north would be against the freight differential. Therefore, without regular outlets for this surplus gasoline they would have been forced to dump it on the market at distress prices. Their plan was to persuade the major companies if possible to buy more East Texas gasoline and to purchase it through the Association which would allocate it among its members who had surpluses. Neil Buckley, a buyer for Cities Service

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[26] Arnott was reported as saying: "East Texas has been a menace to not only the Eastern Seaboard, but its gasoline also has found its way up into the Mid-Continent and has been competitive with the so-called Mid-Continent suppliers' or refiners' gasoline."

The normal market for gasoline refined in East Texas was the State of Texas and the Atlantic Seaboard, reached through tanker shipments from Gulf ports.

Export Corporation in Tulsa, was recommended by one of the independents as the contact man. Buckley undertook the job.[27]

Thus it was not established that the major companies caused the Association to be formed. But it is clear that the services of the Association were utilized in connection with a buying program by defendant companies. The record is quite voluminous on the activities of Buckley in getting the support of the majors to the Association's program. Suffice it to say that he encountered many difficulties, most of them due to the suspicion and mistrust of the majors as a result of the earlier hot oil record of the East Texas independents. His initial task was to convince the majors of the good faith of the East Texas independents. Many conferences were had. Arnott gave help to Buckley. Thus, on March 1, 1935, Arnott wired a small group of representatives of major companies, who were buyers and users of East Texas gasoline, inviting them to attend a meeting in New York City on March 6th "to hear outcome my meeting with East Texas refiners and to consider future action surplus gasoline this and other groups that is awaiting our decision . . . matter of extreme importance." The problem was discussed at that meeting[28] but reliable information was lacking as to the probable amount of distress gasoline, the size of the independents' federal allocations and whether or not such gasoline was going to be manufactured within

[27] Buckley first secured the approval of his employer. His company, not the Association, paid his salary while he was engaged in this work; the Association paid his travel and telephone expenses.

[28] Representatives of respondents Socony-Vacuum, Pure Oil, Sinclair and probably of Shell were present as well as representatives of other majors. The only individual respondents present were Arnott and McElroy.

those allocations. Accordingly Arnott appointed a committee to attend the meeting of the District Allocators [29] on March 13th and to obtain the information. That information was obtained and a schedule was prepared showing the probable amount of surplus gasoline in East Texas and the Gulf, the names of the regular buyers in those areas, and the amounts they might take. Arnott, on March 14th, by telegraph called another meeting in New York City for the next day, saying "The question of surplus gasoline which has been under consideration must be finalized tomorrow." At that meeting someone (apparently a representative of respondent Sinclair) "arose with a slip of paper in his hand and stated that it had been suggested" that each of 12 to 15 major companies "take so much gasoline" from East Texas, "the amounts being read off as to what each company would take." Nothing definite was decided at the meeting. Buckley continued his efforts, talking with Arnott and representatives of other majors. It is impossible to find from the record the exact point of crystallization of a buying program. But it is clear that as a result of Buckley's and Arnott's efforts and of the discussions at the various meetings various major companies did come into line and that a concerted buying program was launched. The correspondence of employees of some of the majors throughout the period in question is replete with references such as the following: "buying program in East Texas"; "our allocation of five cars per day"; "a general buying movement"; "regular weekly purchases from the East Texas group"; "allocations and purchases" in the East Texas field; and the like.

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[29] They were part of the organization of the Planning & Coordination Committee under the Code. As to allocations under the Code see *infra*, pp. 201 *et seq.*

In 1935 the East Texas refiners named in the indictment sold 285,592,188 gallons of gasoline. Of this certain defendant companies [30] bought 40,195,754 gallons or 14.07%. In the same year all independent refiners in East Texas sold 378,920,346 gallons—practically all of it on the spot market. Of this amount those defendant companies purchased 12.03% or 45,598,453 gallons. Of the 8,797 tank cars purchased by all defendants (except Sinclair) from March 1935 through April 1936 from independent refiners in the East Texas field, 2,412 tank cars were purchased by the present corporate respondents.

Every Monday morning the secretary of the East Texas association ascertained from each member the amount of his forthcoming weekly surplus gasoline and the price he wanted. He used the consensus of opinion as the asking price. He would call the major companies; they would call him. He exchanged market information with them. Orders received for less than the asking price would not be handled by the Association; rather the secretary would refer the buyer to one of the independents who might sell at the lower price. Very few cars were purchased through the Association by others than the major oil companies.[31] The majors bought about 7,000 tank cars through the Asssociation in 1935 and about 2,700 tank cars in the first four months of 1936. And in 1935 the secretary of the Association placed an additional 1,000 tank cars by bringing the purchasers and the independent refiners together. The purchases in 1935 in East Texas were, with minor exceptions, either

[30] Not including, *inter alia*, Cities Service Export Oil Co., Louisiana Oil Refining Corp., Tide Water Assoc. Oil Co., The Texas Co., and Gulf Refining Co., as respects which the indictment had been dismissed.

[31] Only three of the corporate respondents purchased through the Association.

at the low or slightly below the low quotation in Platt's Oilgram, following it closely as the market rose in March, April, and May, 1935; they conformed to the market as it flattened out into more or less of a plateau through the balance of 1935 with a low for third grade gasoline of 4⅝¢. This was consistent with the policy of the buying program. For the majors were requested to purchase at the "fair, going market price." [32] And it is clear that this East Texas buying program was, as we have said, supplementary or auxiliary to the Mid-Continent program. As stated in March 1935 in an inter-company memorandum of one of the majors: ". . . with east coast refiners having a program to purchase surplus East Texas gasoline over the next four months, we feel that still further advances can be made in the tank car market and a resultant increase in the service station price."

D. SCOPE AND PURPOSE OF THE ALLEGED CONSPIRACY.

As a result of these buying programs it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end, to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area. Their agreement or plan embraced not only buying on the spot markets but also, at least by clear implication, an understanding to maintain such improvements in Mid-Western prices as would result from those purchases of distress gasoline. The latter obviously would be achieved by selling at the increased prices, not

[32] An inter-company communication between employees of respondent Pure Oil written in May 1935 stated: "Prices were advanced this week in both regions to 4½¢ and 4⅝¢–5⅜¢, in view of some of the refiners squawking because our buying was considerably lower than the publications."

by price cutting. Any other understanding would have been wholly inconsistent with and contrary to the philosophy of the broad stabilization efforts which were under way. In essence the raising and maintenance of the spot market prices were but the means adopted for raising and maintaining prices to jobbers and consumers. The broad sweep of the agreement was indicated by Arnott before a group of the industry on March 13, 1935. He described the plan as one "whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines. . . ." Certainly there was enough evidence to support a finding by the jury that such were the scope and purpose of the plan.

But there was no substantial competent evidence that defendants, as charged in the indictment, induced the independent refiners to curtail their production.

E. MARKETING AND DISTRIBUTION METHODS.

Before discussing the effect of these buying programs, some description of the methods of marketing and distributing gasoline in the Mid-Western area during the indictment period is necessary.

The defendant companies sold about 83% of all gasoline sold in the Mid-Western area during 1935. As we have noted, major companies, such as most of the defendants, are those whose operations are fully integrated—producing crude oil, having pipe lines for shipment of the crude to its refineries, refining crude oil, and marketing gasoline at retail and at wholesale. During the greater part of the indictment period the defendant companies

owned and operated many retail service stations [33] through which they sold about 20% of their Mid-Western gasoline in 1935 and about 12% during the first seven months of 1936. Standard Oil Company (Indiana) [34] was known during this period as the price leader or market leader throughout the Mid-Western area. It was customary for retail distributors, whether independent or owned or controlled by major companies, to follow Standard's posted retail prices. Its posted retail price in any given place in the Mid-Western area was determined by computing the Mid-Continent spot market price and adding thereto the tank car freight rate from the Mid-Continent field, taxes and 5½¢. The 5½¢ was the equivalent of the customary 2¢ jobber margin and 3½¢ service station margin. In this manner the retail price structure throughout the Mid-Western area during the indictment period was based in the main on Mid-Continent spot market quotations,[35] or, as stated by one of the witnesses for the defendants, the spot market was a "peg to hang the price structure on."

About 24% of defendant companies' sales in the Mid-Western area in 1935 were to jobbers, who perform the function of middlemen or wholesalers. Since 1925 jobbers were purchasing less of their gasoline on the spot tank car markets and more under long term supply contracts from major companies and independent refiners. These contracts usually ran for a year or more and covered all of the jobber's gasoline requirements during the period. The price which the jobber was to pay over the life of the contract was not fixed; but a formula for its com-

[33] It appears that, beginning in 1935 and increasing in the latter part of 1936, state chain store legislation resulted in the majors leasing many of their retail service stations.

[34] A defendant to whom a new trial was granted.

[35] Further details of Standard's policy in posting retail prices are discussed, p. 198.

putation was included. About 80% or more of defendant companies' jobber contracts provided that the price of gasoline sold thereunder should be the Mid-Continent spot market price on the date of shipment. This spot market price was to be determined by averaging the high and low spot market quotations reported in the Chicago Journal of Commerce and Platt's Oilgram or by averaging the high and low quotations reported in the Journal alone. The contracts also gave the jobber a wholly or partially guaranteed margin between the price he had to pay for the gasoline and the normal price to service stations—customarily a 2¢ margin.[36]

There is no central exchange or market place for spot market transactions. Each sale is the result of individual bargaining between a refiner and his customers, sales under long-term contracts not being included. It is a "spot" market because shipment is to be made in the immediate future—usually within ten or fifteen days. Sales on the spot tank car markets are either sales to jobbers or consumers, sales by one refiner to another not being included.[37] The prices paid by jobbers and consumers in the various spot markets are published daily

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[36] The following is illustrative: The spot market price (computed as indicated) was to govern when that price plus freight, plus 5½¢ per gallon did not exceed the posted service station price, exclusive of tax, at destination on date of shipment. In case that aggregate figure exceeded the service station price, then the price to the jobber would be reduced by an amount equal to one-half of the excess. In some cases the major companies assumed the full amount of the difference. The margin of 5½¢ was based on the seller's discount of 3½¢ to jobbers. Hence if the seller increased or decreased that discount generally then the margin of 5½¢ would be increased or decreased by an equal or like amount. The wording of the various contracts varied but there was great uniformity in principle.

[37] For this reason "spot open market" is frequently used, "open" market referring to sales which are not made on contract nor based on future publications.

in the trade journals, Platt's Oilgram and Chicago Journal of Commerce. In the case of the Oilgram these prices are obtained by a market checker who daily calls refiners in the various refinery areas (major companies as well as independents) and ascertains the quantity and price of gasoline which they have sold *to jobbers* in spot sales.[38] After checking the prices so obtained against other sources of information (such as brokers' sales) and after considering the volume of sales reported at each price, he determines the lowest and highest prices at which gasoline is being sold *to jobbers* in substantial quantities on the spot market.[39] Thus, if he finds that substantial sales are reported at 5⅛¢, 5¼¢ and 5⅜¢, the Oilgram reports a price range of 5⅛–5⅜¢. The result is published in the Oilgram that same day.[40] The Chicago Journal of Commerce publishes similar quotations the day after the sales are reported. And its quotations cover sales to industrial consumers as well as to jobbers. But it was not shown that either journal had published prices paid by a major company as a price paid by jobbers on the tank car market.

F. THE SPOT MARKET PRICES DURING THE BUYING PROGRAM.

In 1935 the 14 independent Mid-Continent refiners named in the indictment sold 377,988,736 gallons of gasoline. Of that output, the corporate respondents pur-

[38] In case actual sales cannot be obtained, he gets the prices at which the refiners will sell to jobbers in that open spot market.

[39] Major companies sell little gasoline to jobbers on a spot basis. The spot market prices published in the trade journals are based largely on sales by independent refiners.

[40] The National Petroleum News gives the Oilgram quotations in weekly form.

chased about 56,200,000 gallons or approximately 15% [41] and the defendant companies who went to trial, about 17%. The monthly purchases of all defendant companies from Mid-Continent independents from March 1935 to April 1936 usually ranged between 600 and 900 tank cars and in a few months somewhat exceeded those amounts.

Major company buying began under the Mid-Continent program on March 7, 1935. During the week before that buying commenced the Mid-Continent spot market for third grade gasoline rose 3/8¢. The low quotation on third grade gasoline was 3½¢ on March 6, 1935. It rose to 4¾¢ early in June. That advance was evidenced by ten successive steps. The market on third grade gasoline then levelled out on a plateau which extended into January 1936, except for a temporary decline in the low quotation late in 1935. By the middle of January the low again had risen, this time to 5¼¢. It held substantially at that point until the middle of February 1936. By the end of February it had dropped to 5¢. It then levelled off at that low and remained there into May 1936 when the low dropped first to 4⅞¢ and then to 4¾¢. It stayed there until the first week in July 1936. The low then rose to 4⅞¢, maintained that level until mid-August, then started to drop until by successive steps it had declined to 4½¢ before the middle of September. It stayed there

[41] That percentage is apparently reduced to about 10.5% if sales of 29 independent refiners (including the 14 named in the indictment) are taken.

What percentage these purchases by respondents were of the Mid-Continent spot market in 1935 does not clearly appear, the government's estimate of one-third to a half apparently being somewhat high.

until early October when it rose to 4⅝¢, continuing at that level until middle November when it rose to 4¾¢. The low remained at substantially that point throughout the balance of 1936.

During 1935, as the Mid-Continent spot market for third grade gasoline was rising, so was the East Texas spot market. And when in June 1935 the former levelled off for the balance of the year at a low of 4¾¢, the latter [42] levelled off, as we have seen, at a low of 4⅝¢.

During this period there were comparable movements on the Mid-Continent spot market for regular gasoline. From a low of 4⅜¢ on March 7, 1935, it rose to a low of 5⅝¢ early in June, that advance being evidenced by nine successive steps. As in the case of third grade gasoline, the market for regular gasoline then levelled out on a plateau which extended into January 1936. By the middle of January the low had risen to 6⅛¢. It held at that point until the middle of February 1936. By the end of February it had dropped to 5⅞¢. It rose to 6¢ in the first week of March, levelled off at that low and remained there into August 1936. By mid-August it started to drop—reaching 5½¢ in September, going to 5⅝¢ in October and to 5¾¢ in November, where it stayed through the balance of 1936.

These plateaus are clearly shown by a chart of the market journals' quotations. But that does not of course mean that all sales on the spot market were made between the high and the low during the period in question. As we have said, the quotations of the market journals merely indicated the range of prices (usually an eighth) within which the bulk of the gasoline was being sold. Hence actual sales took place above the high and below

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[42] Comparable movements took place in the East Texas spot market for regular gasoline until April 21, 1935, when those quotations were discontinued.

the low. Thus between June and December 1935 while the low for third grade gasoline remained substantially at 4¾¢ and the high at 4⅞¢ jobbers' and consumers' purchases [43] ranged from 4⅜¢ to 5⅛¢. A similar condition existed as respects regular gasoline.

Purchases by the major companies likewise did not always fall within the range of these quotations. In fact, between 85 and 90% of their purchases from the independent refiners were made at prices which were at or below the low quotations in the market journals.[44]

[43] Respondents computed that for 1935 8% of these purchases of third grade gasoline were above the high; 10% were at the high; 7% were between the high and low; 16% were below the low.

[44] Respondents' computations comparing their tabulations with the government's tabulations are as follows:

Price Group	Government's		Respondents'	
	Tank-Cars	%	Tank-Cars	%
Above the lowest quotations in Platt's Oilgram	745	8.09	516	7.5
Above the lowest quotations in Chicago Journal of Commerce	984	10.7	992	14.3
At the lowest quotations in Platt's Oilgram	6,407	69.64	4,491⅔	64.9
At the lowest quotations in Chicago Journal of Commerce	6,564	71.31	4,419⅔	63.9
Below the lowest quotations in Platt's Oilgram	2,052	22.27	1,912⅔	27.6
Below the lowest quotations in Chicago Journal of Commerce	1,656	17.99	1,508⅔	21.8
Total	9,204	100.00	6,920⅔	100.

The government's tabulations dealt with 9,204 tank cars which defendants (excluding Sinclair) purchased on a flat price basis from independent refiners in the Mid-Continent field between March 1, 1935 and April 30, 1936. Respondents' tabulations included Sinclair and excluded sales by defendants who had already been dismissed, and eliminated or reclassified alleged omissions or improper classifications by the government.

Respondents' computations also show that the percentage of purchases at prices below the low quotations was higher during the

There were few such purchases above the high and not a substantial percentage at the high.[45]

G. JOBBER AND RETAIL PRICES DURING THE BUYING PROGRAMS.

That the spot market prices controlled prices of gasoline sold by the majors to the jobbers in the Mid-Western area during the indictment period is beyond question. For, as we have seen, the vast majority of jobbers' supply contracts during that period contained price formulae which were directly dependent on the Mid-Continent spot market prices.[46] Hence, as the latter rose, the prices to the jobbers under those contracts increased.

There was also ample evidence that the spot market prices substantially affected the retail prices in the Mid-Western area during the indictment period. As we have seen, Standard of Indiana was known during this period as the price or market leader throughout this area. It was customary for the retailers to follow Standard's posted retail prices, which had as their original base the Mid-Continent spot market price. Standard's policy was

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March–May, 1935 price rise than during the indictment period as a whole, and that the percentage of purchases above the low was lower during that period of price rise than during the period as a whole.

[45] Respondents' figures were: .7% above the high of the Journal; .8% above the high of the Oilgram; 3.7% at the high of the Journal; 6.1% at the high of the Oilgram. Apparently all purchases above the high were purchases of third grade, not regular gasoline.

[46] One government witness testified that out of 1,729 contracts made by the defendant major oil companies with jobbers in the Mid-Western area during 1935, 1,461 provided that the basic price was to be determined "on the basis of the average of the averages of the high and low quotations of the Chicago Journal of Commerce and Platt's Oilgram on spot market tank car gasoline." During 1935 defendant companies sold over 900,000,000 gallons to jobbers in the Mid-Western area out of total sales by them in that area of over 4,000,000,000 gallons.

to make changes in its posted retail price only when the spot market base went up or down at least 3/10¢ a gallon and maintained that change for a period of 7 days or more.[47] Standard's net reduction in posted prices for the 6 months preceding March 1935 was 1.9¢ per gallon. From March 1935 to June 1935 its posted retail prices were advanced 3/10¢ four times.

Retail prices in the Mid-Western area kept close step with Mid-Continent spot market prices during 1935 and 1936, though there was a short lag between advances in the spot market prices and the consequent rises in retail prices.[48] This was true in general both of the subnor-

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[47] These changes were apparently not made automatically, as the factor of competition was taken into consideration.

[48] A comparison of Monday low quotations for house brand gasoline (Oklahoma market) with average service station prices for Standard's regular grade gasoline (less taxes) for 28 cities (including La Crosse and Milwaukee, Wis.) in the Mid-Western area shows the latter following the former upward from March to June 1935 and in January 1936.

	Oklahoma	*Service Station*
March 4, 1935	4.375¢	12.56¢
March 11, 1935	4.625	12.56
March 18, 1935	4.750	12.56
March 25, 1935	4.750	12.90
April 1, 1935	4.875	12.90
April 8, 1935	5.000	12.97
April 15, 1935	5.125	13.26
April 22, 1935	5.250	13.32
April 29, 1935	5.250	13.32
May 6, 1935	5.250	13.56
May 13, 1935	5.250	13.56
May 20, 1935	5.375	13.56
May 27, 1935	5.500	13.56
June 3, 1935	5.625	13.56
January 6, 1936	5.625	13.35
January 13, 1936	6.125	13.45
January 20, 1936	6.125	13.93
January 27, 1936	6.125	13.93

mal [49] and normal retail prices. To be sure, when the tank car spot market levelled out on a plateau from June to the end of 1935, there was not quite the same evenness in the higher plateau of the average retail prices. For there were during the period in question large numbers of retail price cuts in various parts of the Mid-Western area, though they diminished substantially during the spring and summer of 1935. Yet the average service station price [50] (less tax) having reached 13.26¢ by the middle of April (from 12.56¢ near the first of March) never once fell below that amount; advanced regularly to 13.83¢ by the middle of June; declined to 13.44¢ in August; and after an increase to 13.60¢ during the last of the summer remained at 13.41¢ during the balance of 1935 except for a minor intermediate drop. In sum, the contours of the retail prices conformed in general to those of the tank car spot markets. The movements of the two were not just somewhat comparable; they were strikingly similar. Irrespective of whether the tank car spot market prices controlled the retail prices in this area, there was substantial competent evidence that they influenced them—substantially and effectively. And in this connection it will be recalled that when the buying program was formulated it was in part predicated on the proposition that a firm tank car market was necessary for a stabilization of the retail markets. As reported by one who attended the meeting on February 5, 1935, where the buying program was being discussed: "It was generally assumed that all companies would come into the picture since a stable retail market requires a higher tank car market."

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[49] Prices below the normal prices which Standard posted.

[50] Average price (28 cities Mid-Western area) for Standard's regular gasoline.

IV. *Other Circumstances Allegedly Relevant to the Offense Charged in the Indictment.*

The following facts or circumstances were developed at the trial by testimony or other evidence or were embraced in offers of proof made by respondents.

A. ALLEGED KNOWLEDGE AND ACQUIESCENCE OF THE FEDERAL GOVERNMENT.

Such of the following facts as were included in respondents' offers of proof were not sought to be proved in order to establish immunity from prosecution under the anti-trust laws. For admittedly the authorization under the National Industrial Recovery Act necessary for such immunity [51] had not been obtained. Rather respondents' offers of proof were made in order to show the circumstances which, respondents argue, should be taken into consideration in order to judge the purpose, effect and reasonableness of their activities in connection with the buying program.

Arnott testified that on January 8 or 9, 1935, he reported the appointment of the Tank Car Stabilization Committee to officials of the Petroleum Administrative Board who, he said, expressed great interest in it. A member of that Committee late in January 1935 advised the Chairman of that Board of the "necessity for action in getting tank car prices up before it is too late." The chairman replied that "the tank car situation in relation to the price of crude is one about which we have no disagreement. How to bring about a correction is the stumbling block." There was evidence that at least general information concerning the meetings of the Tank Car Stabilization Committee was given a representative of the Board in February 1935. In March 1935 the Code

[51] Sec. 5 is set forth, *supra,* note 18.

authorities, with the approval of the Administrator, asked the major companies to curtail their manufacture of gasoline during that month by 1,400,000 barrels. The purpose was said to be to aid the small refiners by forcing the majors to buy part of their requirements from them. A voluntary curtailment of some 960,000 barrels was made.

On March 12, 1935, Arnott saw the Chairman and at least one other representative of the Board. Among other things the buying programs were discussed. Arnott did not ask for the Board's approval of these programs nor its "blessing." A representative of the Board testified that Arnott told them that he was conducting those buying programs "on his own responsibility." Arnott denied this. The Chairman of the Board asked Arnott if the programs violated the anti-trust laws. Arnott said he did not believe they did and described what his group was doing. Arnott testified that he felt that the Board thought the program was sound and hoped it would work; and that if he had thought they disapproved, he would have discontinued his activities. There was no evidence that the Board told Arnott to discontinue the program. But on March 13, 1935, Arnott in addressing the District Allocators' meeting said, respecting these buying programs:

"I am perfectly conscious that we have made other efforts at times to have this question dealt with. It has always been done in group form. That has involved agreements, group agreements. Those of us who have had anything to do whatsoever with the whole national picture, who have come to Washington and have had any experience with the PAB and eventually the Department of Justice, know just how long that road is, and for some good reason or for some unknown reason or for no reason

at all those agreements seem to have disappeared; those outstanding attempts—and they were really sincere and worthy attempts—have disappeared in a sort of cloud of mystery, and I don't think I, for one, or anybody else can tell you just where they have gone—they are out of our minds, they are completed, they are finished, and we are not interested."

Respondents also offered to prove that a committee of the industry (the Blazer Committee) appointed by the Administrator to study the condition of the small units in the industry, made a report to him in March 1935 which stated, *inter alia*, as a recommendation:

"We know of nothing, apart from continued improvement in crude production control, which would be so helpful to the tank-car price of gasoline at this time as the substantial buying of distress gasoline by major companies. We understand a program of this sort is being considered by the Industry now in connection with a broad stabilization program. We therefore urge that the Administrator give it his approval and active support." [52]

They also offered a memorandum dated March 22, 1935, from the Chairman of the Petroleum Administrative

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[52] That report went on to say:

". . . we believe such a program might be successful in raising both tank-car and retail prices to their proper level in relationship to crude oil prices.

"If higher tank-car prices are obtained, we believe they can be sustained only by corresponding increases in retail gasoline prices; otherwise, the burden merely would be shifted from small refiners to small marketers, who in many instances have been in just as much distress as the refiners. We find that abnormally low retail prices can depress tank-car prices just as much as low tank-car prices can pull down the retail price structure. Thus it appears to be essential that both prices move up together."

Board to the Administrator [53] commenting on the above report and making the following suggestion:

"We believe success in Code administration, assuming that it is to continue, requires that some of the recommendations made should be adopted; e. g., we have encouraged stabilization efforts designed at this time to aid the independent refiner, . . ."

On April 2, 1935, the Administrator wrote Arnott, referred to his letter of July 20, 1934 and stated, *inter alia:*

"The matter that at present concerns me is the necessity of complying with the requirements of the basic law. In authorizing the formulation of a stabilization program, I necessarily conditioned the authority granted, by providing that the requirements of Clause 2 of Subsection (a) of Section 3 of the National Industrial Recovery Act should be observed. I know you will appreciate that agreements between supplying companies which might be in conflict with the anti-trust laws of the United States require specific approval after due consideration if companies are to receive the protection afforded by Sections 4 and 5 of the National Industrial Recovery Act.

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[53] The Administrator was reported as saying about that report that if a parity between crude oil prices and gasoline prices did not come soon he would call a meeting of representatives of the industry to see what could be done about it. On March 30, 1935, according to respondents, the Administrator wrote concerning that report:

"Concerning the independent refiners, other than those in California, it appears from the report of the Committee on Small Enterprise that the outstanding difficulty is due to the disparity between posted crude oil prices and refinery realizations. This situation has been deplorable for many months, but it is my understanding that at present the activity of the Stabilization Committees is having a distinct effect in the improvement of refinery prices, and that were it not for old contracts, many of which are badly shaded with respect to the posted price, the independent refiner is approaching a normal market structure."

Respondents also offered to prove that the Blazer Committee advised the Board in April 1935 that there was then no occasion to

"I understand that the temporary character of a number of situations and the need for immediate action has made formalized agreements impracticable and in a number of instances they may be unnecessary. However, when the understandings arrived at as bases of solution of price wars affecting the industry over a considerable area are intended to operate over a definite period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal. If any such agreements have been made I should like a report as to them. If they require approval to be effective . . . I should be glad to give consideration to them under the provisions of the Act."

On April 22, 1935, the Petroleum Administrative Board wrote a letter to Arnott imposing three conditions on general stabilization work: (1) there should be no stabilization meeting without a representative of the Board being present; (2) every element in the industry should be heard from before any decisions were made; (3) no general instructions should be given under the July 20, 1934 letter. A meeting of Arnott's committee and members of the Board was held on May 8, 1935. A representative of the Board testified that they called Arnott "on the carpet to request him to explain" to them "what he had been doing." Arnott's group considered the conditions imposed by the Board quite impossible. The Board assigned two of its staff to work the problem out with one of Arnott's men. According to the testimony of one of the representatives of the Board at that meeting, Arnott

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reduce crude oil prices since "we consider tank car gasoline prices now almost up to parity with sufficient additional advances anticipated in both tank car and retail prices"; and expressed its satisfaction "with the success of the program to stabilize tank-car markets."

did not ask for the Board's approval of the buying programs—nothing being said "one way or the other, about approval or disapproval." And he testified that Arnott in substance was told at that meeting by the Board's Chairman that the letter of July 20, 1934, from the Administrator to Arnott (quoted *supra* p. 175) did not give authority to conduct any buying program;[54] and that Arnott said he was not relying on that letter for approval. Arnott, however, testified that he recalled no such statement made by the Board's Chairman. Apparently, however, Arnott, in answer to questions, gave a general explanation of the buying programs, stating that the majors were continuing informally to buy; that there was no pool; that no one was obliged to make purchases; that they were trying to lift from independent refiners distress gasoline which was burdening the market.[55]

Respondents also offered to prove that on May 14, 1935, the Chairman of the Petroleum Administrative Board asked Arnott to undertake to stabilize the Pennsylvania refinery market in the way that he had stabilized the Mid-Continent refinery market; that in connection with this request the Board evinced support and approval

[54] Respondents offered to prove that Arnott's lawyer advised him on July 31, 1934, that although the letter of July 20, 1934, was "not precisely an approval" by the Administrator of any agreement which gave "complete protection" from any prosecution under the anti-trust laws, it nevertheless was "for all practical purposes a complete protection to you and your committees to engage in all reasonable activities to restore prices to normal levels."

[55] A sub-committee of the Planning & Coordination Committee met with the Board on May 10, 1935, to discuss the report of the Blazer Committee. The recommendation in that report that the majors buy distress gasoline from the independents was discussed. Arnott testified that his group told the Board that "we already had buying of gasoline in effect" to which the Chairman of the Board was said to have replied "That is quite so and disposes of that part of the report."

of the Mid-Continent buying program; and that Arnott undertook to do what he could in the matter and called a meeting of the Pennsylvania refiners for May 28, 1935. Apparently the *Schechter* decision terminated that undertaking.

Respondents also offered portions of a final report [56] prepared by the Marketing Division of the Petroleum Administrative Board which discussed the work of the General Stabilization Committee [57] saying, *inter alia:* "One of the most important was the tank-car committee, which attempted to get the tank-car market raised more in line with the price of crude recovery cost on the theory that a firm tank-car market was essential to a stabilized retail structure." And respondents offered testimony of a member of the Board before a Senate Committee in 1937 respecting the "buying pool efforts, that began in December of 1933 and continued from then on during the entire period of the Petroleum Code." That testimony was: "It was an effort of the Department and the industrial committees to bring about the normal relationship between gasoline prices and crude oil prices, in order to permit the independent, non-integrated refiner to be able to operate without loss."

In sum, respondents by this and similar evidence offered to establish that the Petroleum Administrative Board knew of the buying programs and acquiesced in them. And respondents by those facts, together with those discussed under II, *supra,* undertook to show that their objectives under the buying programs were in line

[56] Prepared between December 1935 and February 1936 and issued in June 1936 by the Department of the Interior.

[57] In speaking of the general work of this Committee (which as we have noted was set up to deal with price wars) the report stated: "The stabilization program was perhaps the outstanding development under the code."

with those of the federal government under the Code: to keep the price of crude oil at a minimum of $1 a barrel; to restore the wholesale price level of gasoline at the refinery to a parity with crude oil; to stabilize retail prices at a normal spread between the refinery price and the retail price.

B. OTHER FACTORS ALLEGED TO HAVE CAUSED OR CONTRIBUTED TO THE RISE IN THE SPOT MARKET.

Respondents do not contend that the buying programs were not a factor in the price rise and in the stabilization of the spot markets during 1935 and 1936. But they do contend that they were relatively minor ones, because of the presence of other economic forces such as the following:

1. *Control of production of crude oil.*

Under the Code an attempt was made for the first time to balance the production of crude oil with the consumptive demand for gasoline. Monthly estimates of gasoline consumption would be made by the Bureau of Mines. The quantity of crude oil necessary to satisfy that demand was also estimated, broken down into allowables for each state, and recommended to the states. And there was evidence that the states would approximately conform to those recommendations. After the Code the oil states continued the same practice under an Interstate Compact which permitted them to agree as to the quantities of crude oil which they would allow to be produced.[58]

2. *Connally Act.*

As we have noted, this law was enacted late in February 1935 and began to be effective the first part of March 1935. Prior to this act, control of hot oil by the states

[58] This Compact (49 Stat. 939) was authorized in February 1935 and became effective in August 1935.

had not been effective for any extended period of time. Throughout 1933 and 1934 from 150,000 to 200,000 barrels of crude oil a day were estimated to have been produced in East Texas in excess of the state's allowables, much of it going into interstate commerce. After the Connally Act went into operation, no hot gasoline went into interstate commerce according to respondents' evidence.

3. *$1 Crude oil.*

As we have noted, crude oil was brought to a dollar a barrel near the end of September 1933. Before the Connally Act, however, hot oil flooded the market at substantially lower prices. Gasoline produced from hot oil forced the price of gasoline produced from crude oil down below cost. But with the elimination of the hot oil, fluctuations in the price of crude ceased. This had a stabilizing effect on the price of gasoline.

4. *Increase in consumptive demand.*

Beginning in the spring of 1935 there was an increase in demand for gasoline. During the whole indictment period every month showed an increase over the corresponding month in the previous year. For the entire year of 1935 consumption for the country as a whole was 7% more than for 1934; that for 1936 was about 10% over 1935—substantially the same increases taking place in the Mid-Western area.

5. *Control of inventory withdrawal and of manufacture of gasoline.*

Under the Code crude oil could be withdrawn from storage only with the approval of the Administrator. Also under the Code there were manufacturing quotas for gasoline which through Code authorities were allocated among the refiners. In March 1935, as we have seen, gasoline inventories of the majors were reduced by over

900,000 barrels through a voluntary curtailment program. The demand was so heavy that the industry withdrew from storage and refined over 22,000,000 barrels of crude oil in storage in 1935. Further, imports of crude oil were limited by order of the Administrator.

6. *Improved business conditions.*

The years 1935 and 1936 were marked by improving general business conditions and rising prices everywhere.

Much testimony was taken on these and related points. It was designed to show that under the conditions which existed during the indictment period, stability in the market was to be expected from the play of these various economic forces. For it was argued that by reason of those forces supply and demand were brought into a reasonable continuing balance with the resultant stabilization of the markets. And there was much testimony from respondents' witnesses that the above factors as well as the buying programs did contribute to price stability during this period. But no witness assumed to testify as to how much of a factor the buying program had been.

V. *Application of the Sherman Act.*

A. CHARGE TO THE JURY

The court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they controlled a substantial part of the interstate trade and commerce in that commodity. The court stated that where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal; and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination. It further charged that if such illegal combination existed,

it did not matter that there may also have been other factors which contributed to the raising of the prices. In that connection, it referred specifically to the economic factors which we have previously discussed and which respondents contended were primarily responsible for the price rise and the spot markets' stability in 1935 and 1936, viz. control of production, the Connally Act, the price of crude oil, an increase in consumptive demand, control of inventories and manufacturing quotas, and improved business conditions. The court then charged that, unless the jury found beyond a reasonable doubt that the price rise and its continuance were "caused" by the combination and not caused by those other factors, verdicts of "not guilty" should be returned. It also charged that there was no evidence of governmental approval which would exempt the buying programs from the prohibitions of the Sherman Act; and that knowledge or acquiescence of officers of the government or the good intentions of the members of the combination would not give immunity from prosecution under that Act.

The Circuit Court of Appeals held this charge to be reversible error, since it was based upon the theory that such a combination was illegal *per se*. In its view respondents' activities were not unlawful unless they constituted an unreasonable restraint of trade. Hence, since that issue had not been submitted to the jury and since evidence bearing on it had been excluded, that court reversed and remanded for a new trial so that the character of those activities and their effect on competion could be determined. In answer to the government's petition respondents here contend that the judgment of the Circuit Court of Appeals was correct, since there was evidence that they had affected prices only in the sense that the removal of the competitive evil of distress gasoline by the buying programs had permitted prices to rise to a normal competitive level; that their activities promoted rather

than impaired fair competitive opportunities; and therefore that their activities had not unduly or unreasonably restrained trade. And they also contend that certain evidence which was offered should have been admitted as bearing on the purpose and end sought to be attained, the evil believed to exist, and the nature of the restraint and its effect. By their cross-petition respondents contend that the record contains no substantial competent evidence that the combination, either in purpose or effect, unreasonably restrained trade within the meaning of the Sherman Act, and therefore that the Circuit Court of Appeals erred in holding that they were not entitled to directed verdicts of acquittal.

In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, this Court sustained a conviction under the Sherman Act where the jury was charged that an agreement on the part of the members of a combination, controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity is in itself an unreasonable restraint of trade without regard to the reasonableness of the prices or the good intentions of the combining units. There the combination was composed of those who controlled some 82 per cent of the business of manufacturing and distributing in the United States vitreous pottery. Their object was to fix the prices for the sale of that commodity. In that case the trial court refused various requests to charge that the agreement to fix prices did not itself constitute a violation of law unless the jury also found that it unreasonably restrained interstate commerce. This Court reviewed the various price-fixing cases under the Sherman Act beginning with *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, and *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, and said ". . . it has since often been decided and always assumed that uniform

price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." (p. 398.) This Court pointed out that the so-called "rule of reason" announced in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and in *United States* v. *American Tobacco Co.,* 221 U. S. 106, had not affected this view of the illegality of price-fixing agreements. And in holding that agreements "to fix or maintain prices" are not reasonable restraints of trade under the statute merely because the prices themselves are reasonable, it said (pp. 397–398):

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made

only after a complete survey of our economic organization and a choice between rival philosophies."

In conclusion this Court emphasized that the Sherman Act is not only a prohibition against the infliction of a particular type of public injury, but also, as stated in *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49, a "limitation of rights" which may be "pushed to evil consequences and therefore restrained."

But respondents claim that other decisions of this Court afford them adequate defenses to the indictment. Among those on which they place reliance are *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344; *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553; *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588; *Chicago Board of Trade* v. *United States,* 246 U. S. 231; and the *American Tobacco* and *Standard Oil* cases, *supra.*

But we do not think that line of cases is apposite. As clearly indicated in the *Trenton Potteries* case, the *American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on prices or price structures.

And we are of the opinion that *Appalachian Coals, Inc.* v. *United States, supra,* is not in point.

In that case certain producers of bituminous coal created an exclusive selling agency for their coal. The agency was to establish standard classifications and sell the coal of its principals at the best prices obtainable. The occasion for the formation of the agency was the existence of certain so-called injurious practices and conditions in the industry. One of these was the problem of "distress coal"—coal shipped to the market which was unsold at the time of delivery and therefore dumped on the market irrespective of demand. The agency was to promote the systematic study of the marketing and dis-

tribution of coal, its demand and consumption; to maintain an inspection and an engineering department to demonstrate to customers the advantages of this type of coal and to promote an extensive advertising campaign; to provide a research department to demonstrate proper and efficient methods of burning coal and thus to aid producers in their competition with substitute fuels; to operate a credit department dealing with the reliability of purchasers; and to make the sale of coal more economical. That agency was also to sell all the coal of its principals at the best prices obtainable and, if all could not be sold, to apportion orders upon a stated basis. And, save for certain stated exceptions, it was to determine the prices at which sales would be made without consultation with its principals. This Court concluded that so far as actual purpose was concerned, the defendant producers were engaged in a "fair and open endeavor to aid the industry in a measurable recovery from its plight." And it observed that the plan did not either contemplate or involve "the fixing of market prices"; that defendants would not be able to fix the price of coal in the consuming markets; that their coal would continue to be subject to "active competition." To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied (p. 374):

"The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the coöperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result."

In distinguishing the *Trenton Potteries* case this Court said (p. 375):

"In the instant case there is, as we have seen, no intent or power to fix prices, abundant competitive opportunities will exist in all markets where defendants' coal is sold, and nothing has been shown to warrant the conclusion that defendants' plan will have an injurious effect upon competition in these markets."

Thus in reality the only essential thing in common between the instant case and the *Appalachian Coals* case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. Unlike the plan in the instant case, the plan in the *Appalachian Coals* case was not designed to operate *vis-à-vis* the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural. For the plan had not then been put into operation. Hence this Court expressly reserved jurisdiction in the District Court to take further proceedings if, *inter alia,* in "actual operation" the plan proved to be "an undue restraint upon interstate commerce." And as we have seen it would *per se* constitute such a restraint if price-fixing were involved.

Nor are *Maple Flooring Mfrs. Assn.* v. *United States* and *Cement Mfrs. Protective Assn.* v. *United States, supra,* at all relevant to the problem at hand. For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing. And they were decided, as indicated in the *Trenton Potteries* case, on the express assumption that any agreement for price-fixing would have been illegal *per se*. And since that element was lacking, the only issues were whether or not on the precise facts there presented such activities of the combinations constituted unlawful restraints of commerce. A majority of the Court held that they did not.

Nor can respondents find sanction in *Chicago Board of Trade* v. *United States, supra,* for the buying programs here under attack. That case involved a prohibition on the members of the Chicago Board of Trade from purchasing or offering to purchase between the closing of the session and its opening the next day grains (under a special class of contracts) at a price other than the closing bid. The rule was somewhat akin to rules of an exchange limiting the period of trading, for as stated by this Court the "restriction was upon the period of price-making." No attempt was made to show that the purpose or effect of the rule was to raise or depress prices. The rule affected only a small proportion of the commerce in question. And among its effects was the creation of a public market for grains under that special contract class, where prices were determined competitively and openly. Since it was not aimed at price manipulation or the control of the market prices and since it had "no appreciable effect on general market prices," the rule survived as a reasonable restraint of trade.

There was no deviation from the principle of the *Trenton Potteries* case in *Sugar Institute* v. *United States,*

supra. For in that case so-called competitive abuses were not permitted as defenses to violations of the Sherman Act bottomed on a trade association's efforts to create and maintain a uniform price structure.

Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. And we reaffirmed that well-established rule in clear and unequivocal terms in *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 458, where we said:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, . . ."

Therefore the sole remaining question on this phase of the case is the applicability of the rule of the *Trenton Potteries* case to these facts.

Respondents seek to distinguish the *Trenton Potteries* case from the instant one. They assert that in that case the parties substituted an agreed-on price for one determined by competition; that the defendants there had the power and purpose to suppress the play of competition in the determination of the market price; and therefore that the controlling factor in that decision was the destruction of market competition, not whether prices were higher or lower, reasonable or unreasonable. Respondents contend that in the instant case there was no elimination in the spot tank car market of competition

which prevented the prices in that market from being made by the play of competition in sales between independent refiners and their jobber and consumer customers; that during the buying programs those prices were in fact determined by such competition; that the purchases under those programs were closely related to or dependent on the spot market prices; that there was no evidence that the purchases of distress gasoline under those programs had any effect on the competitive market price beyond that flowing from the removal of a competitive evil; and that if respondents had tried to do more than free competition from the effect of distress gasoline and to set an arbitrary non-competitive price through their purchases, they would have been without power to do so.

But we do not deem those distinctions material.

In the first place, there was abundant evidence that the combination had the purpose to raise prices. And likewise, there was ample evidence that the buying programs at least contributed to the price rise and the stability of the spot markets, and to increases in the price of gasoline sold in the Mid-Western area during the indictment period. That other factors also may have contributed to that rise and stability of the markets is immaterial. For in any such market movement, forces other than the purchasing power of the buyers normally would contribute to the price rise and the market stability. So far as cause and effect are concerned it is sufficient in this type of case if the buying programs of the combination resulted in a price rise and market stability which but for them would not have happened. For this reason the charge to the jury that the buying programs must have "caused" the price rise and its continuance was more favorable to respondents than they could have required. Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise

is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act.

Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a surplus. As we have said, this was a well organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that distress gasoline would not overhang the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy. Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

The elimination of so-called competitive evils is no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed, resulted when distress gasoline was removed from the market. But such defense is typical of the prot-

estations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system. But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied

competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. There was accordingly no error in the refusal to charge that in order to convict the jury must find that the resultant prices were raised and maintained at "high, arbitrary and non-competitive levels." The charge in the indictment to that effect was surplusage.

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the *Trenton Potteries* case itself, where this Court noted with approval *Swift & Co.* v. *United States*, 196 U. S. 375, in which a decree was affirmed which restrained a combination from "raising or lowering prices or fixing uniform prices" at which meats will be sold. Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the

fact that, as here, they are fixed at the fair going market price is immaterial. For purchases at or under the market are one species of price-fixing. In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization. But in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. Respondents, however, argue that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot markets. They point to the fact that such purchasing was lightest during the period of the market rise in the spring of 1935, and heaviest in the summer and early fall of 1936 when the prices declined; and that it decreased later in 1936 when the prices rose. But those facts do not militate against the conclusion that these buying programs were a species of price-fixing or manipulation. Rather they are wholly consistent with the maintenance of a floor under the market or a stablization operation of this type, since the need for purchases under such a program might well decrease as prices rose and increase as prices declined.

As we have indicated, the machinery employed by a combination for price-fixing is immaterial.

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists

if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power (*United States* v. *Patten,* 226 U. S. 525) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act.[59] The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices.

[59] Under this indictment proof that prices in the Mid-Western area were raised as a result of the activities of the combination was essential, since sales of gasoline by respondents at the increased prices in that area were necessary in order to establish jurisdiction in the Western District of Wisconsin. Hence we have necessarily treated the case as one where exertion of the power to fix prices (i. e. the

As to knowledge or acquiescence of officers of the Federal Government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other

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actual fixing of prices) was an ingredient of the offense. But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. That would be true if power or ability to commit an offense was necessary in order to convict a person of conspiring to commit it. But it is well established that a person "may be guilty of conspiring although incapable of committing the objective offense." *United States* v. *Rabinowich,* 238 U. S. 78, 86. And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. *Nash* v. *United States,* 229 U. S. 373, 378. It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. See *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 402. Cf. *Retail Lumber Dealers' Assn.* v. *State,* 95 Miss. 337; 48 So. 1021. And the amount of interstate or foreign trade involved is not material (*Montague & Co.* v. *Lowry,* 193 U. S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *Steers* v. *United States,* 192 F. 1, 5; *Patterson* v. *United States,* 222 F. 599, 618–619. In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. Whatever may have been the status of price-fixing agreements at common law (Allen, Criminal Conspiracies in Restraint of Trade at Common Law, 23 Harv. L. Rev. 531) the Sherman Act has a broader application to them than the common law prohibitions or sanctions. See *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 328. Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effec-

group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2 (c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise

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tiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. See Handler, Federal Anti-Trust Laws—A Symposium (1931), pp. 91 *et seq.*

The existence or exertion of power to accomplish the desired objective (*United States* v. *United States Steel Corp.*, 251 U. S. 417, 444–451; *United States* v. *International Harvester Co.*, 274 U. S. 693, 708–709) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act. An intent and a power to produce the result which the law condemns are then necessary. As stated in *Swift & Co.* v. *United States*, 196 U. S. 375, 396, ". . . when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." But the crime under § 1 is legally distinct from that under § 2 (*United States* v. *MacAndrews & Forbes Co.*, 149 F. 836; *United States* v. *Buchalter*, 88 F. 2d 625) though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–61; *Patterson* v. *United States, supra*, p. 620. Only a confusion between the nature of the offenses under those two sections (see *United States* v. *Nelson*, 52 F. 646; *United States* v. *Patterson*, 55 F. 605; *Chesapeake & O. Fuel Co.* v. *United States*, 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1. Cf. *State* v. *Eastern Coal Co.*, 29 R. I. 254; 70 A. 1; *State* v. *Scollard*, 126 Wash. 335; 218 P. 224.

manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives [60] would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in *United States* v. *Borden Co.*, 308 U. S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto. The fact that the buying programs may have been consistent with the

[60] It should be noted in this connection that the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. Under the N. I. R. A. this could be done through the code machinery with the approval of the President as provided in §§ 3 (a) and 5, *supra* note 18. Under § 407 (8) of the Transportation Act of 1920 (41 Stat. 482; 49 U. S. C. § 5 (8)) carriers, including certain express companies, which were consolidated pursuant to any order of the Interstate Commerce Commission were relieved from the operation of the Anti-Trust laws. And see the Maloney Act (§ 15A of the Securities Exchange Act of 1934; 52 Stat. 1070) providing for the formation of associations of brokers and dealers with the approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations; and the Bituminous Coal Act of 1937 (50 Stat. 72), especially §§ 4 and 12—particularly as they relate to the fixing of minimum and maximum prices by the Bituminous Coal Commission.

general objectives and ends sought to be obtained under the National Industrial Recovery Act is likewise irrelevant to the legality under the Sherman Act of respondents' activities either prior to or after June 1935. For as we have seen price-fixing combinations which lack Congressional sanction are illegal *per se;* they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. Only in the event that they were, would such considerations have been relevant.

Accordingly we conclude that the Circuit Court of Appeals erred in reversing the judgments on this ground. *A fortiori* the position taken by respondents in their cross petition that they were entitled to directed verdicts of acquittal is untenable.

B. RESPONDENTS' OFFERS OF PROOF.

What we have said disposes of most of the errors alleged in exclusion of evidence. The offers of proof covering the background and operation of the National Industrial Recovery Act and the Petroleum Code, the condition of the oil industry, the alleged encouragement, coöperation and acquiescence of the Federal Petroleum Administration in the buying programs and the like were properly excluded, insofar as they bore on the nature of the restraint and the purpose or end sought to be attained. For as we have seen the reasonableness of the restraint was not properly an issue in the case.

There were, however, offers of proof alleged to be relevant to the cause of the price rise and the subsequent stability of the markets during the period in question.

In addition to the foregoing offers, respondents sought to show that the presence of hot oil and hot gasoline had greatly depressed the market from 1932 to early in 1935 when the Connally Act became effective, except for

one short period from October to December 1934; that beginning in October 1934 shipment of hot oil from East Texas into interstate commerce had for the first time been effectively controlled; that within a period of six weeks thereafter the tank car spot market rose 1½¢—an amount corresponding to the price rise from March to June 1935; that the various factors which primarily affect price were almost precisely the same in the fall of 1934 as they were in the spring of 1935; that the price of gasoline had borne a constant relationship to the price of crude oil from January 1918 to October 1933—that relationship disappearing when the price of hot oil fell below legal crude but reappearing in October 1934, and again in March 1935, when hot oil was eliminated; that gasoline prices were more depressed than the prices of other commodities and the cost of living in 1933 and 1934, and recovered and rose less than such other prices and the cost of living in 1935 and 1936.

We think there was no reversible error in exclusion of these various offers.

To the extent that they were designed to show that respondents by their buying programs had not raised the spot market prices to an artificial and non-competitive level, these offers of proof were properly denied as immaterial. For, as we have said, the reasonableness of the prices and the fact that respondents' activities merely removed from the market the depressive effect of distress gasoline were not relevant to the issues.

And to the extent that these offers of proof were aimed at establishing and evaluating other contributory causes for the price rise and market stability during the indictment period, they were not improperly denied. In the first place, the record is replete with evidence showing the condition of the oil industry at the time of the adoption of the code and during the code period. There was

ample testimony bearing on the other causal factors which respondents contend were primarily responsible for the price rise and market stability during the indictment period. Much of the refused testimony was merely cumulative in nature. A trial court has wide discretion in a situation of that kind. The trial lasted about three and a half months. Terminal points are necessary even in a conspiracy trial involving intricate business facts and legal issues. In the second place, the offer to show the market conditions late in 1934 when hot oil was temporarily under control was not improperly denied. There was substantial evidence in the record to demonstrate the depressive market effect of hot oil. While the offer was not wholly irrelevant to the issues, it was clearly collateral. The trial court has a wide range for discretion in the exclusion of such evidence. See *Golden Reward Mining Co.* v. *Buxton Mining Co.*, 97 F. 413, 416–417; *Chesterfield Mfg. Co.* v. *Leota Cotton Mills*, 194 F. 358, 359. Admission of testimony showing the market conditions late in 1934 would have opened an inquiry into causal factors as involved and interrelated as those present during the indictment period. That might have confused rather than enlightened the jury. In any event it would not have eliminated the buying programs as contributory causes to the market rise and stability in 1935 and 1936. And it would have prolonged the inquiry and protracted the trial. As once stated by Mr. Justice Holmes, one objection to the introduction of collateral issues is a "purely practical one, a concession to the shortness of life." *Reeve* v. *Dennett*, 145 Mass. 23, 28; 11 N. E. 938, 944. And see *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 223–224. Similar reasons sustain the action of the trial court in limiting the inquiry into general economic conditions antedating and during the indictment period. In conclusion, we do not think that there was an abuse of discretion by the

trial court in the exclusion of the proffered evidence. A great mass of evidence was received, the range of inquiry was wide, the factual questions relating to the oil industry and respondents' activities were intricate and involved. In such a case a new trial will not be ordered for alleged errors in exclusion of evidence where matters of substance are not affected. See *United States* v. *Trenton Potteries Co., supra,* p. 404.

VI. *Use of The Grand Jury Transcript.*

The Circuit Court of Appeals held that the trial court committed prejudicial error in refusing to permit defense counsel to inspect the transcript of grand jury testimony used to refresh the recollection of certain witnesses called by the government. Respondents here urge that the use made of the grand jury transcript was error because (1) they were denied the right to inspect it, (2) it had not been properly authenticated, (3) the reading of the grand jury testimony must have led the jury to conclude that it was affirmative testimony, and (4) such testimony was not given contemporaneously with the occurrences to which it was related. And in all respects, respondents contend that such use of the grand jury testimony was highly prejudicial.

There were about 90 instances when the government used that testimony. In practically all those cases, the witnesses were employees or representatives of respondents or former defendants, or were closely associated with them. That most of them were hostile witnesses—evasive and reluctant to testify—clearly appears from a reading of their entire testimony. Each of those witnesses had testified before the grand jury which returned the indictment in the case. At times counsel for the government would state to the court that he was suprised at the witness' answer to a question and that it contradicted testimony before the grand jury. More frequently

counsel would ask the witness if his memory could be refreshed by his grand jury testimony. During the first part of the trial government counsel apparently read some grand jury testimony to two witnesses from his notes. After objection had been made, the court instructed counsel to use the transcript. Soon thereafter, and early in the trial, the court adopted the practice of inspecting the transcript and itself seeking to refresh the witness' recollection by reading from his prior testimony. At no time was the transcript shown to the witness. At all times respondents appropriately objected to the practice.

Throughout the trial the stated single reason for the use of such prior testimony was the refreshment of the witness' recollection. Counsel for the defense were ever alert to denounce the practice, especially when it appeared that government counsel might seek to impeach the witness. In such cases the court normally would sustain the objection or admonish government counsel; or the question and answer would be stricken. In many instances where such testimony was used, the incident ended by the witness merely saying that his recollection had not been refreshed. In case it had been, he would state what his present recollection was. Only in about one-sixth of the instances was any inconsistency in testimony developed. In the balance, recollection was either not refreshed or the testimony which had been given was wholly or substantially consistent with the previous grand jury testimony.

During the trial the court told the jury:

"I have used some of the testimony and read some of it for the purpose only of refreshing the witnesses' memories, and many times I have indicated that there was no conflict or nothing inconsistent between the testimony of the witness and the transcript of testimony. The only reason we use this transcript of testimony of each witness before the Grand Jury is to, if we can, refresh their

memories so as to enable them to recall correctly what the fact is."

And the court made a similar statement in its charge to the jury.

As in case of leading questions, *St. Clair* v. *United States,* 154 U. S. 134, 150, such use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. See *Di Carlo* v. *United States,* 6 F. 2d 364, 367–368; *Bosselman* v. *United States,* 239 F. 82, 85; *Felder* v. *United States,* 9 F. 2d 872. He sees the witness, can appraise his hostility, recalcitrance, and evasiveness or his need for some refreshing material, and can determine whether or not under all the circumstances the use of grand jury minutes is necessary or appropriate for refreshing his recollection. As once stated by Judge Hough, "The bald fact that the memory refreshing words are found in the records of a grand jury is not a valid objection." *Felder* v. *United States, supra,* p. 874. Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness. *Morris* v. *United States,* 149 F. 123, 126; *Lennon* v. *United States,* 20 F. 2d 490, 493–494; Wigmore, Evidence (2d ed.), § 762. And the reasons are that only in that way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and "detect circumstances not appearing on the surface" and "expose all that detracts from the weight of testimony." See 2 Wigmore, *supra,* p. 42. The first of these reasons has no relevancy here. And as to the second, no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court. Grand jury testimony is ordinarily confidential. See Wigmore, *supra,* § 2362.

But after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it. See *Metzler* v. *United States,* 64 F. 2d 203, 206. Since there is no inexorable rule which under all circumstances entitles the witness and his counsel to see the prior statement made under oath and since in this case the court itself examined and thus directly controlled the use of the grand jury testimony, we cannot say that the refusal to make it available to counsel for the defense is *per se* reversible error. To hold that it was error in the instances here under review would be to find abuse of discretion, where in fact we conclude from the entire record on this phase of the case that the judge supervised the procedure with commendable fairness. In sum, the selective use of this testimony and the precautions taken by the trial judge make it impossible for us to say that he transcended the limits of sound discretion in permitting it to be used by the government without making it available to the defense.

If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence. *Rosenthal* v. *United States,* 248 F. 684, 686. But here the grand jury testimony was used simply to refresh the recollection on material facts, *New York & Colorado Mining Syndicate & Co.* v. *Fraser,* 130 U. S. 611, not as independent affirmative evidence. *Bates* v. *Preble,* 151 U. S. 149. Furthermore, it was not used for impeachment purposes; and the content of this refreshing material related solely to conversations and events relevant to the formation and execution of the buying programs.

In addition, it clearly appears that the use of this material was not prejudicial. So far as the subject matter of the inquiry is concerned, that prior testimony was either cumulative or dealt only with the minutiae of the conspiracy. The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. No portion of it was dependent on the minor facts concerning which the memory of these witnesses was refreshed.[61] Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted. See *Little* v. *United States,* 93 F. 2d 401; *Putnam* v. *United States,* 162 U. S. 687. Hence assuming, *arguendo,* that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of § 269 of the Judicial Code (28 U. S. C. § 391), since the "substantial rights" of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony.

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[61] Respondents strongly urge that this is not true in the case of the testimony of an employee of one of the trade journals. His prior testimony indicated (1) that the major companies were buying exactly at the journal quotations, so that the graph of those quotations represented prices paid under the buying program; (2) that prices paid by the majors "outweighed" the jobbers' sales reported to his journals. At the trial he testified that those grand jury statements were not true. And they were not. But those matters are not essential issues in the case. That purchases under the buying program did not lead the market up, that the vast majority of purchases were at or below the low quotations, that the volume of purchases did not eliminate all competition, that the spot market prices were still determined by competitive forces, that the volume of purchases under the buying programs was relatively small are wholly immaterial, as we have seen.

Putnam v. *United States, supra,* held it was prejudicial error to use grand jury minutes to refresh the memory of a witness unless that testimony was contemporaneous with the occurrences as to which the witness was testifying. There the testimony before the grand jury was more than four months after the occurrence. This Court held that because of that lapse of time the testimony was not contemporaneous. Whatever may be said of the *Putnam* case on the merits (see Wigmore, *supra,* § 761) it does not establish an inflexible four-months' period of limitation. There the event was a single isolated conversation, most damaging to the defendant. Here there was a continuing conspiracy extending at least up to the period when the witnesses were testifying before the grand jury. Much of the testimony related to events a year or more old. But in the main those matters were woven into the conspiracy, related to events in which the witness actively participated, concerned the regular business matters with which he was familiar, pertained to his regular employment, or constituted admissions against interest. On these facts we do not think there was an abuse of discretion on the part of the trial judge in permitting the testimony to be used. Measured by the test of whether or not the prior statement made under oath was reasonably calculated to revive the witness' present recollection within the rule of the *Putnam* case, there certainly cannot be said to have been error as a matter of law.

Respondents say that the manner employed in refreshing the recollection of the witnesses was bound to inculcate in the minds of the jurors the feeling that the witnesses were testifying falsely or were concealing the truth. But here again, we find no reversible error. The trial judge, as we have said, was alert to stop impeachment. And in view of the obvious hostility and evasiveness of most of those witnesses, we cannot say that the judge transcended the bounds of discretion in permitting

their memories to be refreshed in this manner. "As is true of most that takes place in a trial, the right result is a matter of degree, and depends upon the sense of measure of the judge." See *United States* v. *Freundlich,* 95 F. 2d 376, 379.

VII. *Arguments to the Jury by Government Counsel.*

Respondents complain of certain statements made to the jury by government counsel. Their objections are that government counsel (1) appealed to class prejudice; and (2) requested a conviction regardless of the evidence because the prosecution was convinced of respondents' guilt and because a conviction "was the wish and the desire of the highest officials in the Government of the United States."

Under the first of these, they point to the opening statement that this conspiracy involved some of the "biggest men" in the country—big in the sense of "controlling vast volumes of financial influence"; and that it is a "terrible thing that a group of influential, wealthy millionaires or billionaires should take over the power, take over the control, the power to make prices." At the close of those opening remarks and on objection of defense counsel the court counselled the jury that "any reference to the wealth of any of the defendants is entirely immaterial. A man of wealth has just as much standing in a court as a man that is poverty stricken."

But respondents complain that in the closing arguments the same matter was referred to again as follows: "A hundred lawyers employed—the very cream of the American Bar, the very best legal talent that these people can obtain—every one of them working night and day with suggestions as to how the red herring can be drawn across the clear cut issue in this case"; that it should not be taken for granted "that these more powerful people are above the law and can't be reached and

can't be brought to book"; that the "fear of corporate power in combination" is part of the American tradition as illustrated by a speech made in 1873 by a Wisconsin judge, who said: "There is looming up a new and dark power . . . The accumulation of individual wealth seems to be greater than it ever has been since the downfall of the Roman Empire. The enterprises of the country are . . . coldly marching, not for economic conquests only, but for political power . . . money is taking the field as an organized power. The question will arise . . . which shall rule, wealth or man? Which shall lead, money or intellect? Who shall fill the public stations, educated and patriotic free men, or the futile serfs of corporate capital?" But as to these statements no objection was made at the time by defense counsel.

There were other such references e. g., "malefactors of great wealth," "eager, grasping men" or corporations who "take the law into their own hands . . . without any consideration for the under-dog or the poor man . . . We are going to stop it, as our forefathers stopped it before us and left this country with us as it is now, or we are going down into ruin as did the Roman Empire." Counsel for the defense objected to these statements as improper and prejudicial. The court overruled the objections stating it would deal with the matter in its charge to the jury. In its charge the court warned against convicting a corporation "solely because of its size or the extent of its business"; that it was "your duty to give these corporations the same impartial consideration" as an individual or small corporation would receive; and instructed the jurors not to be concerned "with the financial condition of any of these defendants. Whether a man be rich or poor, he is entitled to the same consideration in this Court."

On this phase of the matter several observations are pertinent. In the first place, counsel for the defense

cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial. See *Crumpton* v. *United States,* 138 U. S. 361, 364. Of course appellate courts "in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." See *United States* v. *Atkinson,* 297 U. S. 157, 160. But as we point out hereafter, the exceptional circumstances which call for an invocation of that rule are not present here. In the second place, it is not improper in a Sherman Act case to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. For that subject is material to the philosophy of that Act. Its purposes and objectives are clearly legitimate subjects for discussion before the jury. But, thirdly, appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them. Some of the statements to which respondents now object fall in this class. They were, we think, undignified and intemperate. They do not comport with the standards of propriety to be expected of the prosecutor. But it is quite another thing to say that these statements constituted prejudicial error. In the first place, it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately. In the second place, this was not a weak case as was *Berger* v. *United States,* 295 U. S. 78, where this Court held that prejudice to the accused was so highly probable as a result of the prosecutor's improper conduct "that we are not justified in assuming its non-existence." (p. 89.) Cf. *New York Central R. Co.* v. *Johnson,* 279

U. S. 310. Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial. But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice.

Under the second of these objections, respondents complain of the plea to the jury not to "let your Government and the United States and its citizens and society down," and that government counsel "believe to the bottom of their hearts in the justice of the cause that they espouse here." No objection at that time was made by defense counsel. But they did object at the trial to the statements by government counsel, ". . . do you honestly think that these boys here (government counsel) . . . would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?"; "You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them, against their wishes, or that the Secretary of the Department of the Interior would allow us to do it, if he didn't want it done?" The court overruled the objections stating, "I suppose we have a right to assume that they are here under the instructions of the Attorney General of the United States." Respondents further complain of the statements that the evidence is "so overwhelming and overpowering that it doesn't even leave the trace or the shadow of a doubt"; that if "you are going to say they are not guilty on this evidence, then you take the responsibility, I won't; you get an alibi, I won't"; that the hundreds of thousands of dollars spent by the government "in trying to get before you the facts" should not be

"thrown to the winds" nor should these men "go clear." But no objection was made at the time by defense counsel.

As respects the statement that it was the "wish and the desire of the highest officials" in the government to have defendants convicted, some background should be given. This came near the end of the closing arguments. In the opening statement, during the trial, and in the closing arguments the defense continuously emphasized the knowledge and acquiescence by government officials of the buying programs. As we have noted, that was one of the main lines of defense. From the beginning of the trial to the end, the defense sought to prove, not official approval in the legal sense, but official acquiescence or at least condonation. Bald statements were made that respondents "were conducting a program which resulted from the instigation and inducement of the Government itself"; after the *Schechter* case they endeavored to "stabilize marketing practices" at the "instance of officials of the Oil Administration"; "what was done by these defendants was done for the purpose of accomplishing the objectives and purposes of the National Industrial Recovery Act, and was undertaken at the request and pursuant to the authorization of the Secretary of the Interior, Mr. Ickes, the Administrator of the Petroleum Code"; respondents "acted to carry out the purposes and objectives sought by the Government and initiated by the Government . . . They were objectives defined by the President of the United States. They were purposes, the accomplishment of which the Secretary of the Interior had been charged, under his oath, to seek to obtain"; "with all this backing and all this help from the government, and all this urging from the government, are you going to brand these men as just selfish individuals?" On innumerable instances the impression was sought to be conveyed by subtle intimation, inference or suggestion

that responsibility for these buying programs should be placed on the shoulders of high government officials. Government counsel accordingly justified his statement on the grounds that it denied what the defense had continuously stated, viz., that the buying programs were conducted with the consent and approval of the Secretary of the Interior. At a subsequent point in the closing arguments government counsel again referred to the matter. On objection of defense counsel he withdrew the statement. And the court instructed the jury to disregard it, saying "This prosecution was commenced at the instigation of the Attorney General of the United States."

In view of these various circumstances we do not think that the above statements were prejudicial. Standing by themselves they appear to be highly improper. Even as a rebuttal to the defense which had been interposed throughout the trial, they overstep the bounds. But in view of the justification which respondents sought to establish for their acts, the subject matter of these statements was certainly relevant. The fact that government counsel transgressed in his rebuttal certainly cannot be said to constitute prejudicial error. For a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages and not at all reflective of the quality of the argument as a whole.

Respondents further urge as prejudicial error the assertions by government counsel of personal knowledge in contradiction of the record for the purpose of discrediting an important defense witness. The statement of government counsel was that in "1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona." Respondents contend that testimony as to navigability of that river was vitally material as establishing such outside competition as would have prevented them from

raising prices to artificial and non-competitive levels. But such testimony was wholly irrelevant, since the reasonableness of the prices was not properly an issue in the case. Furthermore, when objection was made to the remark, counsel withdrew it and the jury was instructed to disregard it. That must be deemed to have cured the error if it could be considered such. As stated in *Dunlop* v. *United States,* 165 U. S. 486, 498, "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand."

VIII. *Granting of New Trials to Some Defendants.*

Respondents contend that the trial court committed reversible error in granting new trials to some defendants and denying them to respondents.

The court charged the jury that it could convict any of the defendants found to have been members of the combination and that it need not convict all or none. As has been noted, the jury found sixteen corporations and thirty individuals guilty. Thereafter the court discharged one corporation and ten individuals, and granted new trials to three corporations and fifteen individuals. Such action left the verdict standing as to only twelve corporations and five individuals. The trial court gave as its reason for granting some of the defendants a new trial its belief that they had not had "an adequate separate consideration of their defense, in view of the fact that as to some of them direct evidence of participation was lacking or slight, and the circumstantial evidence viewed as a whole may well have obscured other facts and circumstances shown, in some cases, to be highly suggestive of innocence, and in all cases entitled to be considered and weighed." *United States* v. *Standard Oil Co.,* (Indiana), 23 F. Supp. 937, 939. In denying the motions of respondents for a new trial it stated (p. 944) that there was "evidence to go to the jury and to sustain

its verdict as to every essential charge in the indictment" as to them.[62]

Respondents' argument runs as follows: The court charged the jury that it was the purpose and the power of the combination to raise prices which were material. Hence the fact that the jury found that the entire group possessed such power does not necessarily mean that the jury would have found that respondents acting alone possessed such power. Since the jury did not consider that issue, it is argued that denial of a new trial to respondents violates their constitutional right to a jury trial. And

[62] In this connection the court said (p. 944) that it appeared "without dispute that a concerted buying movement took place in the Mid-Continent field"; that as to its character and the existence of a concerted East Texas program, there was "ample evidence to take the case to the jury"; and that the proofs were sufficient to sustain the verdict as to the charge that defendants "were able to and did effectually tie the jobbers' price" in the Mid-Western area to the tank car price in the spot market. It significantly added (p. 944): "It is claimed by the defendants that they did not have the power to control the price as charged, and that inasmuch as some of the large companies did not or have not been shown to have participated in the movement, the power of the defendants in that respect was inadequate for the purpose. This does not follow, for the reason that large buyers both in East Texas and in the Mid-Continent fields, while acting separately, were nevertheless buying for their requirements in these fields, as they had always done and as defendants had every reason to believe they would continue to do. The defendants were thus able to consider that these buyings would necessarily reduce the available gasoline which they proposed to take off the market just as effectively as though these other companies had joined in the program. The amount of distress gasoline would be exactly the same in any event, and the proof shows that the surplus was in fact a very small part of the total, so much so that most of the defendants have shown that its acquisition in addition to other buying did not materially increase their inventories. I am satisfied that there was ample evidence to sustain the contention of the Government that the defendants did have power to control the market, and that they did so, as charged."

in support of their contention, respondents insist that Standard of Indiana alone (one of the defendants granted a new trial) possessed such power as would make it impossible for them to raise prices without its agreement and coöperation.

Respondents' argument does not focus sharply the basic and essential elements of the offense and of the instructions to the jury. As we have stated above, the offense charged in this indictment was proved once it was established that any of the defendants conspired to fix prices through the buying programs and that those programs caused or contributed to the price rise. Power of the combination to fix prices was therefore but a conclusion from the fact that the combination did fix prices. Hence in that posture of the case, the issue here is whether or not the finding of the jury that the buying programs affected prices was necessarily dependent on the participation in those programs of all who were convicted.

Obviously it was not. The order granting new trials in no manner impeached or questioned the evidence as to the total spot market purchases made by all companies (whether defendants, co-conspirators or others). Cf. *Bartkus* v. *United States,* 21 F. 2d 425. In their efforts to place a floor under the spot markets respondents assuredly received benefits and assistance from the purchases made by other companies. And the amount of benefit and assistance received did not necessarily depend on whether or not those other companies were co-conspirators. Market manipulators commonly obtain assistance from the activities of the innocent as well as from those of their allies. The fact that they may capitalize on the purchases of others is no more significant than the fact that they may gain direct or collateral benefits from market trends, bullish factors or fortuitous circumstances. And the mere fact that those circumstances

might have changed and that Standard of Indiana, say, might have substantially impaired the effect of the buying programs on prices by a change in its retail policies was as irrelevant as was the chance that the Connally Act might have been repealed. The effect of the concerted activities was not rebutted by the fact that changes in events might have destroyed that effect.

Nor did the case against respondents automatically fall when three of the corporate defendants [63] were awarded a new trial. We have here a situation quite different from that where the participation of those to whom a new trial was granted or against whom the judgment of conviction was reversed was necessary for the existence of the crime charged. See *Gebardi* v. *United States,* 287 U. S. 112; *Morrison* v. *California,* 291 U. S. 82; *King* v. *Plummer* [1902], 2 K. B. 339. In this case the crime was not indivisible (cf. *Queen* v. *Gompertz,* 9 A. & E. (N. S.) 824; *Feder* v. *United States,* 257 F. 694) in the sense that the existence of a conspiracy under the Sherman Act was necessarily dependent on the coöperation of the other defendants with respondents. Nor was the case submitted to the jury on the assumption that the participation of any of the corporations which were granted new trials was indispensable to the finding of a conspiracy among the rest. As we have seen, the court charged that the jury could convict any of the defendants found to have been members of the combination and that it need not convict all or none. It was the existence of a combination and the participation in it of all or some of the defendants which were important, not the identity of each

[63] The question of the effect of the buying programs on market prices obviously concerns only the corporate defendants. The one corporate defendant granted after verdict, a directed verdict of acquittal was The Globe Oil & Refining Co. (Kansas). The record does not show that this company made any spot market purchases in 1935 or 1936.

and every participant. A conspiracy under the Sherman Act may embrace two or more individuals or corporations. Conviction of some need not await the apprehension and conviction of all. The erroneous conviction of one does not necessarily rebut the finding that the others participated. The theory of the charge to the jury was not that the defendants must be convicted, if at all, as a body; rather the issue of guilt was distributive; the identity of all the co-conspirators was irrelevant.

In a Sherman Act case, as in other conspiracy cases, the grant of a new trial to some defendants and its denial to others is not *per se* reversible error. After the jury's verdict has been set aside as respects some of the alleged co-conspirators, the remaining ones cannot seize on that action as grounds for the granting of a new trial to them, unless they can establish that such action was so clearly prejudicial to them that the denial of their motions constituted a plain abuse of discretion. See *Dufour* v. *United States,* 37 App. D. C. 497, 510–511; *State* v. *Christianson,* 131 Minn. 276, 280; 154 N. W. 1095; *Commonwealth* v. *Bruno,* 324 Pa. 236, 248; 188 A. 320; *People* v. *Kuland,* 266 N. Y. 1; 193 N. E. 439; *Browne* v. *United States,* 145 F. 1. There is a complete lack of any showing of abuse of discretion here, for no prejudice has been established.

Hence this case falls within the well-established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474. Certain exceptions have been noted, such as instances where the trial court has "erroneously excluded from consideration matters which were appropriate to a decision on the motion." *Fairmount Glass Works* v. *Cub Fork Coal Co., supra,* p. 483. But there

are no such circumstances here. No iota of evidence has been adduced that the trial court in denying respondents' motions failed to take into consideration the effect of the buying programs on gasoline prices in the Mid-Western area. In fact it seems apparent that the trial court considered that issue and ruled thereon adversely to respondents. It concluded in substance that whoever may have been all the members of the conspiracy, there was ample evidence to go to the jury on the nature and effect of these programs.

Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. *Moore* v. *United States,* 150 U. S. 57, 61–62; *J. W. Bishop Co.* v. *Shelhorse,* 141 F. 643, 648; *O'Donnell* v. *New York Transp. Co.,* 187 F. 109, 110. In substance no more than that is involved here.

IX. *Variance.*

By their cross petition respondents contend that there was a fatal variance between the agreement charged in the indictment and the agreement proved, with a consequent violation of respondents' rights under the Sixth Amendment.

As we have noted, certain trade journals were made defendants. The indictment charged that they were "the chief agencies and instrumentalities" through which the illegally raised prices affected prices paid for gasoline in the Mid-Western area; that they "knowingly published and circulated as such price quotations the wrongfully and artificially raised and fixed prices for gasoline paid by" defendants in the buying programs, while "representing the price quotations published by them" to be gasoline prices "prevailing in spot sales to jobbers in tank car lots" and while "knowing and intending them to be relied on as such by jobbers and to be made the basis of prices to jobbers."

At the close of the government's case the indictment was dismissed, on motion of the government, as against all trade journal defendants who went to trial. This was clearly proper, as the evidence adduced exculpated them from any wrongdoing. But respondents contend that the device charged in the indictment was one by which respondents were to pay higher than the actual spot market prices for their purchases and then to substitute in the trade journal quotations such prices for the lower prices actually paid by jobbers in spot market sales. Since there was failure of proof on this point of falsification, it is argued that there was a variance. For, according to respondents, that feature was an integral and essential part of the plan as charged.

We agree with the Circuit Court of Appeals that there was no variance. Analysis of the indictment which we have set forth, *supra,* pp. 166–170, makes it clear that the charge against respondents was separate from and independent of the charge against the trade journals and that the allegations against those journals constituted not the only means by which the conspiracy was to be effectuated but only one of several means (*supra,* pp. 167–168). In effect, those charges in the indictment sought to connect the trade journals with the conspiracy as aiders and abettors. On the other hand, the gist of the indictment charged a conspiracy by defendants (1) to raise and fix the spot market prices and (2) thereby to raise and fix the prices in the Mid-Western area. So far as means and methods of accomplishing those objectives were concerned, the charge of falsification of the trade journal quotations was as unessential as was the charge, likewise unproved, that defendants caused the independent refiners to curtail their production. The purpose and effect of the buying programs in raising and fixing prices were in no way made dependent on the utilization of fraudulent trade journal quotations. As charged, the trade journals

were the chief instrumentalities by which the spot market prices were converted into prices in the Mid-Western area. Hence under this indictment they were wholly effective for respondents' purposes, though they were innocent and though their quotations were not falsified as charged. A variation between the means charged and the means utilized is not fatal. And where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved. See *Nash* v. *United States,* 229 U. S. 373, 380. Cf. *Boyle* v. *United States,* 259 F. 803, 805.

X. *Jurisdiction or Venue.*

The Sixth Amendment provides that the accused shall be tried "by an impartial jury of the State and district wherein the crime shall have been committed." Respondents contend that the district court for the Western District of Wisconsin had no jurisdiction or venue to try them since the crime was not committed in that district. The Circuit Court of Appeals held to the contrary, one judge dissenting.

As we have noted, the indictment charged that the defendants (1) conspired together to raise and fix the prices on the spot markets; (2) raised, fixed, and maintained those prices at artificially high and non-competitive levels and "thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin)"; (3) have "exacted large sums of money from thousands of jobbers" in the Mid-Western area by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price; and (4) "in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area."

As we have seen, there was substantial competent evidence that the buying programs resulted in an increase of spot market prices, of prices to jobbers and of retail prices in the Mid-Western area. And it is clear that certain corporate respondents sold gasoline during this period in the Mid-Western area at the increased prices. The court charged the jury that even though they found that defendants had the purpose and power to raise the spot market prices, they must acquit the defendants unless they also found and believed beyond a reasonable doubt that defendants "have also intentionally raised and fixed the tank car price of gasoline contracted to be sold and which was sold in interstate commerce in the Mid-Western area, including the Western District of Wisconsin." It also charged that it was not enough "for the prosecution to show an increase in the tank car prices of gasoline within said area, but you must also find and believe beyond a reasonable doubt and to a moral certainty that the defendants combined and conspired together or with others for the purpose of increasing and fixing the same as well as for the purpose of raising and fixing the tank car prices in said spot markets, on one or more of them." It further charged that the jury in order to convict must find some overt acts in the Western District of Wisconsin; and that sales of gasoline therein by any of the defendants would constitute such overt acts.

Respondents, though agreeing that there were such sales in the Mid-Western area and that the prices on such sales were affected by the rise in the spot markets, deny that they were overt acts in pursuance of the conspiracy. Rather, they contend that each of such sales was an individual act of a particular conspirator in the ordinary course of his business by which he enjoyed the results of a conspiracy carried out in another district. That is to say, they take the position that the alleged conspiracy was limited to a restraint of competition in buying and

selling on the spot markets and included no joint agreement or understanding as respects sales in the Mid-Western area. In support of this view they cite the government's concessions that it "does not claim that each defendant 'entered into an agreement not to sell jobbers except in accordance with' the contract described in Paragraph 11 of the Indictment"; [64] and that it does not contend that defendants were "sitting around a table and agreeing on a uniform retail price." And they assert that there was no evidence that respondents agreed not to sell gasoline in the Western District of Wisconsin except on the basis of spot market prices.

Conspiracies under the Sherman Act are on "the common law footing": they are not dependent on the "doing of any act other than the act of conspiring" as a condition of liability. *Nash* v. *United States, supra,* at p. 378. But since there was no evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there. *United States* v. *Trenton Potteries Co., supra,* pp. 402–403, and cases cited. We agree with the Circuit Court of Appeals that

[64] The standard form of jobber contract referred to in par. 11 of the indictment was described therein as follows: "The price of gasoline to the jobber shall be the average spot market price, determined by averaging the high and low spot market prices for gasoline of comparable octane rating published by defendant Platt's Oilgram, for the Tulsa, Oklahoma, market, and by defendant Chicago Journal of Commerce on date of shipment. If the average spot market price plus freight to destination shall allow the buyer a margin of less than 5½¢ per gallon below the service station price posted by defendant Standard of Indiana, then the buyer and the seller shall share equally in the deficit below a 5½¢ margin. In certain States in which the Standard of Indiana has recently discontinued the posting of retail prices, such jobber margins have been calculated on the basis of a margin of 2¢ below the dealer tank wagon prices posted by the Standard of Indiana (such tank wagon prices having usually been 3½¢ below the posted retail prices)."

there was ample evidence of such overt acts in that district. The finding of the jury on this aspect of the case was also supported by substantial evidence. As we indicated in our discussion of the buying programs, there was sufficient evidence to go to the jury that the conspiracy did not end with an agreement to make purchases on the spot markets; that those buying programs were but part of the wider stabilization efforts of respondents; that the chief end and objective were the raising and maintenance of Mid-Western prices at higher levels. As stated by the Circuit Court of Appeals a different conclusion would require a belief that respondents were "engaged in a philanthropic endeavor." They obviously were not. The fact that no uniform jobbers' contract and no uniform retail price policy were agreed upon is immaterial. The objectives of the conspiracy would fail if respondents did not by some formula or method relate their sales in the Mid-Western area to the spot market prices. The objectives of the conspiracy would also fail if respondents, contrary to the philosophy of all the stabilization efforts, indulged in price cutting and price wars. Accordingly, successful consummation of the conspiracy necessarily involved an understanding or agreement, however informal, to maintain such improvements in Mid-Western prices as would result from the purchases of distress gasoline. The fact that that entailed nothing more than adherence to prior practice of relating those prices to the spot market is of course immaterial. In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the "continuous coöperation" necessary to keep the conspiracy alive. See *United States* v. *Kissel*, 218 U. S. 601, 607. Hence, sales by any one of the respondents in the Mid-Western area bound all. For a conspiracy is a partnership in crime; and an "overt act

of one partner may be the act of all without any new agreement specifically directed to that act." *United States* v. *Kissel, supra,* p. 608.

XI. *Respondent McElroy.*

Respondent McElroy argues that the judgment of conviction rendered against him should be reversed and the indictment dismissed not only for the reasons heretofore discussed, but more specifically on the grounds that there was no substantial evidence that he had any knowledge of and participated in the unlawful conspiracy. His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States,* 250 U. S. 616, 619; *Troxell* v. *Delaware, L. & W. R. Co.,* 227 U. S. 434, 444; *Lancaster* v. *Collins,* 115 U. S. 222, 225. We have carefully reviewed the record for evidence of McElroy's knowledge of and participation in the conspiracy. But without burdening the opinion with a detailed exposition of the evidence on this point, we are of opinion that there was no error in the denial of his motion.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE MURPHY did not participate in the consideration or decision of this case.

MR. JUSTICE ROBERTS, dissenting:

I regret that I am unable to agree to the court's decision. I think that for various reasons the judgment of the District Court should not stand.

The opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added. Some of the reasons for my inability to agree with the court's conclusions follow:

The Government relied for venue in the Western District of Wisconsin upon the commission in that district of overt acts in aid of the alleged common enterprise. I think the indictment fails to allege, and the evidence fails to disclose, the commission of any such act in the district of trial. I agree with the dissenting judge in the Circuit Court of Appeals that the case should be dismissed for this reason.

Paragraph 17 of the indictment alleges that the spot market tank car prices of gasoline substantially influence the retail prices.

Paragraph 18 is the only one that defines the charged conspiracy. It alleges that the defendants and others, knowing the facts pleaded by way of inducement (including the fact that retail prices follow spot market tank car prices), "combined and conspired together for the purpose of artificially raising and fixing the tank car prices of gasoline in the aforementioned spot markets, and, as intended by them, defendants have artificially raised and fixed such spot market tank car prices of gasoline and have maintained such prices at artificially high and non-competitive levels and at levels agreed upon among them *and have thereby* intentionally increased and fixed the tank car prices of gasoline contracted to be sold, and sold, in interstate commerce as aforesaid in the Midwestern area (including the Western District of Wisconsin), . . ." It is further alleged that the defendants have arbitrarily, due to the form of their contract [1] with jobbers, exacted

[1] The form and use of this contract is described in paragraph 11 of the indictment.

large sums of money from jobbers and, in turn, have intentionally raised the general level of retail prices in the midwestern area (including the Western District of Wisconsin).

The sole and only conspiracy charged is the agreement artificially to raise and fix spot market tank car prices of gasoline in the Mid-Continent field.

Paragraph 19 is devoted to the *means* by which the conspiracy thus described was *"effectuated."* The conduct of the defendants in this respect is described as their engaging and participating in two concerted gasoline buying programs, one, the East Texas buying program, and the other the Mid-Continent buying program, for the purchase by each of them from independent refiners in spot transactions of large quantities of gasoline in the East Texas and Mid-Continent fields.

After describing these buying programs in subsequent paragraphs, the indictment, in paragraph 25, alleges that the conspiracy "has operated and has been carried out in part within the Western District of Wisconsin." The method of its operation in that district is described as follows: "In pursuance of said combination and conspiracy, defendant major oil companies (with the exception of Standard of Indiana and Gulf) *have contracted to sell and have sold and have delivered* large quantities of gasoline in tank car lots to jobbers within said district at the artificially raised and fixed and non-competitive prices aforesaid and have arbitrarily exacted from jobbers within said district large sums of money. Defendant major oil companies (with the exception of Gulf) have solicited and taken contracts and orders for said gasoline within said district, sometimes by sales representatives located there, which district has been an important market for their product and they have required retail dealers and consumers in said districts to pay artificially increased prices for gasoline as aforesaid, all by virtue of said combination

and conspiracy and pursuant to the purposes and ultimate objectives thereof."

Thus, after describing the conspiracy as one to buy on spot markets for the purpose of raising the price of gasoline on those markets, the indictment purports to charge, as overt acts, entirely unrelated transactions of individual defendants in the resale of gasoline to jobbers and at retail in the Western District of Wisconsin.

There is no evidence in the record that any of the purchases made by the defendants pursuant to the conspiracy was made in Wisconsin. But if the indictment could bear the construction that the charged conspiracy involved an agreement as to the terms of resale to jobbers and retailers, proof was lacking to support any such alleged agreement. Government counsel, both in pleading and in admissions at trial, so conceded.

In its Bill of Particulars the Government said:

"The Government does not claim that each defendant entered into an agreement not to sell jobbers except in accordance with 'the contract described in paragraph 11 of the indictment.' "

At trial Government counsel repeatedly disavowed any charge in the indictment or any claim of the Government that there was an agreement amongst the defendants with respect to the price at which gasoline should be sold to jobbers or at retail. The evidence showed, without contradiction, that the Standard Oil Company of Indiana was the market leader in this area, and that when it posted its price none of the other defendants could sell at a higher price. It further showed that at various times Standard was forced to reduce its price to meet the competition of others. In this connection Government counsel made the following statements:

". . . We do not say that the Standard of Indiana when it posts a retail price first consults with the other companies to find out what retail price should be posted.

"If that is what you're worrying about, if you think we're charging you with sitting around a table and agreeing on a uniform retail price, don't worry because that isn't what we are charging."

In its brief in this court the Government attempts to avoid the effect of these concessions by the statement that the defendants "were not free to sell as they pleased in the Midwestern areas" and adds that "an obligation to adhere to their prior price practice of selling on the basis of spot market prices *was implicit in their unlawful agreement.*" This amounts to saying that the conspiracy was not the one charged in the indictment but was a much more ample conspiracy not only to raise the general level of tank car prices on the spot market by purchasing on that market but to raise, maintain, and fix uniform resale prices to jobbers and retailers. But this contention does not aid the Government for there is no evidence of any agreement to raise, or to maintain, jobber and retail prices, but, on the contrary, evidence that competition in such sales existed during the period in question.

Situations arise, and results ensue, from the prosecution of any agreement or conspiracy. Individual defendants may expect benefits to follow from their adherence to a conspiracy or agreement; but benefits or results, whether anticipated or unforeseen, occurring after consummation of the conspiracy, and because of it, are not overt acts done in aid and furtherance of the conspiracy. The authorities to this effect are uniform.[2]

The Government relies on *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. That case is clearly not in point. There the conspiracy was to fix the prices of the commodity manufactured and sold by the defendants and to adhere to the prices so fixed. This court held that

[2] *Lonabaugh* v. *United States*, 179 F. 476; *United States* v. *Black*, 160 F. 431; *Rose* v. *St. Clair*, 28 F. 2d 189.

a sale made, pursuant to that agreement, in the Southern District of New York afforded venue in that district of an indictment for violation of the Sherman Act. The case would be apposite if the pleading and proof in the instant case were of a conspiracy to fix and maintain jobber and retail prices and adherence to the agreement in sales to jobbers and retailers. Neither pleading nor proof goes to any such conspiracy.

In accordance with the Government's contention, the trial court repeatedly charged that, in order to convict, the jury must find that a combination existed and that the combination agreed to, *and had the power to,* raise the tank car spot market price of gasoline. Of course, the jury was at liberty to find that any number of the defendants less than all fulfilled the conditions named by the court. By its verdict the jury found that those who were convicted, as a body, (1) possessed the power to raise the price and (2) agreed so to do. The trial court granted a new trial to a number of defendants, including Standard of Indiana, the largest major oil company doing business in the area.

Standard was granted a new trial on the ground that there was no sufficient evidence to connect it with the conspiracy. By refusing new trials to the other corporate defendants the court has entered its own verdict that the others involved, excluding Standard, had the power, and agreed, to raise the level of spot market prices in the mid-western area. There is no jury verdict to that effect; no jury has ever passed upon that question, but an affirmative finding on that question is vital to the guilt of the defendants now before us. To affirm the judgment of conviction is to affirm a finding of fact by the trial judge without a jury and to deny the respondents the right to jury trial guaranteed by the Sixth Amendment of the Constitution.

The court's instructions to the jury were that they should return a verdict of guilty if they found that the defendants' actions had in any degree contributed to a rise in gasoline prices. The defendants insisted that the test was the effect of their combination upon competition, and that they could not be convicted unless the jury found that their agreement, and their conduct pursuant thereto, unreasonably restrained competition in interstate commerce.

There was substantial evidence that all the defendants agreed to, or did, was to act in concert to eliminate distress gasoline; that such gasoline was a competitive evil in that it tended to impair or destroy normal competition. There was substantial evidence that what they agreed to, and did, neither fixed nor controlled prices nor unreasonably affected normal competition and that their conduct affected prices only in the sense that the purchase of distress gasoline at going prices permitted prices to rise to a normal competitive level. There was no evidence that, as charged in the indictment, they agreed to, or in fact did, *fix* prices. The Court of Appeals, as I think, correctly held "that the substance of what was accomplished and agreed on was that the major companies would purchase from the independent refiners the latter's surplus gasoline at going market prices."

I think the defendants were entitled to have the jury charged that, in order to convict them, the jury must find that, although defendants knew the result of their activities would be a rise in the level of prices, nevertheless, if what they agreed to do, and did, had no substantial tendency to restrain competition in interstate commerce in transactions in gasoline the verdict should be not guilty.

As has been pointed out by this court, violation of the antitrust act depends upon the circumstances of indi-

vidual cases.[3] It is always possible to distinguish earlier decisions by reference to the facts involved in them but, in the course of decision in this court, certain principles have been laid down to which, I think, the charge of the court ran counter.

One of these firmly established principles is that concerted action to remove a harmful and destructive practice in an industry, even though such removal may have the effect of raising the price level, is not offensive to the Sherman Act if it is not intended and does not operate unreasonably to restrain interstate commerce; and such action has been held not unreasonably to restrain commerce if, as here, it involves no agreement for uniform prices but leaves the defendants free to compete with each other in the matter of price.[4]

No case decided by this court has held a combination illegal solely because its purpose or effect was to raise prices. The criterion of legality has always been the purpose or effect of the combination unduly to restrain commerce.

I think *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, a controlling authority sustaining the defendants' contention that the charge foreclosed a defense available to them under the Sherman Act. It is said that their combination had the purpose and effect of putting a floor under the spot market for gasoline. But that was

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[3] See *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563, 579.

[4] *United States* v. *American Tobacco Co.,* 221 U. S. 106, 178, 180; *United States* v. *Union Pacific R. Co.,* 226 U. S. 61, 84–85; *American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 400, 417; *Maple Flooring Mfrs. Assn.* v. *United States,* 268 U. S. 563, 568; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 362–3, 373–4; *Sugar Institute* v. *United States,* 297 U. S. 553, 597–8.

precisely the purpose and effect of the plan in the *Appalachian* case. True, the means adopted to overcome the effect of the dumping of distress products on the market were not the same in the two cases, but means are unimportant provided purpose and effect are lawful.

Ethyl Gasoline Corp. v. *United States,* 309 U. S. 436, is relied upon, but, in that case, as in *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, maintenance of prices fixed by agreement was involved. So also in *Sugar Institute* v. *United States,* 297 U. S. 553, condemned features of the common plan had to do with the maintenance of announced prices and the abstinence from selling certain sorts of sugar. The combinations or agreements in these cases specifically prevented competitive pricing or took a commodity out of competition. This is not such a case.

As I think, the error in the court's charge is well illustrated by the following instruction:

"If you should find that the defendants acting together, and those independent refiners acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, *or* that they did not combine for that purpose, *and* if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally, *then* you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to and did merely eliminate abuses which tended to produce destructive competition and restore competition to a fairer base and produce fairer price levels. In such event, you may conclude that the purchase of such gasoline in the manner shown by the evidence was reasonable and beneficial and not injurious to the public interest and that, therefore, the restraint of trade was not undue, and

not illegal, and you may acquit the defendants." (Italics supplied.)

This was to tell the jury that, if they found the combination had power and purpose to raise the general level of prices, they should convict without considering whether the defendants' concert of action was intended merely to remove a source of destructive competition, and without considering whether, as defendants contended and sought to prove, other factors in the industry, over which they had no control, limited their power to raise prices beyond a level which would be the normal result of the removal of the abuses engendered by the dumping of distress gasoline.

I think that the closing address of counsel for the Government is ground for setting aside the verdict.

It is true that to much that was objectionable in that address the defendants did not object or, if they did, failed to except. However, they assigned error to the whole of it and excepted to some of the more egregious violations of the canons of fair comment. I am of opinion that a situation is presented, which regardless of the technicalities of procedure, requires action by an appellate court. But, in any event, portions which are the subject of exception alone require a reversal of the judgment.

The final and closing address covers twenty-eight pages of the record. About five refer to the facts in the case. The balance consists largely of what the speaker himself characterized as "clowning" and personal references to counsel, parties, the court, and other subjects, the object of which apparently was to distract attention from the issues.

At many points counsel should have been stopped by the court and warned against continuance of such tactics.

The Circuit Court of Appeals said as to this matter:

"The Government does not undertake to justify much of the argument and misconduct complained of, but it earnestly insists that any error committed is not of a reversible nature. As the case is to be reversed, there seems no occasion for us to make a determination in this respect. We shall merely express the opinion that some of the argument complained of was highly improper and that, taken in connection with the misuse of the Grand Jury testimony, heretofore discussed, would present a very serious obstacle to the affirmance of the judgment."

I shall not quote those portions of the address which are quoted or summarized in the opinion of the court. It will suffice to make added reference to several portions.

One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons.

In the closing address counsel said to the jury:

"Now, if anybody doubts, if anybody has the least shadow of a doubt about the fact that these men [referring to Government counsel] believe to the bottom of their hearts in the justice of the cause that they espouse here, I can disabuse their minds of that doubt at any time. They have been aggressive, and they have been forceful; their movements here have been intelligent, well-timed; and, as I said, they have come into this court room morning after morning, worn and tired almost to the breaking point. And it seemed to me that, I some times got the feeling, coming as they did then before you

to present this evidence and this case, they were something like the Crusaders of old, saying 'God wills it, God wills it.' "

Objection was not made by counsel for the defendants at the time of this statement but when a somewhat similar statement was made a few moments later objection was noted and exception taken. I think, however, that the offense was so flagrant that the court itself should have intervened irrespective of any objection.

A little later these statements occurred:

"Now, just between yourselves, do you honestly think that these boys here (indicating counsel at government table) fired with the enthusiasm of crusaders, as I say, and having given to this case every ounce of mental and physical strength they have, and I myself have contributed, also, would be trying to convict these men unless that was the wish and the desire of the highest officials in the government of the United States?"

After objection and exception counsel continued as follows:

"Now, just what do you think about it? Do you think these are three or four or five of these young fellows, as they have been calling them, just starting out on their own, running hog-wild? These are important men. I presume you all know they are engaged in a very important business, a business, the operation of which is almost a necessity in this country today. You don't think the government of the United States would allow four or five lawyers to come out here and prosecute this case against them, against their wishes, or that the Secretary of the Department of the Interior would allow us to do it, if he didn't want it done? And if he wanted it done it was because he believed, as did the other men in Washington, that there was a violation of law here, so outstanding and so withering and far-reaching in its effect that something ought to be done to stop it; and by that to tell the people

of this country that you can't do these things and get away with it."

Again there was objection and exception.

Counsel did not confine himself to testimony as to the prosecutors' belief in the defendants' guilt but, in attacking the credibility of an important witness for defendants, essayed to contradict that testimony by a statement of counsel's own knowledge of facts. The quotation from the address will make the matter clear:

"I want to refer in a moment to something that made an impression on me.

"You know, we lawyers have to depend—most of us are kind of tough guys. We have our own way of talking about witnesses. And one thing that we very often say and talk about is the three classes of liars. There is the plain liar, the damn liar, and the expert witness. And of all of them, the expert witness is the worst.

"There were a few of them here. There was Swensrud, the representative of the Standard of Ohio; there was Van Covern, and I think there was another one.

"But I just didn't think much of Swensrud's whole testimony, especially after I found out that he was giving testimony that they could ship gasoline in 1935 and 1936 up the Mississippi River to St. Paul. I happen to be around the Mississippi River quite a little, and know quite a lot about it. In 1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona—because the Government was putting in these dams for the purpose of creating the nine-foot channel that you have read so much about. They had concrete clear across the river, spaced in so many ways, that, as I say, you just couldn't get a rowboat up there. When Swensrud talked about gasoline going up that river, where I knew, because I lived there and was around there, that it couldn't be done, I just thought——."

After objection and a request that the court direct the jury to disregard the statement the court ruled:

"The jury may disregard it. I didn't hear it. I was thinking about something else."

Thereupon counsel resumed as follows:

"Now, if you will let me alone a few minutes, I will be through. If you don't, like 'Old Man River,' I will just keep rolling along. I don't want to do that.

"Now I was referring to these witnesses who knew so much. There was Van Covern, Swensrud, and a fellow named J. D. Miller. He was the fellow who never looked at anybody, so you could catch his eye. They knew so much, in the way they were telling it to you, that it is impossible, just impossible to believe that they could know as much as they said they did about it. They just covered too much territory. I think all history, sacred and profane, gives us but one single example of a person who knew everything—and he was not only a man, but he was God. And He gave up His life in a shameful death, upon the cross, between two thieves."

. . . . .

It is true that no formal exception was taken but the matter was highly prejudicial. The court should have dealt with it in some definite and positive way, which he omitted to do.

Considering what is set out in the opinion of this court, and the additional references I have made to the address, I am of opinion that counsel's argument was highly improper, as indeed the Government admits, and, further, that it was highly prejudicial. I do not think the court took proper means to counteract the impropriety and prejudice thus created and I think the only remedy available is to set aside a verdict ensuing upon such misconduct. Compare *Berger* v. *United States,* 295 U. S. 78, 85, 88, 89.

MR. JUSTICE MCREYNOLDS concurs in this opinion.

DAMPSKIBSSELSKABET DANNEBROG, CLAIMANT, ET AL. *v.* SIGNAL OIL & GAS CO. OF CALIFORNIA.

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

No. 662. Argued April 1, 1940.—Decided May 20, 1940.

1. Where, by the terms of a charter party, the charterer has the direction and control of the vessel, and there is no prohibition against the creation of liens for necessary supplies ordered by the charterer, one who on the order of the charterer supplies fuel oil to the vessel is entitled to a maritime lien, even though the charter requires the charterer to "provide and pay for" fuel. Construing the Act of June 23, 1910, as amended. Pp. 271, 275.

   Semble, where the charter party prohibits the creation of a lien for supplies ordered by the charterer, no lien will attach.

2. The fact that the supplier had a general contract with the charterer to supply "the fuel oil requirements of any and all vessels owned, chartered, or operated" by the latter, *held* not to defeat the lien, where such contract did not provide that the oil should be supplied on the sole credit of the charterer or negative the creation of maritime liens for supplies actually furnished to the vessels in satisfying their requirements. P. 276.

3. The Act of June 23, 1910, as amended, provides that "any person to whom the management of the vessel at the port of supply is intrusted" shall be presumed to have authority to procure supplies upon the credit of the vessel. *Held* that where, apart from mere navigation, the vessel is placed under the direction and control of the charterer as the hirer of the vessel, who as such may determine to what port she shall go and what she shall carry, subject only to specified exceptions, then the charterer, in the absence of any provision to the contrary, is deemed to be intrusted with the vessel's management, within that provision of the Act. Pp. 277, 279–280.

106 F. 2d 896, affirmed.

CERTIORARI, 309 U. S. 644, to review the affirmance of decrees in admiralty, 25 F. Supp. 594, sustaining maritime liens.

Mr. Lane Summers, with whom *Messrs. W. H. Hayden* and *F. T. Merritt* were on the brief, for petitioners.

Mr. Glenn J. Fairbrook for respondent.

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

The question is whether the respondent is entitled to maritime liens for fuel oil delivered to petitioners' vessels.

In September, 1932, respondent, Signal Oil and Gas Company, made a contract with the Anglo Canadian Shipping Company, Limited, agreeing to sell fuel oil to any vessel which the Anglo Canadian Company might own, charter or operate. In May, 1933, the parties modified the contract so as to include the fuel oil requirements of vessels owned, chartered or operated by W. L. Comyn & Sons. Later, the respective owners of the two vessels here in question, the "Stjerneborg" and the "Brand," chartered them to W. L. Comyn & Sons.

The charters were time charters on the so-called "Government form." The owners agreed "to let" and the charterers "to hire" the vessel "from the time of delivery" for a specified period, the vessel to be placed "at the disposal of the charterers" at such place as the charterers may direct, being on her delivery ready to receive cargo and to be employed in carrying merchandise as stated. The owners agreed to provide and pay for all provisions, wages and shipping and discharging fees of the captain, officers, engineers, firemen and crew; to pay for the insurance of the vessel, and to maintain her in a thoroughly efficient state in hull, machinery and equipment. The charterers agreed to "provide and pay for" coals and fuel oil, port charges, pilotages, etc., and all other usual ex-

penses except as before stated. The charterers were to pay "for the use and hire" of the vessel a stipulated amount commencing "on and from the day of her delivery" and to continue until "the day of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owners (unless lost) at a safe port" as designated. It was provided that the captain, although appointed by the owners, should be "under the orders and direction of the charterers as regards employment or agency"; and the charterers were to load, stow and trim the cargo at their expense under the supervision of the captain. If the charterers should have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners if necessary should make a change in the appointments. The charterers were allowed to appoint a supercargo to accompany the vessel and "see that voyages are prosecuted with the utmost despatch." It was further provided that nothing in the charter should be construed as a "demise" and that the owners were to remain responsible for the navigation of the vessel. The charters contained no prohibition against the creation of liens for necessary supplies ordered by the charterers.

Respondent libeled the vessels for fuel oil supplied to the vessels respectively on the charterers' order, and the owners appeared and filed answers alleging that the oil was furnished upon the charterers' credit and not upon that of the vessel.

The District Court sustained the liens, 25 Fed. Supp. 594, and the Circuit Court of Appeals affirmed the decrees. 106 F. 2d 896. Because of an alleged conflict with decisions of the Circuit Court of Appeals of the Fifth Circuit in *The Cratheus,* 263 F. 693, and *Pensacola Shipping Co.* v. *United States Shipping Board,* 277 F. 889, certiorari was granted, 309 U. S. 644.

The Circuit Court of Appeals in the instant case followed its decisions in *The Portland,* 273 F. 401, and *The*

Golden Gate, 52 F. 2d 397. *The Golden Gate* was a case of a time charter which required the charterer to provide and pay for fuel oil but contained no provision denying the right of the charterer to bind the ship for necessary supplies. The court said that in the absence of such a prohibition the ship was bound whether the supplies were ordered by the charterer or by the master. The ruling was reiterated by the same court in *The Luddco,* 66 F. 2d 997, 998. In further support of its position, respondent cites the following cases from other circuits: *The Everosa,* C. C. A. 1st, 93 F. 2d 732, 735; *The J. W. Hennessy,* C. C. A. 2d, 57 F. 2d 77, 79, 80; *The Anna E. Morse,* C. C. A. 3d, 286 F. 794, 798; *Munson Inland Water Lines* v. *Seidl,* C. C. A. 7th, 71 F. 2d 791, 793.

Petitioners rely upon our decisions in *The Kate,* 164 U. S. 458, 464, and *The Valencia,* 165 U. S. 264, to the effect that where the charter party requires the charterer to provide and pay for supplies, the supplier being charged with knowledge of the provisions of the charter party was not entitled to a maritime lien for supplies furnished to the vessel upon the order of the charterer.

These decisions, however, were prior to the passage of the Act of June 23, 1910, 36 Stat. 604, which governs the present case. The text of the Act, as amended, is set forth in the margin.[1] Its purpose was to simplify and

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[1] The Act of June 23, 1910, 36 Stat. 604, as amended by the Act of June 5, 1920, § 30, 41 Stat. 1005, 46 U. S. C. 971–973, provides:

"§ 971. *Persons entitled to lien.* Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in

clarify the rules as to maritime liens as to which there had been much confusion. The Act did away with the artificial distinction between repairs, supplies, etc., furnished in home ports and those furnished in foreign ports. It did away with the doctrine that when the owner of a vessel contracted in person for necessaries or was present in the port when they were ordered, it was presumed that the material-man did not intend to rely upon the vessel's credit. It substituted a federal statute for numerous state statutes purporting to confer liens. *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11.[2]

In so doing, the statute provided a series of simple and comprehensive rules. While it was said not to be intended to change the general principles of the law of maritime

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rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"§ 972. *Persons authorized to procure repairs, supplies, and necessaries.* The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"§ 973. *Notice to person furnishing repairs, supplies, and necessaries.* The officers and agents of a vessel specified in section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Other provisions, §§ 974 and 975, relate to the waiver of liens and the superseding of state laws.

[2] See, also, *The Yankee*, 233 F. 919, 924; *The Oceana*, 244 F. 80, 82; Senate Report, No. 831, 61st Cong., 2d sess.; House Report, No. 772, 61st Cong., 2d sess.

liens,[3] it was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels. Any person furnishing repairs, supplies, etc., to a vessel whether foreign or domestic, "upon the order of the owner" or "of a person authorized by the owner," is to have a maritime lien which may be enforced by suit *in rem*. It is not necessary to allege or prove that credit was given to the vessel. The "managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted," is presumed to have authority to procure the necessaries. The officers and agents thus specified include those appointed "by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel." These broad provisions are then subjected to the qualification that nothing in the Act should be construed to confer a lien "when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Despite the aim thus to provide simple and clear rules, there has been no little contrariety of opinion in the application of the statute,—well illustrated by the conflicting decisions to which we have referred with respect to the existence of maritime liens where supplies have been ordered by a charterer who has agreed with the owner to provide and pay for them. As, in such a case, the supplies are furnished on the charterer's order, there is no question that the supplier is charged with knowledge of the provisions of the charter when he either knows them

[3] Senate Report, No. 831, 61st Cong., 1st sess. *Marshall & Co.* v. *The President Arthur*, 279 U. S. 564, 568.

or by reasonable diligence could have ascertained them. So far, the principle of *The Kate* and *The Valencia, supra,* is embodied in the statute. But it does not follow that, in the light of the statute, *The Kate* and *The Valencia* can still be regarded as authority for the view that the mere fact that the charterer is bound to provide and pay for the supplies excludes the supplier from having a maritime lien when the charter party contains no prohibition against its creation.

We think that our decision in *The South Coast,* 251 U. S. 519,[4] negatives such a conclusion. That was a case of a bare-boat charter which provided that the charterer should pay for all supplies and all other charges and save the owner harmless from all liens. The supplies were ordered by the master, but, though appointed by the owner, the master was under the orders of the charterer and thus the master's orders were the charterer's orders. When the supplies were ordered, representatives of the owner at the port of supply warned the supplier that the vessel was under charter and that he must not furnish the supplies on the credit of the vessel. If the owner had power to prevent the attaching of a lien by this warning, the owner had done so. But while under the terms of the charter party it was clearly the duty of the charterer to provide and pay for the supplies and to save the owner harmless, this was held not to preclude the creation of a maritime lien. *The Kate* and *The Valencia* were cited unavailingly. When the charter party was examined to see if it prohibited liens it was found that it did not do so; it recognized the possibility of liens. It provided that the owner might retake the vessel in case of the failure of the charterer to discharge within thirty days any debt which was a lien upon it and also for a surrender of the

[4] The facts are more fully set forth in the opinion of the Circuit Court of Appeals. *The South Coast,* 247 F. 84.

vessel free of liens upon the charterer's failure to make certain payments.

We think that the fair import of our decision in *The South Coast* is that when the charterer has the direction and control of the vessel and it is his business to provide necessary supplies, and the charter party does not prohibit the creation of a maritime lien therefor, the material-man is entitled to furnish the supplies upon the credit of the vessel as well as upon that of the charterer and the lien is not defeated by the fact that the charterer has promised the owner to pay.

When, however, the charter party, with knowledge of which the material-man is charged, prohibits the creation of a lien for supplies ordered by the charterer or the charterer's representative, no lien will attach. This was decided in *United States* v. *Carver,* 260 U. S. 482. That was a case of vessels owned by the United States. The charterer, whose representative had ordered the supplies, had agreed that it would "not suffer nor permit any lien" which might have priority over the title and interest of the owner. The question was whether a maritime lien would have arisen against the vessels if they had been privately owned. The court, quoting the provision of the Act of 1910 as to the duty of the material-man to make inquiry, said that he was not entitled "to rest upon presumptions until he is put upon inquiry"; he must inquire. "If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms." The court added that there would have been no difficulty in finding out both. The court found a difference between the language of the charter party in the *Carver* case and that used in *The South*

Coast. In the *Carver* case "the primary undertaking" was that "a lien shall not be imposed." The lien was denied, not because the charterer was bound to provide and pay for supplies, but because the charter party prohibited the lien. To the same effect is the decision in the case of *The St. John's. Colonial Beach Co.* v. *Quemahoning Coal Co.*, 260 U. S. 707.

As, in the instant case, the charter parties contained no provision prohibiting the creation of a maritime lien, we are of the opinion that the mere fact that they required the charterers to provide and pay for the supplies did not prevent the liens from attaching.

The argument is pressed that respondent was under a general contract to supply "the fuel oil requirements of any and all vessels owned, chartered, or operated" by W. L. Comyn & Sons. But this contract did not provide that the oil should be supplied on the sole credit of Comyn as the owner or charterer of the vessels or negative the creation of maritime liens for supplies actually furnished to the vessels in satisfying their requirements. The decisions which petitioner cites are not apposite. In *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra,* the Coal Company had made a contract with a corporation, which owned both steamers and factories, to furnish such coal as should be required. The court observed that the difficulty which confronted the Coal Company in seeking to enforce a maritime lien did not lie in the fact that a contract had been made for the supply of coal. "A vessel," said the court, "may be liable *in rem* for supplies, although the owner can be made liable therefor *in personam;* since the dealer may rely upon the credit of both." So, the court recognized that if in that case "the coal had been furnished to the several vessels by the libellant, maritime liens would have arisen and could have been established under the statute without

proof that credit was given to the vessels." The difficulty which blocked recovery by the Coal Company was "solely that it did not furnish coal to the vessels." There "was no understanding when the contract was made, or when the coal was delivered by the libellant, that any part of it was for any particular vessel or even for the vessels then composing the fleet. And it was clearly understood that the purchasing corporation would apply part of the coal to a non-maritime use." *Id.*, pp. 10, 11, 13. In the instant case, the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced; and there was nothing in the general contract to the effect that the supplies were to be furnished upon the exclusive credit of W. L. Comyn & Sons and not also upon the credit of the vessels.

In the other case relied upon, *Marshall & Co.* v. *The President Arthur,* 279 U. S. 564, the point was that the maritime lien had been waived by the libellant under an agreement by which trade acceptances endorsed by designated persons had been received; that "by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had." *Id.*, p. 572. It may be noted that in the instant case there was a contention that the liens had been waived by the respondent by entering into a certain creditor's agreement and by accepting certain security. But it appeared that in those transactions the right to the liens on the vessels had been expressly reserved. The court below accordingly ruled that there had been no waiver and its decision in that relation has not been challenged here.

There remains the contention that, apart from any prohibition of the creation of liens, the vessels could not be bound for supplies ordered by the charterers because of

the nature of the charter parties. There is a plain distinction between a case of a bare-boat charter, where the charterer mans the vessel, and a case where the charter party is a mere contract for the carriage of goods. In the former there is a clear demise; in the latter, the charterer is in substance only a shipper.[5] There is an intermediate class of charters which has given rise to many questions in various situations. Time charters of the sort now before us are in this class. The owner provides the master and crew and undertakes the navigation of the vessel and to maintain her in an efficient condition. But the master although appointed by the owner, is placed "under the orders and direction of the charterers as regards employment or agency." The owners agree "to let" the vessel and the charterers "to hire" her "from the time of delivery" until the date set for "her redelivery." The charterers are to provide and pay for fuel supplies, port charges, pilotages, etc. and all other expenses except those pertaining to the captain, officers or crew.

There is thus a distribution of responsibility, and liability or the legal consequences of particular conduct would be determined accordingly. While the owners assumed responsibility for the navigation of the vessels and their maintenance in an efficient state, we are not concerned with any questions relating to faults in navigation or failure in maintenance. The mere fact that the owners furnished the master and crew cannot be regarded as decisive of the question before us. See *United States* v. *Shea,* 152 U. S. 178, 190, 191; *United States* v. *Cornell Steamboat Co.,* 267 U. S. 281. Aside from the navigation of the vessels, they were placed under the control of the

[5] See *Reed* v. *United States,* 11 Wall. 591, 600; *Leary* v. *United States,* 14 Wall. 607, 610; *United States* v. *Shea,* 152 U. S. 178, 189–191; *The Barnstable,* 181 U. S. 464, 468.

charterers and the master and crew were under their directions. The vessels by the terms of the charters were delivered to the charterers, and where the vessels were to go and what they were to carry, within the broad limits described in the charters, were determined by the charterers.

The question whether under a charter, containing these or similar provisions, the material-man may have a lien for supplies furnished on the order of the charterer has given rise to conflicting views [6] and no little confusion has resulted.

We think that this conflict may be resolved by having due regard to the manifest purpose of the governing statute. The Act says nothing about types of charters. In speaking of those who shall be presumed to have authority to procure supplies, the statute expressly includes not only the "ship's husband" and the "master" but "any person to whom the management of the vessel at the port of supply is intrusted," and these persons are to be taken to include such officers and agents "when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel." We think that the purpose of the statute is not properly served by construing the term "management of the vessel" as referring to her "navigation." Management is a broader term connoting direction and control for the purposes for which the vessel is used. Where, as in this

[6] See, e. g., upholding the lien; *The India,* 14 F. 476, 16 F. 262; *The Bombay,* 38 F. 512, 863; *The George Dumois,* 68 F. 926; *The Anna E. Morse,* 286 F. 794; *The A. S. Sherman,* 51 F. 2d 782; *The Golden Gate,* 52 F. 2d 397; *The Everosa,* 93 F. 2d 732. See, e. g., *contra: The Cratheus,* 263 F. 693; *Pensacola Shipping Co.* v. *U. S. Shipping Board,* 277 F. 889; *The Thordis,* 290 F. 255; *The Ville de Djibouti,* 295 F. 869; *The Pajala,* 7 F. Supp. 618; *The Dictator,* 18 F. 2d 131. Compare, *The J. W. Hennessy,* 57 F. 2d 77, 80.

case, apart from mere navigation, the vessel is placed under the direction and control of the charterer as the hirer of the vessel, who as such may determine to what port she shall go and what she shall carry, subject only to specified exceptions, we think the charterer must be deemed to be intrusted with the vessel's management for the purpose of applying the statutory test of authority to obtain necessary supplies upon the credit of the vessel, in the absence of a provision to the contrary.

The origin of the maritime lien is the need of the ship. *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra.* The lien is given for supplies which are necessary to keep the ship going. The material-man when furnishing such supplies on the order of the charterer is charged with knowledge of the terms of the charter party when he can ascertain them, but when it appears that by these terms the charterer has direction and control of the vessel and that he is the one to obtain the essential supplies, and that there is no prohibition of the creation of a maritime lien, the material-man is protected by the terms of the statute. He furnishes the supplies on the order of the person authorized to obtain them and he is entitled to rely on the credit of the vessel as well as upon the credit of the one who gives the order.

We are of the opinion that it would thwart the purpose of the statute to compel the material-man furnishing supplies to the vessel to resolve the ambiguities which may be found in such charters as those here involved. The statute was intended to afford the material-man a reasonably certain criterion. The owner has a simple and ready means of protection. All that it is necessary for him to do, as the material-man in dealing with the charterer is charged with notice of the charter, is to provide therein that the creation of maritime liens is prohibited. When the owner does not do so, he should not be heard to complain when it appears that it is the

charterer's business to obtain supplies to keep the vessel on her way and the charter has not prohibited reliance upon the credit of the vessel.

The judgment of the Circuit Court of Appeals is

Affirmed.

SONTAG CHAIN STORES CO., LTD. *v.* NATIONAL NUT COMPANY OF CALIFORNIA.

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

No. 671. Argued April 24, 1940.—Decided May 20, 1940.

1. One who, subsequently to the issuance of a patent but prior to the filing of an application for a reissue patent on broadened claims, put into use a machine which it is alleged infringes the reissue patent, though it does not infringe the original patent, *held*, in the absence of fraud or bad faith, to have acquired intervening rights which barred injunctive relief against continued use of the accused machine. Pp. 282, 293–295.
2. That at the time the accused machine was first put into use the alleged infringer was without actual knowledge of the original patent, does not defeat the claim of intervening rights. P. 295.
3. Assumed, but not decided, that (apart from the question of intervening rights) the reissue patent here involved was valid and infringed. P. 285.

107 F. 2d 318, reversed.

CERTIORARI, 309 U. S. 645, to review the reversal of a decree denying an injunction to restrain alleged infringement of a patent.

Mr. Guy A. Gladson, with whom *Messrs. Franklin M. Warden* and *Arthur D. Welton, Jr.* were on the brief, for petitioner.

Mr. Hugh N. Orr, with whom *Mr. Charles S. Evans* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Circuit Court of Appeals declared respondent's reissue patent No. 20,024, for a nut treating apparatus, valid and infringed by petitioner's use of the accused machine, and rejected the defense of intervening rights. The record requires us to consider what effect an enlarged inclusive reissue claim has upon the use of a machine manufactured and operated after grant of the original patent without infringing it, but which does come within the enlargement.

Kohler's patent—No. 1,958,409—with four narrow claims, issued May 15, 1934.

Petitioner procured and began to use the machine here accused about April 1, 1935. It first obtained actual knowledge of the original patent October 8, 1935 when notice of infringement was received. Nothing shows earlier knowledge by the manufacturer who began to make and sell like machines not later than August 1934.

By suit filed in the District Court, October 19, 1935, respondent charged petitioner with infringing the original patent, and asked appropriate relief. Infringement was denied by answer, November 22, 1935.

January 15, 1936 respondent applied for and on June 30, 1936 obtained a reissue patent—No. 20,024—with seventeen claims. The first four were identical with the original ones; thirteen of broader scope cover petitioner's machine. Respondent was moved to obtain the reissue by petitioner's use of the accused machine.

January 26, 1937 respondent began another proceeding charging infringement of the enlarged claims. Petitioner's answer relied upon intervening rights acquired through public use without violating the original patent; also, invalidity of the reissue because of laches. The two

suits were consolidated; claims one to four were not relied on. A single decree went for petitioner. Both bills were dismissed.

Infringement of respondent's design patent No. 89,347—February 28, 1933—was alleged, but both courts declared it not infringed. No point in respect of it is before us.

The District Court held—"That with respect to Kohler Reissue Letters Patent No. 20,024 in suit, this defendant and those in privity with it, including the manufacturer of the machine in question, acquired intervening rights which in equity plantiff may not now disturb." The Circuit Court of Appeals reversed and directed a remand. 107 F. 2d 318.

The cause is here by certiorari. Petitioner asserts the reissue patent is void because of laches; also that by reason of acquired intervening rights, use of the accused machine may continue.

The provision concerning reissues in the present Patent Act, § 4916 Revised Statutes as amended by Act May 24, 1928, c. 730, 45 Stat. 732; U. S. C. Title 35, § 64, is copied in the margin.[1] It derives through the Acts July 3,

[1] "Whenever any patent is wholly or partly inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a patent for the same invention, and in accordance with the corrected specification, to be reissued to the patentee or to his assigns or legal representatives, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the reissued patent, but in so far as the claims of the original and reissued patents are identical, such surrender shall not affect any action then pending nor abate any cause of action then existing, and the reissued patent to the extent that its claims are identical with the original patent shall constitute

1832, c. 162, § 3, 4 Stat. 559; July 4, 1836, c. 357, § 13, 5 Stat. 117, 122; March 3, 1837, c. 45, § 5, 5 Stat. 191, 192; July 8, 1870, c. 230, § 53, 16 Stat. 198, 205.

The reissue provision, Act 1832, was supplanted without change presently important by the corresponding one in the 1836 Act. This was substantially reënacted in 1870. Modifications by the 1928 Act are not important here. *Stimpson* v. *West Chester Railroad Co.,* (1846) 4 How. 380, 402; *Parker & Whipple Co.* v. *Yale Clock Co.,* (1887) 123 U. S. 87, 96; Walker on Patents, Deller's edition (1937), Vol. 2, p. 1342; Robinson on Patents (1890) Vol. 2, § 653 *et seq.*

These provisions have often been before the courts and there are sharply differing views concerning them. Some of the pertinent cases are noted below.[2]

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a continuation thereof and have effect continuously from the date of the original patent. The commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued letters patent. The specifications and claims in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specifications, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

[2] *Stimpson* v. *West Chester Railroad Co.* (1846) 4 How. 380; *Battin* v. *Taggert,* (1854) 17 How. 74; *Miller* v. *Brass Co.,* (1881) 104 U. S. 350; *Mahn* v. *Harwood,* (1884) 112 U. S. 354; *Coon* v. *Wilson,* (1885) 113 U. S. 268; *Wollensak* v. *Reiher,* (1885) 115 U. S. 96; *White* v. *Dunbar,* (1886) 119 U. S. 47; *Newton* v. *Furst & Bradley Co.,*

The Circuit Court of Appeals after holding the enlarged reissue claims valid and infringed further declared—"In the instant case there was admittedly no knowledge of or reliance on the scope of plaintiff's patent, and no facts creating an estoppel. Furthermore, defendant has not shown a two-years user of the infringing patent. The defense of intervening rights is denied."

For present purposes we assume, without deciding, correctness of the conclusion that the reissue patent was valid and infringed, and upon that assumption, we come to consider the effect of the enlarged claims upon petitioner's machine, lawfully manufactured and operated prior to their inception. There is nothing to show dishonesty, bad faith, or deceptive intention upon petitioner's part.

Counsel for respondent insist the denial of intervening rights finds adequate support in *Stimpson* v. *West Chester Railroad Co., supra; Battin* v. *Taggert, supra; White* v. *Dunbar, supra; Topliff* v. *Topliff, supra; Abercrombie & Fitch Co.* v. *Baldwin, supra.* The first two are in point; but when considered in connection with later opinions are not decisive of the present issue. The other cases relied upon are not especially helpful.

(1886) 119 U. S. 373; *Ives* v. *Sargent,* (1887) 119 U. S. 652; *Parker & Whipple Co.* v. *Yale Clock Co.,* (1887) 123 U. S. 87; *Electric Gas Co.* v. *Boston Electric Co.,* (1891) 139 U. S. 481; *Topliff* v. *Topliff,* (1892) 145 U. S. 156; *Leggett* v. *Standard Oil Co.,* (1893) 149 U. S. 287; *Dunham* v. *Dennison Manufacturing Co.,* (1894) 154 U. S. 103; *Abercrombie & Fitch Co.* v. *Baldwin,* (1917) 245 U. S. 198; *Keller* v. *Adams-Campbell Co.,* (1924) 264 U. S. 314, and cases there cited; *Altoona Theatres* v. *Tri-Ergon Corp.,* (1935) 294 U. S. 477; *Wooster* v. *Handy,* (1884) 21 F. 51; *Ashley* v. *Samuel C. Tatum Co.,* (1917) 240 F. 979; *General Refractories Co.* v. *Ashland Fire Brick Co.,* (1926) 15 F. 2d 215, reversed on appeal (1928) 27 F. 2d 744; *Christman* v. *New York Air Brake Co.,* (1928) 1 F. Supp. 211; *Moto Meter Gauge & Equipment Corp.* v. *E. A. Laboratories,* (1932) 55 F. 2d 936.

The Patent Act of 1832 was a response to *Grant* v. *Raymond,* (Feb. 23, 1832) 6 Pet. 218, 242, 243–244. The opinion there (Chief Justice Marshall) affirmed the power of the Secretary to grant an application dated April 20, 1825 for reissue of a patent dated August 11, 1821 although not expressly authorized so to do, upon the ground that this was necessary in order to effect the purposes of the Patent Act by securing to inventors full benefit of their discoveries through "faithful execution of the solemn promise made by the United States." The Court said—

"An objection much relied on is, that after the invention has been brought into general use, those skilled in the art or science with which it is connected, perceiving the variance between the specification and the machine, and availing themselves of it, may have constructed, sold and used the machine without infringing the legal rights of the patentee, or incurring the penalties of the law. The new patent would retro-act on them, and expose them to penalties to which they were not liable when the act was committed."

"This objection is more formidable in appearance than in reality. It is not probable that the defect in the specification can be so apparent as to be perceived by any but those who examine it for the purpose of pirating the invention. They are not entitled to much favour. But the answer to the objection is, that this defence is not made in this case; and the opinion of the circuit court does not go so far as to say that such a defence would not be successful. That question is not before the court, and is not involved in the opinion we are considering. The defence when true in fact may be sufficient in law, notwithstanding the validity of the new patent."

Under the two year rule of *Miller* v. *Brass Co.,* (1881) *supra,* note 2, a reissue patent granted in circumstances

like those disclosed by the report of Grant's case, now would be declared invalid.

Stimpson v. *West Chester Railroad Co.,* (1846) *supra,* note 2, involved infringement of a reissue, granted in 1835, of an original patent dated in 1831. The trial judge charged the jury—

"It clearly appears that the defendants constructed their railroad with the plaintiff's curves in 1834, one year or more before the plaintiff's application for his renewed patent; consequently, they may continue its use without liability to the plaintiff."

This was declared in conflict with the reissue provision Act of 1832 and the corresponding one in the 1836 Act. The two are declared substantially alike. The Court said—

"It is plain that no prior use of the defective patent can authorize the use of the invention after the emanation of the renewed patent under the above section. To give to the patentee the fruits of his invention was the object of the provision; and this object would be defeated, if a right could be founded on a use subsequent to the original patent and prior to the renewed one. . . . Now any person using an invention protected by a renewed patent subsequently to the date of this act is guilty of an infringement, however long he may have used the same after the date of the defective and surrendered patent."

Battin v. *Taggert,* (1854) *supra,* note 2, reaffirmed *Stimpson* v. *West Chester R. Co.,* and disapproved the following instruction to the jury—"That a description, by the applicant, for a patent of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as a patentee, is a dedication of it to the public. That such a dedication cannot be revoked, after the machine has passed into public use, either by surrender and reissue, or otherwise."

The Court said—"Whether the defect be in the specifications or in the claim, under the 13th section [Act 1836] above cited, the patentee may surrender his patent, and, by an amended specification or claim, cure the defect. The reissued patent must be for the same invention, substantially, though it be described in terms more precise and accurate than in the first patent. Under such circumstances, a new and different invention cannot be claimed. But where the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give to it validity, and protect the rights of the patentee against all subsequent infringements."

"So strongly was this remedy of the patent recommended, by a sense of justice and of policy, that this court, in the case of Grant *v.* Raymond, 6 Pet. 218, sustained a reissued and corrected patent, before any legislative provision was made on the subject."

"How much stronger is a case under the statute, which secures the rights of the patentee by a surrender, and declares the effect of the reissued and corrected patent? *By the defects provided for in the statute, nothing passes to the public from the specifications or claims, within the scope of the patentee's invention. And this may be ascertained by the language he uses.*" [Italics supplied.]

Miller v. *Brass Co.*, (1881) *supra,* note 2, departing from the view expressed in *Battin* v. *Taggert* concerning omissions in claims, declared—

"But it must be remembered that the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. It is a declaration that that which is not claimed is either not the patentee's invention, or, if his, he dedicates it to the public. This legal effect of the patent cannot be revoked unless the patentee sur-

renders it and proves that the specification was framed by real inadvertence, accident, or mistake, without any fraudulent or deceptive intention on his part; and this should be done with all due diligence and speed. Any unnecessary laches or delay in a matter thus apparent on the record affects the right to alter or reissue the patent for such cause. If two years' public enjoyment of an invention with the consent and allowance of the inventor is evidence of abandonment, and a bar to an application for a patent, a public disclaimer in the patent itself should be construed equally favorable to the public. Nothing but a clear mistake, or inadvertence, and a speedy application for its correction, is admissible when it is sought merely to enlarge the claim."

"We think it clear that it was not the special purpose of the legislation on this subject to authorize the surrender of patents for the purpose of reissuing them with broader and more comprehensive claims, although, under the general terms of the law, such a reissue may be made where it clearly appears that an actual mistake has inadvertently been made. But by a curious misapplication of the law it has come to be principally resorted to for the purpose of enlarging and expanding patent claims. And the evils which have grown from the practice have assumed large proportions. Patents have been so expanded and idealized, years after their first issue, that hundreds and thousands of mechanics and manufacturers, who had just reason to suppose that the field of action was open, have been obliged to discontinue their employments, or to pay an enormous tax for continuing them."

Mahn v. *Harwood* (1884) *supra,* note 2, reaffirms *Miller* v. *Brass Company,* and declares—

"The public is notified and informed by the most solemn act on the part of the patentee, that his claim to invention is for such and such an element or combina-

tion, and for nothing more. Of course, what is not claimed is public property. The presumption is, and such is generally the fact, that what is not claimed was not invented by the patentee, but was known and used before he made his invention. But, whether so or not, his own act has made it public property if it was not so before. The patent itself, as soon as it is issued, is the evidence of this. The public has the undoubted right to use, and it is to be presumed does use, what is not specifically claimed in the patent. Every day that passes after the issue of the patent adds to the strength of this right, and increases the barrier against subsequent expansion of the claim by reissue under a pretence of inadvertence and mistake."

"The truth is (as was shown in *Miller* v. *The Brass Company*), that this class of cases, namely, reissues for the purpose of enlarging and expanding the claim of a patent, was not comprised within the literal terms of the law which created the power to reissue patents. But since the purpose of the statute undoubtedly was to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments, it may fairly be inferred that a mistake in a patent whereby the claim is made too narrow, is within the equity, if not within the words, of the statute. Yet no court of equity, considering all the interests involved, would ever grant relief in such a case without due diligence and promptness on the part of the patentee in seeking to have the error corrected. It is just one of those cases in which laches and unnecessary delay would be held to be a bar to such relief. And in extending the equity of the statute so as to embrace the case, the courts should not overlook or disregard the conditions on which alone courts of equity would take any action, and also on which alone the

Commissioner of Patents has any power to grant a reissue."

See, *Clements* v. *Odorless Apparatus Co.,* (1884) 109 U. S. 641, 649–650; *Turner & Seymour Co.* v. *Dover Stamping Co.,* (1884) 111 U. S. 319, 326–327; *Coon* v. *Wilson,* (1885) 113 U. S. 268, 277.

Topliff v. *Topliff,* (1892) *supra,* note 2, recognizes that a valid reissue patent with enlarged claims may be granted, when the original is inoperative, under condition—

"Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public to the same extent that a failure by the inventor to apply for a patent within two years from the public use or sale of his invention is regarded by the statute as conclusive evidence of an abandonment of the patent to the public."

In *Dunham* v. *Dennison Manufacturing Co.,* (1894) *supra,* note 2, infringement was alleged of a reissue, dated June 10, 1884, of an original patent issued May 8, 1883, for "a new and improved combined tag and envelope." This Court said—

"The patent of May 8, 1883, was expressly and distinctly, both in the specification and in the claims, limited to an envelope, with an opening at one end; with a flap, attached to the envelope at that end, of sufficient size to cover the whole of that side of the envelope in which the opening was; . . . The patentee thus gave the public to understand that an envelope, the flap of which did not cover its whole length, would not come within his patent, and might rightfully be made by any one. After the defendant had made envelopes with a short flap of

semi-circular shape and covering little more than the opening of the envelope, (which, it is admitted, did not infringe the plaintiff's patent as originally issued,) the plaintiff obtained a reissue, enlarging the claims, and altering the specification throughout, so as to include an envelope with a flap of any size or shape, and to make the invention consist, not, as in the leading words of the description in the original patent, of 'an envelope with an end flap covering its side,' but in 'a tag provided with means for attaching it to the merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise.' The words of the description in the original patent were neither technical nor complicated; but they were of the simplest kind, and their meaning and scope could not have been misunderstood by any one who read them with the slightest attention, least of all by the patentee. To uphold such a reissue under such circumstances would be to grant a new and distinct privilege to the patentee at the expense of innnocent parties, and would be inconsistent with the whole course of recent decisions in this court."

Abercrombie & Fitch Co. v. *Baldwin,* (1917) *supra,* note 2, declared a reissue claim was not an enlargement and held the defendant guilty of violating the patent as originally written.

In *Keller* v. *Adams-Campbell Co.,* (1924) *supra,* note 2, certiorari was dismissed. The Chief Justice pointed out that the question of intervening rights, while not free from difficulties, was not before the Court. It decided nothing presently important.

The opinions reviewed above will suffice to indicate the progressive efforts of the court to meet problems incident to our rapidly expanding patent system. From a small State Department bureau in 1836, the Patent Office has expanded until in 1939 over 40,000 patents were granted—in 1838, 515 were granted. Although of immense impor-

tance, the system has become exceedingly complex. Questions relative to reissued patents have long been vexatious to those immediately concerned with administration of the patent laws.

Miller v. *Brass Company, supra,* pointed out that "the evils which have grown from the practice [reissues] have assumed large proportions. Patents have been so expanded and idealized, years after their first issue, that hundreds and thousands of mechanics and manufacturers, who had just reason to suppose that the field of action was open, have been obliged to discontinue their employments, or to pay an enormous tax for continuing them."

It is now accepted doctrine that "the claim of a specific device or combination, and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed." "This legal effect of the patent cannot be revoked unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident, or mistake, . . ." Also, that a reissue with enlarged claims, not applied for within the two years after the original, is void in the absence of extraordinary exculpating circumstances.

In the case under consideration the patentee might have included in the application for the original patent, claims broad enough to embrace petitioner's accused machine, but did not. This "gave the public to understand" that whatever was not claimed "did not come within his patent and might rightfully be made by anyone." The enlarged claims were presented with knowledge of the accused machine and definite purpose to include it.

Recapture within two years of what a patentee dedicates to the public through omission is permissible under specified conditions, but not, we think, "at the expense of

innocent parties." Otherwise, the door is open for gross injustice to alert inventors and baffling uncertainty will hinder orderly development of useful arts.

The District Court properly ruled that petitioner had "acquired intervening rights which in equity plaintiff [respondent here] might not now disturb."

In *Ashland Fire Brick Co.* v. *General Refractories Co.*, (1928) 27 F. 2d 744, 745–746, the matter of "Intervening Rights" was lucidly discussed. The opinion states the case thus—

"This is the usual suit for infringement, based upon reissue patent No. 15,889, August 12, 1924, to Tackett, for a brick machine. The defense chiefly relied upon in the court below and here is that, between the date of the original issue and the application for the broadened reissue, the defendant had built and begun to operate its machines in a form which was not covered by the original patent, even though it were by the reissue, and that the defendant had thus acquired such a right, intervening with reference to the original and reissue, as to make it inequitable to enforce against it the later and broader monopoly."

And it concluded—

"Because the claims of the original patent were limited as to the form of conveyor, and because after the issue of the original patent and with knowledge of it and expressly appreciating its limited character, indeed, being governed therein by the advice of patent counsel, the defendant built a noninfringing brick machine, and still before the reissue application another one, at a substantial expense, and put them into commercial use on a large scale by extensively selling their product, and thus made them substantially material to its manufacturing business, the defendant thereby acquired at least a right

to continue to use these two machines as if it held a license therefor under the reissued patent."

We think this conclusion was right and appropriate in the circumstance presented.

In the instant case the accused machine went into operation when the owner had no actual knowledge of the original patent; but that circumstance we think ought not to defeat the defense based upon intervening rights. All patents must "be recorded, together with the specifications, in the Patent Office in books to be kept for that purpose." U. S. C. Title 35, § 39. Constructive notice of their existence goes thus to all the world. *Boyden* v. *Burke,* (1852) 14 How. 575, 582; *Wine Ry. Appliance Co.* v. *Enterprise Ry. Equipment Co.,* (1936) 297 U. S. 387, 393; Walker on Patents, Deller's edition (1937) Vol. 3, p. 2176. In consequence the owner of the machine here accused operated it with implied knowledge of the original patent and may justly claim whatever privileges would follow actual knowledge.

Grant v. *Raymond, supra,* speaks disparagingly of one who having obtained knowledge of an invention from a patent thereafter appropriates what might have been claimed but was not. In the different conditions of today that observation would not be appropriate. We cannot conclude that one so circumstanced occupies a position superior to an honest inventor or user who has acted with implied but no actual knowledge of a recorded patent. "The purpose of the statute undoubtedly was to provide that kind of relief which courts of equity have always given in cases of clear accident and mistake in the drawing up of written instruments," and these courts are always tender of rights claimed by innocent parties. "A sense of justice and of policy" shelters them.

The possibility of defeating a charge of infringement by establishing intervening rights is adumbrated in *Grant*

v. *Raymond, supra,* "The defence when true in fact may be sufficient in law, notwithstanding the validity of the new patent."

The challenged judgment must be reversed with a remand to the Circuit Court of Appeals for further proceedings consistent with this opinion.

Reversed.

CANTWELL ET AL. *v.* CONNECTICUT.

APPEAL FROM AND CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 632. Argued March 29, 1940.—Decided May 20, 1940.

1. The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. P. 303.
2. The enactment by a State of any law respecting an establishment of religion or prohibiting the free exercise thereof is forbidden by the Fourteenth Amendment. P. 303.
3. Under the constitutional guaranty, freedom of conscience and of religious belief is absolute; although freedom to act in the exercise of religion is subject to regulation for the protection of society. Such regulation, however, in attaining a permissible end, must not unduly infringe the protected freedom. Pp. 303–304.
4. A state statute which forbids any person to solicit money or valuables for any alleged religious cause, unless a certificate therefor shall first have been procured from a designated official, who is required to determine whether such cause is a religious one and who may withhold his approval if he determines that it is not, is a previous restraint upon the free exercise of religion and a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. P. 304.

So *held* as it was applied to persons engaged in distributing literature purporting to be religious, and soliciting contributions to be used for the publication of such literature.

A State constitutionally may by general and non-discriminatory legislation regulate the time, place and manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the com-

munity. The statute here, however, is not such a regulation. If a certificate is issued, solicitation is permitted without other restriction; but if a certificate is denied, solicitation is altogether prohibited.

5. The fact that arbitrary or capricious action by the licensing officer is subject to judicial review can not validate the statute. A previous restraint by judicial decision after trial is as obnoxious under the Constitution as restraint by administrative action. P. 306.

6. The common law offense of breach of the peace may be committed not only by acts of violence, but also by acts and words likely to produce violence in others. P. 308.

7. Defendant, while on a public street endeavoring to interest passersby in the purchase of publications, or in making contributions, in the interest of what he believed to be true religion, induced individuals to listen to the playing of a phonograph record describing the publications. The record contained a verbal attack upon the religious denomination of which the listeners were members, provoking their indignation and a desire on their part to strike the defendant, who thereupon picked up his books and phonograph and went on his way. There was no showing that defendant's deportment was noisy, truculent, overbearing or offensive; nor was it claimed that he intended to insult or affront the listeners by playing the record; nor was it shown that the sound of the phonograph disturbed persons living nearby, drew a crowd, or impeded traffic. *Held,* that defendant's conviction of the common law offense of breach of the peace was violative of constitutional guarantees of religious liberty and freedom of speech. Pp. 307 *et seq.*

126 Conn. 1; 8 A. 2d 533, reversed.

APPEAL from, and certiorari (309 U. S. 626) to review, a judgment which sustained the conviction of all the defendants on one count of an information and the conviction of one of the defendants on another count. The convictions were challenged as denying the constitutional rights of the defendants.

Mr. Hayden C. Covington, with whom *Mr. Joseph F. Rutherford* was on the brief, for appellants and petitioner.

Messrs. Francis A. Pallotti, Attorney General, and *Mr. Edwin S. Pickett,* with whom *Messrs. William L. Hadden,*

Richard F. Corkey, Assistant Attorney General, and *Luke H. Stapleton* were on the brief, for the State of Connecticut, appellee and respondent.

The purpose of the statute is to protect the public from fraud in the solicitation of money or other valuables under the guise of religion. The only activity of any alleged religious group which it is sought to regulate is such solicitation.

The statute does not impair in any way rights commonly regarded as embraced in freedom of speech.

The "liberty" of worship undoubtedly includes the right to entertain the beliefs, to adhere to the principles, and to teach the doctrines which appellants advocate. *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, 262. But it is difficult to see how this statute can interfere with their freedom to worship as they see fit. It does not limit or define their mode of worship or restrict their teachings or doctrine.

The fact that appellants may believe as an article of faith that the statute contravenes their religion furnishes no constitutional basis for their violation of it. *Commonwealth* v. *Plaisted,* 148 Mass. 375; *Reynolds* v. *United States,* 98 U. S. 145.

Undoubtedly appellants' activity in distributing literature is protected by freedom of the press. But the activity which violated the statute was their solicitation of funds. The statute restricts in no way the distribution of pamphlets and literature, nor the mere receiving of contributions from those who might be inclined to donate. Whether solicitation was their primary purpose, or merely incidental to the spread of the gospel in accordance with their views, is not controlling.

Denial in the exercise of official discretion would not necessarily be final and conclusive on the person applying for a permit. *Norwalk* v. *Connecticut Co.,* 89 Conn. 537, 542.

Unlike the ordinance in *Schneider* v. *State,* 308 U. S. 147, the statute does not seek to place any restriction upon communication of any views or the advocacy of any cause, nor to set up censorship in a police officer to determine what literature may be distributed or ideas communicated or who may distribute it.

The ordinance in *Lovell* v. *Griffin,* 303 U. S. 444, forbade the distribution by hand or otherwise of literature of any kind without written permission.

The acts and conduct of petitioner are within the common law definition of breach of peace. It is not necessary to show that other persons were actually provoked to the point of violence. 1 Bishop Criminal Law, 9th Ed., § 539; *State* v. *Farrall,* 29 Conn. 72; *State* v. *Warner,* 34 Conn. 276, 279; *Davis* v. *Burgess,* 54 Mich. 514, 517; *Delk* v. *Commonwealth,* 166 Ky. 39, 45; L. R. A. 1916 B, 1117. Nor is a specific intent to provoke a breach of peace essential; it is sufficient if the acts tend to produce it. *State* v. *Shelby,* 95 Minn. 65.

Acts or language which, under the circumstances, are calculated or likely to provoke another to acts of immediate violence may constitute a breach of the peace. 49 L. R. A. (N. S.) 919; *Holmes* v. *State,* 135 Ark. 187, 189; *Faulkner* v. *State,* 166 Ga. 645, 665.

The rule is as applicable where the objectionable language is communicated by means of a phonograph operated by the accused or by banner or placard. *West* v. *Commonwealth,* 208 Ky. 735.

The tendency of words or conduct depends largely upon the circumstances and is a question of fact. *State* v. *Moser,* 33 Ark. 140. The playing for audition by loyal Catholics of a record violently attacking their religion could well be found to constitute the offense charged.

While the right to propagate religious views is not to be denied, one will not be permitted to commit a breach of peace under the guise of preaching the gospel. *Delk* v. *Commonwealth, supra,* 47.

Acts and conduct in violation of social duties, subversive of good order, and contrary to the law of the land are not immune because they are claimed to have been motivated by religious belief. *Reynolds* v. *United States,* 98 U. S. 145; *Commonwealth* v. *Plaisted,* 148 Mass. 375.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses. After trial in the Court of Common Pleas of New Haven County each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut,[1] and on the fifth count, which charged commission of the common law offense of inciting a breach of the peace. On appeal to the Supreme Court the conviction of all three on the third count was affirmed. The conviction of Jesse Cantwell, on the fifth count, was also affirmed, but the conviction of Newton and Russell on that count was reversed and a new trial ordered as to them.[2]

By demurrers to the information, by requests for rulings of law at the trial, and by their assignments of error in the State Supreme Court, the appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because, on its face and as construed and applied, it denied them freedom of speech and prohibited their free exercise of religion. In like manner

[1] General Statutes § 6294 as amended by § 860d of the 1937 supplement.

[2] 126 Conn. 1; 8 A. 2d 533.

they made the point that they could not be found guilty on the fifth count, without violation of the Amendment.

We have jurisdiction on appeal from the judgments on the third count, as there was drawn in question the validity of a state statute under the Federal Constitution, and the decision was in favor of validity. Since the conviction on the fifth count was not based upon a statute, but presents a substantial question under the Federal Constitution, we granted the writ of certiorari in respect of it.

The facts adduced to sustain the convictions on the third count follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled "Enemies," included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah's Witnesses.

The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable

or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that "in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute." It overruled the contention that the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment, because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

The facts which were held to support the conviction of Jesse Cantwell on the fifth count were that he stopped

two men in the street, asked, and received, permission to play a phonograph record, and played the record "Enemies," which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.

The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace, and that the facts supported the conviction of that offense.

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.[3] The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the

[3] *Schneider* v. *State*, 308 U. S. 147, 160.

second cannot be. Conduct remains subject to regulation for the protection of society.[4] The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee.[5] It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to

[4] *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333.

[5] Compare *Near* v. *Minnesota,* 283 U. S. 697, 713.

that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that "it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not

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been performed." [6] It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.[7]

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.[8] The State is likewise free to regulate the time

[6] *Woodmont Assn.* v. *Milford,* 85 Conn. 517, 522; 84 A. 307, 310; see also *Connecticut Co.* v. *Norwalk,* 89 Conn. 528, 531; 94 A. 992.

[7] *Near* v. *Minnesota,* 283 U. S. 697.

[8] Compare *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 306–310; *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 72.

and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Second. We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell on the fifth count must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

Conviction on the fifth count was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer.[9] Such a declaration of the State's policy

[9] Compare *Gitlow* v. *New York*, 268 U. S. 652, 670–1; *Thornhill* v. *Alabama, ante*, pp. 98–105.

would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an offense under the state law, and we accept its decision as binding upon us to that extent.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell, on April 26, 1938, was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he

intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question "Did you do anything else or have any other reaction?" "No, sir, because he said he would take the victrola and he went." The other witness testified that he told Cantwell he had better get off the street before something happened to him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or

personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.[10]

The judgment affirming the convictions on the third and fifth counts is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

BORCHARD ET AL. *v.* CALIFORNIA BANK ET AL.

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

No. 752. Argued April 30, 1940.—Decided May 20, 1940.

In a proceeding under § 75 (s) of the Bankruptcy Act, the debtors petitioned the conciliation commissioner for an appraisal and the setting aside of the property to them (no action having been taken upon a previous petition); appraisers were appointed and made report to the commissioner of the value of the property, but no stay order fixing terms on which the debtors would remain in possession had been entered. *Held*, the action of the District Court, at that stage, in granting leave to a creditor to sell the property under deeds of trust was contrary to the provisions of § 75 (s). P. 316.

107 F. 2d 96, reversed.

CERTIORARI, 309 U. S. 648, to review the affirmance of an order of the District Court, in a proceeding under

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[10] Compare *Schenck* v. *United States*, 249 U. S. 47, 52; *Herndon* v. *Lowry*, 301 U. S. 242, 256; *Thornhill* v. *Alabama*, *ante*, p. 88.

§ 75 (s) of the Bankruptcy Act, authorizing the sale of the debtors' property under deeds of trust.

Messrs. Lloyd S. Nix and *William Lemke* for petitioners.

Mr. Thos. W. Henderson, with whom *Mr. Chas. E. Donnelly* was on the brief, for respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We granted certiorari in this case for the reason that it presents important questions with respect to the procedure required by § 75(s) of the Bankruptcy Act, as amended.[1]

The precise matter in controversy is whether the bankruptcy court may permit foreclosure of mortgage liens where the procedure prescribed by § 75 (s) has not been followed.

The petitioners, husband and wife, are farmers. Over the period January 24, 1927 to June 19, 1933, they borrowed from the respondent, the California Bank, a total of $87,566.93, in varying amounts, executing to the bank their promissory notes for the respective loans together with deeds of trust [2] on their farm real estate as security. From time to time they made payments which reduced the principal of the indebtedness to $53,919.20. The lender, in the meantime, had made some advances towards the payment of taxes on the property. Further to secure their indebtedness they executed, on January 30, 1934, a mortgage on all the crops standing or growing, or

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of August 28, 1935, c. 792, 49 Stat. 942. The Act has been further amended in particulars not here important by the Act of June 22, 1938, 52 Stat. 840, 939. Section 75, as it now stands, is Tit. 11, U. S. C. § 203.

[2] The deeds of trust ran to the respondent Trust Company as trustee.

which should thereafter be planted, grown, cultivated, cut, gathered, packed, or harvested, during the life of the mortgage on certain of their farm real estate.

November 17, 1934, they filed their petition under § 75 of the Bankruptcy Act, which was approved and referred to a Conciliation Commissioner. In January 1935 the respondent bank declared defaults, and recorded notices thereof and of its election to cause the property to be sold pursuant to the deeds of trust, and the law of California.

March 25, 1935, the Conciliation Commissioner appointed appraisers who filed an appraisal on May 1 valuing the debtors' real estate at $68,550. It is to be noted that § 75 contains no provision for appraisal during the course of the conciliation proceedings covered by subsections (a) to (r); nor do we find any rule of the District Court providing for appraisal at this stage of the cause. The transcript of record does not disclose whether this appraisal was asked by any creditor or by the debtors. So far as appears, the order for the appointment of appraisers was made by the Conciliation Commissioner of his own motion.

The debtors were unable to obtain the requisite acceptance of creditors to the composition and extension proposal they submitted. As a consequence, they amended their petitions and prayed to be adjudicated bankrupts in accordance with the provisions of § 75 (s). The petition was granted and an adjudication entered May 6, 1935. Apparently no further proceedings were taken until June 26, 1935, when the bankruptcy cause was dismissed on the ground that this court had held § 75 (s) unconstitutional.[3] On the same day the debtors petitioned a local court for relief under a State moratorium act and obtained an order granting a moratorium, which

[3] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

remained in effect until September 20, 1935, when the debtors filed a petition for reinstatement of the bankruptcy cause in accordance with the amendment of § 75 (s) adopted to meet the decision in the *Radford* case.[4] On the same date the District Court approved the petition, ordered the proceedings reinstated, and referred the case to a Conciliation Commissioner in accordance with the provisions of § 75 (s). The court restrained the respondents from selling, or proceeding with a sale of, the real estate covered by the deeds of trust and also enjoined them from collecting from packers or processors the proceeds of crops covered by mortgage, until the further order of the court.

October 18, 1935, the petitioner Franz J. Borchard presented his petition to the Conciliation Commissioner praying that appraisers be appointed; that his exempt property be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of all of the remainder of his property, and for such further order as might be just and proper in the premises, as authorized by § 75 (s). Shortly thereafter the debtors filed a petition for an order on the bank to compel it to release its asserted claim to the crop of oranges grown on their property in 1935. In opposition the bank not only asserted the validity of its lien, but urged that the proceedings be dismissed because § 75 (s), as amended, was unconstitutional. The District Judge held that the bank had a lien on the 1935 orange crop but refrained from passing upon the validity of § 75 (s), stating that he would decide that question at a later date if the parties so desired. Apparently the parties requested a ruling, and, on May 15, 1936, the Judge overruled the contention of the bank and refused to dismiss the proceedings.

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[4] Act of August 28, 1935, c. 792, 49 Stat. 942.

Nothing having been done pursuant to the petition for appraisal and award of possession to Franz J. Borchard, the petitioners and respondents, on May 27, 1936, filed in the District Court a stipulation by the terms of which $3,900, held by third parties, being the proceeds of 1935 crops harvested from the premises, was to be paid to the bank and by it expended for the cultivation and improvement of the land. The District Court accordingly ordered the sum paid to the bank. June 10, 1937, the parties stipulated that $2,494, like proceeds of crops harvested, be paid to the bank, to be expended for the cultivation of the farm. The court so ordered. December 20, 1937, a stipulation was filed and an order made that $2,000 be paid to the bank, $1,500 to the debtors, and $946 applied to taxes. Finally, on March 7, 1938, pursuant to stipulation, $1,763 was released from the hands of third parties to be expended for the cultivation and preservation of the mortgaged real estate. The stipulation further provided that the bank should receive the monies realized from the sale of then growing crops and should apply them, so far as necessary, to maintain and protect the orange grove on the property.

All of the stipulations reserved the rights of the parties and were to be without prejudice to such rights.

May 24, 1938, the debtors petitioned the Conciliation Commissioner for an appraisal and the setting aside of the property to them. June 22, 1938, appraisers were appointed and they reported the value of the real estate as $87,300. It does not appear what, if any, proceedings were had before the Conciliation Commissioner upon the coming in of the appraisers' report. The petitioners assert that the Commissioner was considering the terms of an order for a stay and the conditions to be inserted in that order. On November 10, 1938, however, the bank filed its petition in the District Court for leave to sell under its trust deeds. The petition recited the facts as

above outlined, stated the principal and interest due under the various notes; set forth the amount of the advances the bank had made for taxes and other accounts, and showed an existing indebtedness, secured by deeds of trust and mortgage, totaling $89,246.82. It alleged that the mortgaged premises would not bring more than $65,000; that the bank had already suffered a serious loss; and that further delay in the sale of the property would entail a greater one. The court took testimony as to value and concluded that the real estate was not worth more than $65,000. It found that, as the debtors had had several years within which to arrange an adjustment of their obligations and had been unable so to do, it was fair and equitable that the bank be allowed to proceed so as to save itself further loss. The petition was granted and the outstanding restraining order was dissolved.

On appeal by the debtors the Circuit Court of Appeals affirmed the decree,[5] holding that the District Court's action was justified by our decision in *Wright* v. *Vinton Branch Bank,* 300 U. S. 440.

We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of § 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch Bank, supra,* and *John Hancock Ins. Co.* v. *Bartels,* 308 U. S. 180. As was said in the latter case (p. 187):

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to

[5] *Borchard* v. *California Bank,* 107 F. 2d 96.

the payment of their claims, the priorities and liens of secured creditors being preserved."

That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act. As a prerequisite to an intelligent determination of the terms under which the debtor is to remain in possession, the statute requires that the court and the parties shall be informed of the fair value of the property. As pointed out in the *Wright* case, *supra,* the secured creditors' rights are protected to the extent of the value of the property. The court may order rent to be paid by the debtor, may order him to make payments on acaccount of principal, and, in its continuing control over the property, may enter any other orders for the protection of the debtor and secured creditors which the situation requires. Failure of the debtor to comply with any such orders may eventuate in a sale.

Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consented to the retention of possession by the debtors and arranged that they should coöperate in the cultivation of the farm, proceeds of the crops being used for further cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors. For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been

entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

NATIONAL LABOR RELATIONS BOARD *v.* BRADFORD DYEING ASSOCIATION (U. S. A.) ET AL.

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

No. 588. Argued March 26, 27, 1940.—Decided May 20, 1940.

1. The National Labor Relations Act is applicable to an employer whose business consists of dyeing and finishing goods moved to and from its plant by their owners through the channels of interstate commerce. P. 324.
2. The Act is applicable even though the employer's business is small in comparison with the industry to which it belongs. P. 326.
3. It is not material to the question of the Board's jurisdiction that the customers of the processor, if the interstate movement of the goods to and from the plant were stopped by a strike, might secure the same services from other processors in the same State. P. 326.
4. Since the purpose of the Act is to protect and foster interstate commerce, the Board can exert jurisdiction before industrial strife occurs in the plant. P. 326.
5. Evidence before the National Labor Relations Board sustained its findings:

   (1) That two of the respondent company's employees were discharged for union activities. Pp. 326, 330.

(2) That the company dominated and supported one labor organization and refused to bargain collectively through another after a majority of the employees had selected it as their bargaining unit. Pp. 333 *et seq.*

6. Where a shift of majority membership from one union to another was brought about by the unfair labor practices of the employer, the Board was justified in finding that the first union continued to be the exclusive representative of all the employees for the purposes of collective bargaining. P. 339.
7. In vacating the Board's order for reinstatement of two employees, upon the ground that they had incited or threatened unlawful conduct after their discharge, the court below acted without jurisdiction. P. 340.
8. Where the National Labor Relations Board, acting within the compass of its power, on a charge of unfair labor practice, has held a proper hearing, has made findings based on substantial evidence, and has ordered an appropriate remedy, the Circuit Court of Appeals is bound, on application, to enforce the order. P. 342.

106 F. 2d 119, reversed.

CERTIORARI, 308 U. S. 549, to review a decree on a petition for enforcement of an order of the National Labor Relations Board. 4 N. L. R. B. 604; 8 *id.* 979.

Mr. Charles Fahy, with whom *Solicitor General Biddle* and *Messrs. Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* were on the brief, for petitioner.

Mr. Harry Parsons Cross, with whom *Mr. George Paul Slade* was on the brief, for Bradford Dyeing Association, respondent. *Mr. William G. Feely* submitted for the B. D. A. Employees Federation, respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Circuit Court of Appeals declined to decree effective enforcement of an order of the National Labor Relations Board upon the ground that the Board's order, in material respects, rested upon findings that were not supported by substantial evidence.

In its petition for certiorari, the Board took sharp issue with the Court of Appeals, asserting that some findings upset by the court were supported not merely by substantial but by "uncontradicted" and "undisputed evidence." The petition also pointed out that the court's opinion was "ambiguous and inconclusive" and "left unclear the court's holding as to whether the Board had jurisdiction." Our inspection of the court's opinion and decree disclosed that the court deemed the Board to be wholly lacking in jurisdiction. Nevertheless, the Board was ordered to proceed in accordance with the opinion which concluded with the indecisive statement that "if the case should not be dismissed for lack of jurisdiction" a large part, but apparently not all, of the Board's order should be vacated. The court's decree did not direct enforcement even of those parts of the Board's order not expressly vacated. The Board's petition further pointed out that its motion for rehearing in order to clarify the question of its jurisdiction and to establish the status of "those portions of the Board's order which the court neither vacated nor enforced" was denied without explanation. Because the Labor Board's petition in challenging the action of the Court of Appeals thus raised questions of grave public importance affecting the administration of the National Labor Relations Act and judicial review as provided in the Act, we granted certiorari.[1]

This proceeding was initiated upon charges filed by the Textile Workers Organizing Committee of the C.I.O. Thereupon, the Labor Board served a complaint and notice of hearing on the Bradford Dyeing Association (U. S. A.), respondent here.

In the complaint, it was alleged that respondent in order to discourage membership in the C. I. O., had discharged and refused to reinstate its employees, Edward

[1] 308 U. S. 549; cf. *Labor Board* v. *Waterman Steamship Co.*, 309 U. S. 206.

Nelson and Percy Schofield, because of their affiliation and activities in the Textile Workers Organizing Committee of the C. I. O., (T. W. O. C.); respondent had dominated and supported the Bradford Dyeing Association Employees' Federation, a labor organization, and had refused to bargain collectively with its employees through the T. W. O. C. after a majority had selected it as their bargaining representative.

The Board's jurisdiction was unsuccessfully challenged on the ground that respondent's business involved no activities in or affecting interstate commerce within the meaning of the Act. And, answering, respondent alleged that Schofield was discharged because he smoked during working hours; "that . . . Nelson was not discharged, that he was insubordinate and defiant, that he did not work and refused to work during the times when he was supposed to be working, that he was on the premises during hours when he was not supposed to be on the premises of respondent and was taking up the time of other employees who were supposed to be working during such time, that . . . Nelson went upon a vacation and has not returned to work after such vacation nor made any statement of his readiness to return to work or made any request that he be put to work again"; that respondent had not dominated or coerced the Federation; and that any labor disputes at its plant were attributable to the conduct of the T. W. O. C.

The Federation was allowed to intervene in the extensive hearing held by the Board.

After this hearing, the Board found that "a labor dispute" in respondent's plant would widely affect "the flow of commodities in interstate commerce," with consequent jurisdiction in the Board, and that the charges of the complaint had been substantiated.

The Board accordingly ordered respondent to cease and desist from (1), interfering, or coercing its employees

in the exercise of their rights to self-organization; (2), dominating and interfering with the Federation or any other labor organization; (3) discouraging membership in the T. W. O. C.; (4), refusing to bargain collectively with the T. W. O. C; and (5), ordered respondent affirmatively to offer reëmployment to Schofield and Nelson and to make them whole, to withdraw all recognition from and completely disestablish the Federation, to bargain collectively with its employees through T. W. O. C., and to post the usual notices throughout its plant stating that the company would cease its unlawful and unfair labor practices and would treat its agreement with the Federation as of no effect.

In its final decree the Circuit Court of Appeals directed that "until a new election has taken place by order of the Board, and the employees have expressed their preference as to what group or body shall represent them in any labor disputes between them and the respondent, the order of the Board, except as to paragraphs (1), (2), and (3) of the cease and desist portion of the order, and the entire paragraph ordering affirmative action, shall be vacated, the Board then to proceed in accordance with the opinion passed down this day." As phrased, the decree is not clear but apparently the court vacated subdivisions (4) and (5) of the Board's order. The court's opinion did make clear that under its decree the company was left free to bargain collectively with the Federation and to decline to bargain with the T. W. O. C. Discharges of Schofield and Nelson were approved and the company was released from publishing notices which, if warranted, were "essential if the employees were to feel free to exercise their rights without incurring the company's disfavor." [2] Although those portions of the Board's order prohibiting the company's interfering with

[2] *Labor Board* v. *Falk Corp.*, 308 U. S. 453, 462.

its employees' union affiliations were not expressly set aside or modified, neither were they ordered enforced.[3] Thus the court's decree gave the Board's order no effect at all.

It did not explicitly so decree, but the Court of Appeals evidently was of the view that evidence was lacking upon which the Board could have found that respondent's business was in or affected interstate commerce. The court expressly found a lack of evidence to support the Board's conclusion that Schofield and Nelson were discharged for union activities and stated its belief that Schofield was discharged for smoking in the plant and Nelson for insubordination, and that "the finding by the Board that the T. W. O. C. had a majority of the employees of the respondent signed up even to become members of a union under that name is without substantial evidence on which to rest."

Without specifically passing upon the Board's finding that respondent had unlawfully dominated the Federation, the opinion of the court stated, ". . . *assuming that the president or officers of the respondent influenced its employees to join the Federation, so-called,* it does not appear by clear and substantial evidence that a majority of the employees ever joined, or indicated an intent to join, the T. W. O. C., . . ." [Italics supplied.] Since the court

[3] Section 10 (e) of the National Labor Relations Act gives the Board power to petition any Circuit Court of Appeals of the United States for the enforcement of its order; grants these courts exclusive jurisdiction and provides that "Upon . . . [the Board's filing a transcript of the entire record in the proceeding], the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to . . . make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." 49 Stat. 449, 454.

did not vacate that part of the Board's order directing the company to discontinue domination of the Federation, we might infer that the court accepted the Board's finding that the Federation had been so dominated. But this inference is opposed by the court's action in vacating the order of disestablishment. The uncertainty in which the court has left the questions of jurisdiction and company domination of the Federation makes necessary a review of the evidence on both, along with other evidence which we think amply demonstrates the justification for the Board's order in every respect.

First. As to Jurisdiction.

A major portion of the opinion of the court below is devoted to its expression of doubts about the Board's jurisdiction, i. e., "there is no substantial evidence to warrant a finding that the transportation of these materials by the respondent was ever in interstate commerce"; "there is also lacking substantial evidence that forty per cent of the supplies consisting of chemical and dyes, which were contracted for in Rhode Island and delivered by the sellers to the respondent's plant in Bradford, were transported by the respondent in interstate commerce, or that they were used by the respondent except at Bradford, though the Board assumed without evidence that they were shipped by the respondent in interstate commerce, but its assumption lacks substantial evidence on which to rest, that would compel this court to accept it as a fact"; "The respondent, according to uncontroverted testimony, neither sells, transports, nor arranges for transportation of the goods into or out of Rhode Island in interstate commerce which is done in each instance by the customer, . . ."; and "The Board apparently assumed that the respondent transported goods to its plant and from it, which the uncontroverted evidence disclosed were not the facts." Referring to waste products which respondent sells in interstate commerce, the court noted that they did

not "exceed one per cent of the total goods processed" and said that they were but "a mere incident . . . [of the business] to which the maxim *de minimis* might well be applied, even by the National Labor Relations Board." And the conclusions of the opinion were only stated subject to the condition "If the case should not be dismissed for lack of jurisdiction."

There was evidence before the Board which showed:

The Bradford Dyeing Association (U. S. A.), as stated by its president, is "engaged in the dyeing and finishing of cotton, rayon and acetate piece goods." These piece goods reach the plant at Bradford, Town of Westerly, Rhode Island, as unfinished "gray goods." Customers of Bradford, known as "converters," ship the gray goods to the plant, retaining title, and direct shipment of the goods when processed. Bradford owns no goods or means of transportation, and its customers pay the cost of transportation to and from the plant. A New York office is maintained, however, "where . . . solicitors [who contact converters] make their headquarters," and advertisements are run in New York papers and trade journals. A majority of Bradford's (converters) are located in States other than Rhode Island, in Baltimore, Boston, Philadelphia, Trenton, and principally in New York City. There are "very few customers" in Rhode Island. In 1936, 57,000,000 yards of goods were processed and for the first six months of 1937, 29,000,000. About ninety per cent of all goods processed, the processing taking "an average of between two and three weeks," are shipped out of Rhode Island. "More than half" of the goods processed come from beyond the borders of Rhode Island.

Incidental to its business of processing, respondent accumulates and acquires title to "remnants" which are ends of cloth processed and goods damaged in processing. In 1936, 588,000 yards of remnants were sold by respondent, ninety per cent of which was shipped in interstate commerce. These remnants represented roughly "just less than one per cent" of the yards processed in that year. For the same year, respondent purchased $355,856.00 worth of colors and dyestuffs, weighing over 235,111 pounds, of which forty per cent came from outside of

Rhode Island. The company, during 1935, averaged 688 employees, with wages of $604,614.68, and its gross income from processing was $2,026,156.00. In 1937, the employees on the payroll were nearly 800.

That this evidence was abundantly sufficient to justify exercise of jurisdiction by the Board is not now open to controversy. It is settled that the Act is applicable to a processor, who constitutes even a relatively small percentage of his industry's capacity,[4] where the materials processed are moved to and from the processor by their owners through the channels of interstate commerce,[5] and it is not material, as the court below thought, that respondent's customers might be able to secure the same services from other Rhode Island processors if a labor dispute should stop the interstate flow of materials to and from respondent's plant. Since the purpose of the Act is to protect and foster interstate commerce, the Board's jurisdiction can attach, as here, before actual industrial strife materializes to obstruct that commerce.[6]

Second. Discharge of Nelson.

In its answer to the Board's complaint, the company contended that Nelson was not discharged April 3, 1937, but was merely "laid off," and on April 2, "went upon a vacation" and did not return or indicate a willingness to go back to work. However, the company insists, as it has throughout, that Nelson was not a diligent worker and was insubordinate; that he trespassed upon company property after work hours Thursday, April 1st; that "one or two mornings that week he started work a little late

[4] The record indicates that respondent does roughly one per cent of the national total of business in its industry.

[5] *Labor Board* v. *Fainblatt*, 306 U. S. 601.

[6] *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 222; cf., *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 43. A strike at respondent's plant in 1929 apparently did result in a stoppage of the flow of the interstate movement of materials to and of processed goods from respondent's plant.

and quit a little early"; that he did not start work Saturday, April 3, until 7:30, a half hour late.

Some of the evidence supporting the Board's finding that Nelson was actually discharged for union activities on April 3, was:

Prior to Saturday, April 3, 1937, when Nelson was "laid off," he had worked for the company two years as a carpenter. He had become actively interested in organizing the employees in a C. I. O. union the preceding Monday, March 29, 1937. On that day, he had obtained three hundred and fifty T. W. O. C. cards from a fellow employee (Schofield), who, he heard, "had some applications for joining the union, the C. I. O." His distribution of the cards met with quick response and many signed so that on Friday, the company official "who does all the hiring," approached him and said, "You're a ringleader of the C. I. O., but you are not going to be fired for it." Nelson refused to tell this official the names of his collaborators in forming the union and also told him he would not reveal their names to Mr. Summersby, the company's president and general manager. Later that day, Nelson observed Schofield talking with Summersby and was introduced to the latter as "helping . . . [Schofield] to organize and get these pledge cards signed in the mill." He was, that same day, Friday, refused admission to a meeting in Summersby's office between some employees and Summersby, but that afternoon, after work, he was called to Summersby's office. There Summersby asked "why didn't we form a local union of our own" and "thought it was a much better plan to form a local union." And Summersby asked that the question of a local union be put up to a C. I. O. committee meeting to be held that night.

All day Friday and Saturday morning, his foreman "didn't speak one word to" Nelson. Saturday morning, April 3, this foreman asked him "when [he] . . . intended to start work" but added that he "didn't hold anything against" him. When Saturday's work was over, Nelson was sent for by Summersby, who was affable at first, but who became hostile when Nelson indicated he would not go along with a local union. Sum-

mersby then asked Nelson if he had been stealing on an occasion when he had returned to the plant after hours to get some T. W. O. C. cards, and asked him if he had begun work promptly that day (Saturday, April 3). Nelson was told by Summersby "to take two weeks off and cool off." Nelson insisted he was ready to go back to work Monday morning. His testimony narrated this conversation in part as follows

"A. . . . I said, 'As far as being excited about it, you are more excited than I am and you are worried about it and I ain't.' He says, 'Sure, I am excited about it, but you are the cause of all it.' I said, 'I can't help that.' He said, 'You take the two weeks off and then come back and see Mr. Pierce.' I said, 'Meaning what, that I go back and see Mr. Pierce? I am not sure of a job when I come back? Or is this just a matter of beating about the bush to fire me?' He says, 'I won't give you nothing definite.' I says, 'I want something definite. I want to know whether or not you are firing me. If you are not telling me whether I go to work when I come back or not, I want to know whether you are firing me.' He says, 'I won't give you nothing definite.' I says, 'I can't go out without money. If you are going to fire me, I can't live without money.' He says, 'Silvia, get his money.' Mr. Silvia went out and got me my money and came in and I thanked Mr. Silvia for my money and went out. When I was halfway across the outer office I heard laughing, and I saw Silvia swing his arm down, and Mr. Silvia and Mr. Summersby were laughing for all they were worth, as though they had pulled a big joke."

"Q. Did you ever go back after that for your job? A. No I didn't. Mr. Summersby told me if I stepped foot on the premises within two weeks he was going to have me arrested."

Nelson never went back because a T. W. O. C. official who conferred with Summersby said Summersby would not take him back. This T. W. O. C. official and a Conciliator of the United States Department of Labor said Summersby wouldn't take Nelson back because "there would be a question of his authority." In fact, a fellow employee told Nelson that Summersby had said some-

thing about firing Nelson and Schofield and "that he would find some way of getting around it." On the morning of the day Nelson was fired he had spent a "couple of minutes" telling other employees about a C. I. O. meeting of the previous night.

From the testimony of the T. W. O. C. official in question, a T. W. O. C. Director for Rhode Island, Summersby would not rehire "especially Mr. Nelson." And Summersby himself stated that he told the Federal Conciliator, "I couldn't take back either of them because it would break down the discipline of our plant."

Nelson's foreman testified as a witness for respondent—

On Friday, April 2, "I could see that he [Nelson] was talking around more or less, and so I had him come in the shop to work on the trucks. I thought that would be the place where I could watch him better." He saw Nelson talking to the men early on April 3, before work and until 7:30, although work begins at 7. He reported to his superior that Nelson was "talking to different ones," and went with Nelson to Summersby who asked Nelson "if he decided, on some question that they were talking about the afternoon before . . . [Nelson] said, 'No,'" and Summersby said, "Well, then, if you can't give me a satisfactory answer on that I have thought it over and I have decided to lay you off for two weeks and let you think it over." This foreman "knew . . . [Nelson] was interested in the C. I. O., but . . . didn't know anything he said" to the men Saturday morning. On other occasions, he had seen Nelson start late or quit early without ever reporting the fact, and had seen Nelson talk around like that "quite often" but "this is the only time . . . [the foreman] ever got mad at him." This time, he was aware that Nelson had been connected with the C. I. O. for the past week "and . . . supposed he was still at it." The foreman admitted that Nelson was "a very good workman," that he may have worked between 7 and 7:10 on this particular Saturday morning and that on Saturday, April 3, Nelson, after having been spoken to, "said he hadn't any feelings but what he would go on and do his work all right. And he did after that."

According to the Chief Engineer, who ranked above Nelson's foreman—

Nelson previously "did a whole lot of talking." In his three years with the company, he had seen others talking but never laid any one else off for talking. In his view "when men are talking with one another there is very little work done," but the foreman did not report the men to whom Nelson was talking on April 3, although they also were "surely" wasting time. The plant rules do not forbid talking.

Summersby, the president and general manager—

On April 2, "inquired as to who [Nelson] . . . was and what he did and if he had been active in the C. I. O. as an organizer." Nelson, he stated, "automatically forfeited his job" by not coming back at the end of his two weeks lay off, which was without pay. And if he should apply for work, his forced vacation "would be on his record and would always be a black mark against him."

Third. Discharge of Schofield.

The court below saw no evidence supporting the Board's findings that this employee was discharged for union activities, and accepted the company's contention that he was discharged for smoking in the plant contrary to rules. Respondent admits that Schofield was discharged.

Schofield, a machine operator, or "jigger," testified—

On Saturday, March 27, 1937, he attended a C. I. O. meeting, obtained eight application cards for the C. I. O. and talked to some of his fellow employees about the C. I. O. All eight cards were signed that night. By Sunday, March 28, he had asked for and obtained seven hundred cards which he used during the following week, giving Nelson about one-half on Monday, March 29. By Wednesday, the cards gave out. On Friday, April 2, he and Summersby discussed certain difficulties with the piece work of "jiggers." Summersby, talking there in the plant, brought up the C. I. O. and said "he couldn't see anything in an organization outside . . . [with] . . .

big shots . . . running big automobiles and hotel expenses."

Summersby then suggested "a union of our own in the shop." Schofield attended a meeting in Summersby's office as a member of a committee of "jiggers," and the subject of the C. I. O. arose again. Summersby said he wouldn't recognize an outside union. When Nelson attempted to enter this meeting, Summersby turned him away and referred to him as a "troublemaker." Sunday, April 4, there was a C. I. O. meeting at which Schofield and Nelson were both on the platform. Schofield went to work on Monday, the 5th, continuing to distribute C. I. O. cards. On Tuesday, the 6th, at 2:25 (Nelson had been "laid off" on the 3rd), a "charge hand" notified Schofield that Summersby wanted to see him "in his office right away." He left his work and went directly to the locker room to wash and change from work clothes. While there, he and two other employees were smoking. An official of the company—a boss dyer—whom he had never seen "in the locker room, not while the men were changing their clothes"—caught Schofield smoking and said, "So that's it, you damn fool." Schofield then went to Summersby's office as he had been directed, but did not find him there. Summersby's first words, on entering the office about twenty minutes later, charged Schofield with smoking, but Summersby refused to tell Schofield why he had originally been sent for—before he was caught smoking. Schofield was told to "take a couple of weeks off." He had been laid off once before for smoking.

On the Friday before the Tuesday on which this employee would, he thought, have been taken back to work, a Federal Conciliator and C. I. O. officials conferred with Summersby about Nelson and him. The C. I. O. official told Schofield that Summersby refused to rehire either, and as a result he never went back. Although he "wanted to go back the first week," he took the word of the Federal Conciliator and the C. I. O. official that he would not be rehired. The two other employees who were smoking when he was caught were not disciplined, although the accosting official could see them. Despite "No Smoking" signs, it was the practice of the men to smoke on the sly. Other men have been laid off two

weeks for smoking, but Nelson was caught and "others" have been seen by foremen and no lay-offs resulted. Schofield didn't "know of any one being discharged" for smoking. He was made T. W. O. C. local financial secretary.

In the words of the C. I. O. official, "Mr. Summersby saw red the minute I mentioned Schofield's and Nelson's names."

As told by the boss dyer who found Schofield smoking—

This official had sent an employee to notify Schofield of Summersby's desire to see him; he himself went to the locker room to deliver the message. He asked one of the other employees in the locker room to remember the scene because he "knew Percy Schofield's character." It was his duty to detect smokers and he usually laid off, himself, any man found smoking. He had time to lay off Schofield while walking with him part of the way to Summersby's office, but he did not do so. "It was a peculiar case and I wanted to think before I did anything." This was the only case in which he had ever reported a smoker to a higher up. He had laid Schofield off for two weeks twice before, for smoking. In six or seven years, he had caught seven or eight smokers of whom, excepting Schofield, only one was discharged. He didn't go to the wash room "very often." "A very short time before" he had heard that Schofield was somewhat active in the C. I. O.

One of the fellow employees present in the locker-room where Schofield was found smoking, stated that he also had been smoking but was not doing so when the boss dyer came in, and that the third man was smoking at that time but wasn't observed. He got the impression, then, that the boss dyer said something to the effect that he at last "had" Schofield after having been after him for some time. He "had never seen . . . [the boss dyer] go to the locker room" before.

Summersby testified that he had been told by Schofield that he was "interested in organizing the C. I. O."; and that he discharged Schofield for smoking.

Fourth. Domination of the Federation.

As already noted, the Court of Appeals' opinion did not especially pass upon this contention. Since, however, the Court did not enforce the Board's order to cease dominating and to disestablish the Federation, as we think it should have, appropriate evidence on this issue will be pointed out.

A machinist, employed eleven years by respondent, testified—

He attended a meeting in Summersby's office on April 6, the day of Schofield's discharge. Summersby "said that he wouldn't recognize the C. I. O. and that it would be much better for us to join our own union than to be bothered by this C. I. O." which would require the men to go out on sympathy strikes. This employee saw Federation cards and literature "on the table" in the company's office. These were "handed around" and one or two were picked up by the employees present; when Summersby and the vice president of the company left the room, the employees "seemed to pick them up more frequently." Temporary officers of the Federation were chosen there, in Summersby's office. A day or so later, the Federation met in the company's shipping room with one hundred and fifty to two hundred men present; Summersby addressed the meeting and said he would not recognize the C. I. O. and that it was better to have our own union. The machinist distributed in the plant the Federation cards which he had "picked . . . up" in "Summersby's office"; the Federation cards "were there."

From testimony of other employees, it appeared that—

At the meeting on the 6th (the day Schofield was discharged) in Summersby's office, Federation cards and circulars were seen, and an employee distributed these

cards; Summersby said "he would like to have this local union" and "wouldn't recognize the C. I. O." Three "jiggers" had seen Summersby on April 5 about wages and conditions of employment; he "thought it would be better if we had our own union" instead of paying outside fellows. "Someone" suggested that cards be passed out for a local union. Word was passed out by fellow workers that the company would pay for time spent at the meeting in the shipping room, at which Summersby "said he wouldn't recognize C. I. O. or A. F. of L., no outside union," that it would "be better if we had a local union" instead of paying others to ride around in big cars and that "he would not tolerate C. I. O." Workers were seen passing out Federation cards in the plant during working hours. Pay was given for the half-hour spent in the shipping room meeting and this time was included by instruction of the "boss of the frames." Federation cards were passed out "openly" by men on the day of the shipping room meeting. Bosses were seen with cards. One employee was given his Federation card by the boss of his department. Another was asked by his foreman whether he had joined the Federation.

An employee testified—

Summersby sent for him on April 6, (the day of Schofield's discharge). The paymaster came to his house for him and said he was glad that this man wasn't "deep . . . in the C. I. O.," and took him to the office. There Summersby told him he was sorry that men in his line of work (in the gray room) had been left out of the meeting that morning in Summersby's office. This employee had told the men in the gray room that they shouldn't sign cards from a meeting at which they had not been represented. Summersby told him the C. I. O. would take money out of the plant and that a "committee had gotten together . . . to form this local union, because he informed them that he wouldn't recognize the C. I. O., and they started to organize a union that he would recognize. He said he would recognize the local." He and Summersby then went into the meeting in an adjoining office ("one is Mr. Pawson's [respondent's vice president] and the other is Mr. Summersby's").

A leader at this meeting in company offices and attended by Summersby, "said a few of them got together and decided they didn't want a C. I. O., that they thought they would be better off if they had a local union, that they had a talk with Mr. Summersby, and Mr. Summersby wouldn't recognize the C. I. O., and rather than have trouble he was going to see if we couldn't have a local union." Summersby "explained advantages of the local union and spoke of the B. D. A."

Another employee supplied evidence that a week or two after Nelson was fired, the timekeeper took him to see Summersby, who asked about a C. I. O. card which had been on the back of this employee's car, and that Summersby then "said he wouldn't recognize it" and could close the plant down.

The financial Secretary of the Federation stated—

He was first given a temporary appointment at the meeting in Summersby's office, April 6, when Summersby said "he didn't like the idea of bargaining outside." The men present in the afternoon meeting in Summersby's office "asked for the privilege of using the office to find out how we had made out on our cards." The meeting in the shipping room was a day or so later. After the morning meeting in Summersby's office on the 6th, this temporary Federation official started passing out Federation cards for which Summersby had given permission. Federation circulars were posted on plant bulletin boards. Federation application cards were passed out by "all of us that were in the office at that first meeting." Officers of the Federation were subsequently elected (April 11). "All us men who were in the office the first day, I think we acted as a committee." Between April 6 and 11, Summersby permitted the temporary committee to meet in an old company office in the plant. The paymaster gave them a list of the men in the plant by which to determine the necessary fifty-one per cent. On April 9, prior to the election of the Federation's officers on the 11th, this temporary committee presented a letter to Summersby stating that they represented fifty-one per cent of the men. That same day, Summersby granted

recognition to the Federation. This employee felt no need for organization, except for "better feeling" which he thought "was necessary because the C. I. O. was going to do the same thing." He helped form the Federation "partly" to stop the C. I. O., and because the C. I. O. had already started. A company car was used by him on one occasion for purposes of the Federation. Meetings of the executive committee of the Federation were held in a club room "on property owned by the B. D. A." This witness engaged as attorney for the Federation one who he knew "had represented . . . [the company] on some cases"; he himself lives in a house owned by the company. Some Federation dues were collected on the company's premises; members were not suspended for dues delinquency and may also be members of any labor union or society. The Federation started about a week after the C. I. O. drive; it had no income of its own prior to the last week in April. Eventually it affiliated with an outside union still designated "as the B. D. A. Employees' Federation" "to bring a little more prestige and to prove to the ones that were skeptical, that we were not a company union."

The first vice president of the Federation testified—

He negotiated recognition of the Federation, April 9, (three and six days respectively after discharge of Schofield and Nelson) as its acting president. On that day, he called a meeting of the organizing committee in "the little office in the gray room," showed them that they had fifty-one per cent signed cards, and then went to Summersby's office. In Summersby's office, the witness and company officials counted the signed cards and checked them against a list of employees which Summersby asked the paymaster to get. The cards were not checked to see if each signer was eligible; the management took the temporary committee's word for it. And the cards were left with Summersby. The witness didn't know that the Federation planned to do anything that "was any different" from what the employees previously could have done by grievance committees. He had heard rumors that a boss had Federation cards or spoke to employees about them, and believed one man quit work as the result of posting C. I. O. hand-bills.

He spoke at the shipping room meeting and asked Summersby to speak there. Summersby did speak. Along the lines of his conversation at the two previous meetings in his office, Summersby told this gathering of employees that he preferred a local and "was not in favor of bargaining with the C. I. O."

T. W. O. C.'s State Director for Rhode Island stated—

On April 7, he saw Summersby and told him T. W. O. C. had "about seventy-five per cent" of the men signed. Summersby refused to say then that he would recognize T. W. O. C. April 16, the Director, a Federal Conciliator and a T. W. O. C. organizer saw Summersby again and were told by Summersby that "he had a union" and wouldn't recognize the C. I. O. as he was "afraid of an outside union." It was agreed that he would hear from Summersby's attorney after the first (April 7) meeting, but he never heard. A form contract was submitted to Summersby on the 16th, but by that date "he had definitely decided that he would refuse to bargain with the C. I. O."

According to the company's vice president—

He was present part of the time at one of the meetings in Summersby's office on April 6, where cards and literature were present and a union was discussed. Summersby was heard to express the opinion "that he would prefer to deal with a union of his own employees rather than to deal with outside influences."

One of the men present when Schofield was found smoking testified that a salaried employee who reports "things which are done wrong" came around and asked everybody if he had joined the local union; at the meeting in the shipping room, Summersby said he would not recognize the C. I. O. but would recognize a local; the witness was paid for the fifteen minutes spent at that meeting; the men were told by the time-keeper that they would be so paid. An official of the Federation said, "The impression was that Mr. Summersby probably wouldn't recognize" the C. I. O.; this official was "one

of the first" organizers of the Federation and conveyed to people the impression that Summersby wouldn't recognize the C. I. O.

As related by Summersby, president and general manager of respondent—

A wage increase was announced March 31. After he met in his office on April 6, (the day of Nelson's discharge) with the committee of "jiggers," later the same day he was asked for a place in which the Federation's temporary committee could meet. He answered the request by saying, "You can have my office and make yourselves comfortable." That afternoon, as he was ready to leave, the temporary committee met in his office and he was "advised that they were organizing a local union . . . I told them that I would grant them the same privileges I would grant any other union . . ." Two days after recognizing the Federation, he placed and paid for an ad in a local paper, entitled "The Strike that Failed" because in part, as he said, "the B. D. A. Employees' Federation had formed and had taken the organization into their own hands, and had shown that they were still real citizens." Respondent is owned by an English concern and a statement by him appeared in the local paper, on April 25, disclosing the possibility of the company's moving the plant out of the United States if there were to be "labor uncertainties."

He recognized the Federation April 9, and on April 13, told the Federal Conciliator that an election could not be held, since the Federation had already been recognized. And on the 16th, Summersby told Salerno that his proposed T. W. O. C. contract would be taken up with Summersby's lawyer.

Fifth. Designation of T. W. O. C. as bargaining agent.

The court below found no substantial evidence to support the Board's finding that a majority of respondent's employees joined the T. W. O. C., or that "the T. W. O. C. . . . ever came into actual existence with authority to negotiate a contract with the respondent." Much of the testimony already referred to bore upon the genesis of T. W. O. C. at respondent's plant.

Schofield said:

By April 4 he had "four hundred and sixty-five or four hundred and sixty-seven" signed application cards "marked down." The cards were sent to Boston. A few men paid dues but collection was stopped. ". . . we had a majority of cards signed." Dues are not collected until management grants recognition. No local C. I. O. (T. W. O. C.) entity had been formed for the plant; "we had the fifty-one per cent, but this company union stuff and discharge and everything came along, and we have just had to wait for this hearing . . ."

Nelson stated that he told the timekeeper, on April 2, "It's all over but the shouting . . . We have well over sixty per cent signed up all ready." And from the testimony of an officer of the Federation it appeared that the C. I. O. drive resulted in a number of signatures, and that both organizations could possibly claim fifty-one per cent of the employees signed up.

As explained by the T. W. O. C. State Director—

A charter or local is unnecessary for membership in T. W. O. C.; no charter to a local is granted until after recognition. Members of the Federation are members in good standing of T. W. O. C., even if they have not paid dues or initiation fees. The T. W. O. C. cards were brought to him during the first week in April. Summersby, April 9, refused to agree to have the Federal Conciliator, or a third party, count the T. W. O. C. cards. Employees are eligible to membership in T. W. O. C., without formation of a plant local.

The T. W. O. C. Director's Secretary stated that the T. W. O. C. cards were brought in before April 12. It was agreed at the hearing that, after respondent checked against the original signed cards, T. W. O. C. had a list of four hundred and eighty-two names taken from those cards. And it was stipulated that these cards were signed "on or before April 10, 1937."

Shift in membership.

Respondent has contended before the Board, as here, that if the T. W. O. C. did actually represent a majority

of its employees on April 4 (as the Board found), a shift in membership had given the Federation a majority when the company on April 9 recognized it as exclusive bargaining representative. However, the Board found that "the record is clear that, had it not been for the unfair labor practices of the respondent in organizing and fostering the Federation and in persuading, intimidating and coercing its employees to join the Federation and leave the T. W. O. C., the respondent's employees would have remained members of the T. W. O. C." In view of the substantial support in the evidence for the Board's findings that the company intimidated and coerced its employees and dominated the Federation, the Board properly concluded that "The unfair labor practices of the respondent cannot operate to change the bargaining representative previously selected by the untrammelled will of the majority." [7] And, accordingly, the Board was justified in its finding "that on April 4, 1937, and at all times thereafter, the T. W. O. C., pursuant to Section 9 (a) of the Act, was the exclusive representative of all the employees in the appropriate unit for purposes of collective bargaining . . ."

Sixth. The "Sit Down."

As one of the apparently alternative grounds of its decision, the Circuit Court of Appeals declared the Board without authority to order reinstatement of Nelson and Schofield because of so-called unlawful conduct and the alleged incitement of a "sit down" strike within the meaning of the *Fansteel* case.[8] The opinion stated that "Nelson even threatened truck drivers delivering materials to the plant with violence, and to destroy the spur tracks over which materials were delivered to the plant, . . . The

[7] Cf. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 557, 571, affirming 33 F. 2d 13, affirming 24 F. 2d 426; 25 *id.* 873; 25 *id* 876, 877–8.

[8] *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240.

affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts, which it is not denied were committed in this instance, would not only not effectuate the policy of the Act, but would directly tend to make abortive its plan for peaceable procedure."

We find no such issue raised by respondent's pleadings before the Board. Respondent made request for special findings by the Board, but included none that Nelson and Schofield had been guilty of any unlawful conduct. Nelson categorically denied having made threats of violence. The court was apparently referring to the testimony of a truck driver which appears in the record. An objection of the Board's representative to the introduction of this particular testimony was overruled by the trial examiner when respondent's attorney made the following statement: "If your Honor please, may I point out that while Mr. Nelson was on the witness stand in cross-examination I asked him if he did not say certain things at this time and place, that this witness has been referring to, which the witness Nelson denies. The testimony of this witness that Nelson did say those things is in contradiction of Mr. Nelson's testimony and is clearly admissible as tending to impeach the veracity of Mr. Nelson's testimony. Aside from that I also submit it as bearing on the type of conduct and the attitude of the representatives and organizers of this T. W. O. C. getting membership and conducting the affairs of this organization."

This truck driver's helper testified that on the morning of April 8, after Schofield and Nelson had been laid off, he saw Nelson, Schofield and a third "little fellow from the

C. I. O." "outside the mill yard." He noticed Nelson "going up and down motioning . . . Going like this [illustrating by waving arms, squatting and standing.]" As this truck driver recollected, Schofield was not "doing anything." "If anybody was looking out the east door they could" see Nelson or Schofield moving their hands that morning; Nelson "made a motion to sit down, that is all," out "on the main road going to the plant." He "couldn't say that" any workers would have seen Nelson; he "couldn't say that, whether they could see out or not. I don't know." An employee, not Nelson or Schofield, who "went through the department shouting 'Sit-down strike,' " was taken for an automobile ride by the company's vice president, talked to, given lunch and sent home to bed without loss of pay and was still working for the company at the time of the hearing. When asked, "You remember you said, 'Well, we can blow up the railroad?'," Nelson answered, "No, absolutely not."

In vacating the Board's order of reinstatement on the ground that undenied evidence showed that Nelson and Schofield had, after their unlawful discharge, incited or threatened unlawful conduct, the court acted without any justification.

Congress has placed the power to administer the National Labor Relations Act in the Labor Board, subject to the supervisory powers of the Courts of Appeals as the Act sets out. If the Board has acted within the compass of the power given it by Congress, has, on a charge of unfair labor practice, held a "hearing," which the statute requires, comporting with the standards of fairness inherent in procedural due process, has made findings based upon substantial evidence and has ordered an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order. Until granted such enforcement, the Board is powerless to act upon the parties

before it. And the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required.

Mindful of the separate responsibilities Congress has imposed upon the Board and the courts, we have carefully scrutinized this entire record. Within the range of our examination has appeared not merely the testimony but also the procedure followed from the filing of the charge before the Board to final decree of the Court of Appeals. The Board and its representatives solicitously guarded respondent's and intervenor's right to a full and fair hearing; manifested liberality in ruling upon evidence proposed by both sides; and conducted the proceedings in a manner calculated to bring about a just result. And as we have pointed out, substantial evidence supported the result which the Board did reach.[9] Notwithstanding, the court below declined to order enforcement of the Board's order, and the implications of its opinion are that the Board without a proper regard for either the limitations on its power or the evidence made findings all of which had no substantial support.

But in reaching this conclusion the Court of Appeals itself failed to give proper regard to the evidence which was before the Board, which appeared in the record before the court and which we have set out in this opinion. In refusing to enforce the Board's order, the court exceeded the power given it. The cause is reversed and remanded with directions to enforce the Board's order without conditions or qualifications.

Reversed.

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

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[9] Accepting the underlying findings of the Board, as we do, it was within the province of the Board to draw the inferences that the

UNITED STATES ET AL. *v.* CHICAGO HEIGHTS TRUCKING CO. ET AL.

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

No. 724. Argued April 26, 29, 1940.—Decided May 20, 1940.

Common carriers by motor, in interstate commerce, filed tariffs providing rates on goods reshipped in the original packages as less than truck-load consignments immediately after their transportation as parts of a truck-load or carload consignment, and on less-than-truck-load goods which, on arrival at their immediate destination, are to be immediately reshipped, in the original packages, as parts of a truck-load or carload consignment. The Interstate Commerce Commission found the rates lower than other rates on like goods between the same points; that practically they could be used only by forwarders and a few large shippers; that they would operate for the special benefit of forwarders and would not benefit owners of the goods shipped; and that forwarders would thereby be afforded transportation at rates lower than those charged certain other shippers under substantially similar circumstances and conditions, in violation of § 216 (d) of the Federal Motor Carrier Act. *Held:*

1. That the Commission was justified in canceling the proposed tariffs. P. 347.

2. Section 216 (d) of the Motor Carrier Act, like provisions of the Interstate Commerce Act, insures equality of rates for substantially similar services. P. 351.

3. Although the evidence was undisputed, it was for the Commission to determine the question of undue preference and discrimination. P. 352.

4. The Commission was authorized to act in the matter on its own motion, without complaint by shippers. P. 353.

5. The Commission performs its duties in the interests of shippers generally, of the national transportation system, and of the public. P. 354.

Reversed.

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guarantees of § 7 of the Act required disestablishment of the Federation (*Falk* case, 308 U. S. 461, and cases cited), and that posting of appropriate notices was necessary. *Id.*, p. 462.

APPEAL from a decree of the District Court of three judges, which set aside an order of the Interstate Commerce Commission canceling tariffs of motor carriers.

Mr. A. H. Feller, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Frank Coleman, William J. Campbell, Daniel W. Knowlton,* and *E. M. Reidy* were on the brief, for appellants.

Messrs. John R. Turney and *R. E. Quirk* for appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

Respondents are forty-one interstate common carriers operating motor vehicles subject to the Interstate Commerce Commission under the Federal Motor Carrier Act of 1935.[1] Our decision turns upon the validity of an order of the Commission cancelling certain proposed tariffs of these carriers upon the ground that they were unlawfully discriminatory in affording lower rates to "forwarders" of freight than to other shippers.

Forwarders utilize common carriers by rail and motor truck to transport goods owned by others. They solicit and obtain many small shipments, from various points within an area, and cause them to be carried in less than truck-load or carload lots to a concentration center within the area. There they are assembled by the forwarder for further transportation in truck-load or carload lots. Although the forwarder gives owners of individual small shipments his own contract corresponding in form to through bills of lading and assumes responsibility for safe through carriage, the forwarder customarily arranges for the pickup, assembly and transportation of the shipments by carriers for hire. And the forwarders, not the owners of the goods, select the carriers and

[1] 49 Stat. 543.

route the shipments. Upon arrival of a truck-load or carload of the assembled small shipments at a distribution center, the bulk shipment is broken up, the forwarder separates and takes possession of the original small shipments and arranges, where necessary, their further carriage to their various final destinations in the area served by the particular distribution point. In this final carriage of the small shipment to its ultimate destination, the forwarder again utilizes carriers for hire to move these less than truck-load or carload lots. Thus, forwarders may use the service of carriers to assemble shipments of less than truck-load or carload lots at their concentration center, to transport the assembled truck-load or carloads to a distribution center and to carry the broken up small shipments beyond their break-bulk distribution center.

The forwarding business has been built upon the expectation that a material part of the transportation which it causes to be provided for small shippers can by consolidation of small shipments be obtained at truck-load or carload rates. For the forwarders' business was originally made profitable because it could operate upon the margin of profit represented by the difference between railroad carload rates paid by the forwarder and the higher rates, approximating less than carload rates, which the forwarder charged the owner of a shipment.[2] But forwarders in using railroads enjoy no special tariff rates and pay the same published carload and less than carload rates that other shippers pay. And the question here it not whether the Commission should have approved as lawful lower rates for truck-loads than for smaller shipments, but whether the court properly set aside the Commission's order which had directed cancellation of re-

[2] See *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 243.

spondents' tariffs providing lower rates for certain less than truck-load shipments solely because they had previously been, or were intended subsequently to be, consolidated in truckloads with other individual shipments.

Upon the Commission's own motion, a hearing was held and the Commission ordered the cancellation of these tariffs.[3] Respondents brought suit in the District Court to set aside and restrain enforcement of the Commission's order. A three judge court held the order void and perpetually enjoined its enforcement. The case is here on direct appeal by the United States and the Interstate Commerce Commission.[4]

Respondents' tariffs would be available to forwarders who arrange assembling, transportation and distribution services in the trade areas surrounding concentration and break-bulk centers in Illinois, Wisconsin and Indiana. And the Commission found that "In practical effect these rates can be used by few, if any, shippers, except the forwarders." Since in its opinion these tariffs were "materially lower than respondents' local rates on like traffic between the same points," [5] the Commission found that "the forwarders . . . and possibly a few large shippers . . . will be afforded transportation at rates lower than the rates . . . charged certain other shippers under substantially similar circumstances and conditions, in violation of Section 216 (d)." [6] In the view we take, it be-

[3] Division 5 first reported, 10 M. C. C. 556. On reconsideration, the report was by the Commission, 17 M. C. C. 573.

[4] 28 U. S. Code, 45, 45 (a), 47 (a), 345.

[5] Two Commissioners in dissent thought this was "true only in part. They are lower than some, but by no means all, of the corresponding local rates."

[6] § 216 (d): "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of

comes unnecessary to consider additional grounds upon which the Commission found the tariffs violated another Section of the Act.[7]

So far as pertinent here, the tariffs before us propose rates for transportation of commodities in less than truck-load lots. All commodities (with exceptions not here material) are as a group given the same special rate. In general, respondents' other tariffs provide rates which vary for different types of commodities. Accordingly, if the suspended rates were in effect, transportation of the same commodity over the same haul might cost a forwarder less than other shippers.

The findings of the Commission and the supporting evidence[8] reveal that local less-than-truck-load rates charged shippers are in many if not most instances greater than rates on like commodities between the same points to be afforded forwarders under the proposed tariffs which the Commission ordered cancelled. However, upon reviewing the identical evidence which the Commission had considered, the court below drew inferences opposite to those of the Commission and disagreed with its conclusion that in operation the disputed tariffs would violate § 216 (d) which forbids undue preferences and advantages that lead to unjust discrimination. The exercise of judgment by the Commission and by the court

traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

[7] See § 217 (a), (b).

[8] The District Court found that some of the local "rates are higher and some lower than the suspended rate," but the average revenue derived by the respondents from local rates "per hundred pounds . . . upon the whole, is less than" that produced by the suspended rates.

in appraising the same evidence has led to these opposing conclusions.

The tariffs apply on " 'All freight' (except as otherwise provided . . .), which has been transported to . . . [an] origin station . . . , as a part of a truck-load consignment or carload consignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission and immediately reshipped in the original packages as an L. T. L. [less than truck-load] shipment: or

"(b) 'All freight', . . . which is to be transported to . . . [a named] destination station . . . as an L. T. L. shipment, and immediately reshipped in the original package as part of a truck-load consignment or carload assignment moving under tariffs or schedules lawfully on file with the Interstate Commerce Commission."

It is evident that these special tariffs are available only to shippers who intend and are able (a) to arrange immediate further transportation in carloads or truck-loads for commodities that have been carried in less than truck-load lots, or (b) to move commodities in less than truck-load lots immediately after they have been carried as part of a carload or truck-load. While, as has been noted, some few large shippers may possibly avail of the tariffs, there is no question about the finding of the court below that the "principal traffic which will be carried under the suspended rates is what is called by the Commission 'freight forwarder traffic.' "

Almost since its inception the Commission has been called upon to exercise its judgment relative to the Interstate Commerce Act as applied to forwarders.[9] Initial hostility of the railroads caused them to deny forwarders the advantage of their published rates. However, when

[9] See, e. g., Export Shipping Co. *v.* Wabash Railroad Co., 14 I. C. C. 437; Freight Forwarding Investigation, 229 I. C. C. 201; Acme Fast Freight, Inc., Common Carrier Application, 8 M. C. C. 211.

called upon to decide, the Commission held that the railroads' action discriminated against forwarders and declared forwarders to be entitled as shippers to published carload rates. This Court sustained the action of the Commission.[10]

About 1920, prior to the Motor Carriers Act, forwarders began to utilize motor carriers. Forwarders and truckers operated under individual contracts providing divisions of the complete line haul charge. After the tariff provisions of the Motor Carriers Act went into effect, forwarders filed tariff schedules with the Interstate Commerce Commission on the assumption that they were subject to the Act as common carriers. Tariffs so filed were, however, ordered cancelled by the Commission upon the ground that forwarders were not motor carriers subject to the Act. A three judge District Court upheld the Commission [11] and this Court affirmed.[12]

Here, the complaint itself has alleged that the so-called "proportional" tariffs under consideration "name rates which are identical with" the divisions of through L. C. L. rates which respondents would have received had the forwarders' tariffs been upheld. And, as stated by the Commission, "Stripped of protective coloring, these rates are published as proportional rates primarily as a matter of expediency to serve the purpose of certain freight forwarders and to perpetuate in another form so-called divisions of purported joint rates of the freight forwarders."

Respondents contend that the Commission improperly concluded that the canceled tariffs create undue preferences or advantages resulting in unjust discriminations in

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[10] *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235.

[11] 8 M. C. C. 211, *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968.

[12] *Acme Fast Freight, Inc.* v. *United States*, 309 U. S. 638.

violation of 216 (d) because there was no evidence that the suspended rates would subject any particular person or type of traffic to disadvantage or injury; while the suspended rates, applicable on all classes of traffic, might be lower as to some commodities, the aggregate compensation from them would not be less than that from like local traffic if all such local traffic is considered; services rendered by respondents to the forwarders are unlike and less burdensome than local services rendered individual shippers; services rendered the forwarders are on longer hauls than on other local less than truck-load commodity traffic; terminal services rendered forwarders by respondents are less expensive than in the case of other shippers; forwarders bear the expense of soliciting business thereby relieving respondents of that burden; the only evidence before the Commission was introduced by respondents; and no shippers complained of injury.[13]

Weighty as these arguments were, they did not persuade the Commission that forwarders could without discrimination be given lower L. T. L. rates than other shippers. The Commission was impressed by the facts that the proposed rates were not in reality available to all of the shipping public and in practical effect would operate for the special benefit of the forwarders and would not benefit the owner of goods shipped; that § 216 (d) of the Act represented a manifestation of the congressional purpose in Part I, § 2, and Part II, § 202 (a) of the Interstate Commerce Act, to prevent favoritism by insuring equality of treatment on rates for substantially similar services; and that the proposed tariff would afford "forwarders . . . , and possibly a very few large shippers . . . , transportation at rates lower

[13] These arguments for sustaining the tariffs were all forcefully presented in the dissenting opinion of Chairman Eastman, concurred in by Commissioner Mahaffie.

than the rates which . . . [would] be charged certain other shippers under substantially similar circumstances and conditions, in violation of Section 216 (d)." Moved by these considerations, the Commission concluded that the mere fact that forwarders might ordinarily furnish a volume of traffic greater than but identical in kind with that furnished by individual shippers did not justify lower rates for forwarders.

"It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." [14] And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." [15] So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment

[14] *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.

[15] *Id.*

to existing facts, of the existence of forbidden preferences, advantages and discrimination.[16]

A special allowance to a forwarder as an inducement to ship goods by a particular carrier would be an illegal rebate.[17] Similarly, and as previously pointed out, forwarders are shippers protected by the Interstate Commerce Act from discrimination by carriers.[18] As shippers, forwarders do business subject to the paramount principle that Congress intended our national transportation system to operate without favoritism. Pursuant to its duty to apply that principle upon a national scale, the Commission can prevent unjust rate discrimination by carriers against other shippers and in favor of forwarders. The particular problem here involved is but a segment of the larger complicated national problem of rates with which the Commission must deal. As exemplified by this record, the Commission is "informed by experience" [19] of years in its consideration of the relationship of forwarders to our national transportation system.

The fact that the Commission acted on its motion without complaints by individual shippers did not detract

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[16] *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304; *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co., supra,* at 255; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 481. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n,* 162 U. S. 197, represents an apparent exception, at an early date before the function of the Commission had become fully outlined against the background of time and the empiric pattern of litigation. (Commission's bill to enforce its holding that the difference between domestic and imported merchandise could not justify different rates between the port of reception and point of delivery, ordered dismissed).

[17] *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444.

[18] *Interstate Commerce Comm'n* v. *Delaware, L. & W. R. Co., supra,* at 255.

[19] Cf. *Standard Oil Co.* v. *United States,* 283 U. S. 235, 239; *Illinois Central R. Co.* v. *Interstate Commerce Comm'n,* 206 U. S. 441, 454.

from the Commission's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest.[20] Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. "The judgment so exercised, being supported by ample evidence, is conclusive." [21]

The judgment of the court below is reversed and the bill is ordered dismissed.

Reversed.

EX PARTE BRANSFORD, COUNTY TREASURER OF PIMA COUNTY, ARIZONA, ETC.

No. —, Original. Argued April 23, 1940.—Decided May 20, 1940.

1. Mandamus is proper to review error of a district court in refusing to call in additional judges, under Jud. Code § 266, in a suit praying an interlocutory injunction against state officers. P. 355.
2. The application for mandamus may be made by one of several defendants. P. 356.
3. A suit by a national bank to enjoin the collection of a state tax is not a suit to restrain the enforcement of a statute of the State "upon the ground of the unconstitutionality of such statute," within the meaning of Jud. Code § 266, where the bill makes no attack upon the state legislation involved but alleges that state officials have misconstrued it and have made an assessment which is unconstitutional because excessive and discriminatory and which is also invalid because it discriminates against national bank shares in violation of R. S. § 5219, and includes preferred shares of the bank owned by the Reconstruction Finance Corporation, which are exempt under the Act of Congress of March 20, 1936. P. 357.

A petition for an injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court,

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[20] Cf. *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157.

[21] *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 525, 526.

is to be distinguished from one based on the alleged unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter does not require a three-judge court, its attack being aimed at allegedly erroneous administrative action.

Motion denied.

On a motion for leave to file a petition for a writ of mandamus and on the respondent's return to a rule to show cause.

Mr. Gerald Jones, with whom *Mr. John Mercer Johnson* was on the brief, for petitioner.

Mr. J. L. Gust for David W. Ling, U. S. District Judge, respondent.

MR. JUSTICE REED delivered the opinion of the Court.

The county treasurer and ex-officio tax collector of Pima County, Arizona, moves to file a tendered petition for a writ of mandamus to be directed to District Judge Ling of the federal district court for that state. A rule to show cause has issued and the return has been made. Petitioner, a county treasurer, and other officials are defendants together with their counties, in a suit brought in the district court by the Valley National Bank in which the Bank is seeking an interlocutory and permanent injunction against the collection of certain taxes by the counties. The district judge has ruled that he will hear the case while sitting alone and petitioner contends that under § 266 of the Judicial Code he is entitled to have the case heard before three judges. Mandamus is the proper remedy.[1]

Arizona taxes shares of bank stock in the name of the shareholders and requires the bank to pay for them.[2]

[1] *Ex parte Williams,* 277 U. S. 267, 269; *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U. S. 10, 16.

[2] Revised Code of Arizona, 1928, §§ 3069–71.

Assessments are made in the first instance by county assessors, with an appeal allowed first to a county and then to a state board of equalization. The state board returns the final assessment with a levy of the rate for state purposes to the county supervisors. This body adds the several local rates and places the assessment upon the tax roll. Collection is performed by the county treasurer,[3] and the taxes collected are apportioned between state and county.[4] Where a bank is doing business in several counties the value of its stock is apportioned among the counties in accordance with the assets located in each.[5] Because other property in the state has been under-assessed the state board in 1935 ordered that bank shares be valued at 75% of capital stock, surplus and undivided profit. Assets, borrowings, deposits and other liabilities are disregarded.

The petitioner is the only defendant to apply for mandamus. As the issuance of such an order depends on the jurisdiction of the single district judge, sitting alone, over the suit pending in the district court, this is sufficient. As the issues with this petitioner in that suit include those with all other defendants, we do not need to state the issues arising with the officials of counties other than Pima. The Bank states its controversy with the petitioner arose in the following manner. The Bank had branches in several counties. It had common capital stock, a surplus and undivided profits. Also the Bank had an issue of preferred which it had sold to the Reconstruction Finance Corporation prior to the time of the 1935 assessment at the par value of $1,240,000 and which the Reconstruction Finance Corporation still owns. Taking the position that the preferred owned by the Reconstruction Finance Corporation could not be taxed,

[3] *Id.*, § 3110.
[4] *Id.*, § 3111.
[5] *Id.*, § 3071.

the Bank reported a total value of $524,629.50, 75% of $699,026 (the amount of its common, surplus, undivided profits and reserves), as the total taxable value of its shares, and apportioned this among the counties according to the assets there located. On this basis $139,088.80, 26.53% of its total taxable value, was apportioned to Pima County. The assessor of Pima County made an assessment of $327,590, the "actual cash value of the real and personal property" situated in Pima County. By agreement of the parties, the Bank paid the amount which under its computation was due Pima County, the right to litigate the validity of the county's assessment being reserved. Subsequently, the petitioner having threatened to institute proceedings to enforce the county's assessment, the Bank brought its suit in the district court to enjoin collection.

The Bank by its bill in the district court seeks an injunction upon several grounds. We are of the opinion that none of these compels the trial judge to call a three-judge court under § 266.

The assessment in Pima County was made in the amount of the value of the Bank's real estate and personal property. It is therefore, says the Bank, impossible to tell whether the assessment is the valuation of the property, the proportion of the value of the common stock alone or that of the aggregate of the common and preferred. An assessment upon the property, it is alleged, is "void as unauthorized by the statutes of Arizona." If the valuation includes the preferred stock, the complaint alleges it is invalid because of the Act of March 20, 1936, exempting the preferred stock while owned by the Reconstruction Finance Corporation.[6] If the valuation is upon the common stock alone, it is said to be invalid (1) because the valuation is far beyond the actual value and therefore confiscatory and (2) because the valuation is discrimina-

[6] 49 Stat. 1185.

tory since the common stock in other banks is assessed at 75% of the value of common stock, surplus and undivided profits and other classes of property at sixty per cent of its actual value, while this valuation is on the basis of approximately twice the common stock, surplus and undivided profits of the bank and twice its actual value. It is further alleged that this excessive and discriminatory valuation violates R. S. § 5219 which limits the rate of taxation of national bank shares to that assessed "upon other moneyed capital in the hands of individual citizens . . . coming into competition with the business of national banks." It is prayed that action under these assessments for the reasons stated be enjoined as violative of the Constitution and laws of the United States and Arizona.

Section 266 lays down as one of the requirements for a three-judge court that the injunction against the officer of the state to restrain the enforcement, operation or execution of the state statute must be sought "upon the ground of the unconstitutionality of such statute."

In so far as it is alleged that the assessments are void because unauthorized by the Arizona statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the Federal Constitution.

The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and R. S. § 5219 depend upon no constitutional provision within the meaning of Judicial Code § 266. If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law [7] or in a manner forbidden by the National Banking Act.[8] The

[7] *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21.

[8] R. S. § 5219; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668.

declaration of the supremacy clause [9] gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to § 266 in *Ex parte Buder,*[10] and before that a similar result had been reached in *Lemke* v. *Farmers Grain Company* [11] in regard to a provision of the Judicial Code granting direct appeal to this Court in cases where the sole issue [12] was the unconstitutionality of a state statute.[13]

It is said, however, that the allegations of confiscation and discrimination in valuation of the common shares in comparison with the stock of other banks and other property show the injunction is sought upon the ground of the unconstitutionality of the statute. This point depends upon excessive valuation of the shares. The validity of the statute itself is not involved. Variations by assessors in valuations of like property, taxable under the same statute, sufficiently marked to be discriminatory under the Constitution or valuations so large as to be confiscatory cannot properly be said to be the basis for attack on the ground of the unconstitutionality of the statute. Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself.[14]

But it is said by the petitioner here that the last sentence of § 3071 requires this excessive and discrimina-

[9] Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . ."

[10] 271 U. S. 461, 465–66.

[11] 258 U. S. 50, 52.

[12] *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397, 407.

[13] See *D. A. Beard Truck Line Co.* v. *Smith,* 12 F. Supp. 964.

[14] Cf. *Ex parte Williams,* 277 U. S. 267, 271; *Jett Bros. Co.* v. *Carrollton,* 252 U. S. 1, 5.

tory assessment. That sentence reads: "When a bank maintains branches or conducts business in more than one county, city or town, the assessed value of the capital stock shall be apportioned among the several counties, cities and towns in which the main office or such branches are maintained or business conducted, and the amount apportioned to each county, city or town shall not be less than the actual cash value of the real and personal property of such bank situated in such county, city or town." If this is interpreted as requiring that the apportionment of the value of the capital stock to each county must not be less than the tangible property in that county, the aggregate apportionment may be much larger than the assessed value of the stock. A greater assessment per share will occur if the total valuation is allocated to common shares only. If the valuation, reached under the formula by treating the preferred as capital stock, is allocated among the common shares, only, it would mean that the preferred was treated as stock for purposes of the valuation and disregarded for the assessment of individual shares. The argument of petitioner is that if the result, as he contends the Bank alleges, violates the Federal Constitution by discrimination of common shares as compared to shares of other banks without preferred stock or owners of other property, the statute violates it. Therefore, in effect, the attack on the constitutionality of the assessment is an attack on the constitutionality of the statute.

The contention of the Bank, however, is that the assessor misinterpreted the statute; that the objectionable aspect of the assessment is the attribution to the common of the whole amount instead of an apportionment to both preferred and common or the use of the preferred as capital stock in the state valuation formula. We are not now called upon to reach any conclusion upon the meaning of the Arizona tax statutes. If the trial court deter-

mines that the assessment complained of is made properly under the statute and that by the statute the assessment is to be prorated among the common shares, it would determine only a question of statutory construction. It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court,[15] and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court.[16] In such a case the attack is aimed at an allegedly erroneous administrative action.[17] Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction.[18] Where by an omission to attack the constitutionality of a state statute, its validity is admitted for the purposes of the bill, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill. Jurisdiction, properly assumed, may be lost by the special court, when it appears that a prerequisite such as need for relief against state officers is lacking.[19] Even where the statute is attacked as unconstitutional, § 266 is inapplicable unless the action complained of is directly attributable to the statute.[20] There is no indication that Congress sought by § 266 to have every attack on the constitutionality of a state statute determined by a three-judge court.

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[15] *Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10.

[16] *Ex parte Hobbs*, 280 U. S. 168.

[17] *Ex parte Williams, supra.*

[18] *Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10, 15.

[19] *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391.

[20] *Ex parte Collins*, 277 U. S. 565, 567, 569.

It sought such a bench only to avoid precipitate determinations on constitutionality on motions for interlocutory injunctions.

As the foregoing ground adequately disposes of the petition for mandamus, we do not discuss the other reasons for refusal urged by the Bank.

The motion to file the petition for mandamus is

Denied.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* BROWNING ET AL., CONSTITUTING THE STATE BOARD OF EQUALIZATION OF TENNESSEE.

CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

No. 789. Argued April 30, May 1, 1940.—Decided May 20, 1940.

1. In the absence of special circumstances rendering it inapplicable to the particular case, the mileage basis affords an appropriate method, consistent with the Commerce Clause, of apportioning the value of an interstate railroad system among the several States in which it functions, for the purpose of taxation. Arithmetical precision in the apportionment is not essential to its validity. P. 365.

   The judgment of state taxing authorities and courts upholding a use of the mileage basis, despite evidence of different earning capacities of lines of the railroad in and out of the State,—*accepted* in this case.
2. Upon review of a decree of a state court sustaining a tax assessment of a railroad over the objection that unconstitutional discrimination resulted from systematic assessment of railroads and other public utilities at full value and undervaluation of all other kinds of property, this Court declines to examine the minutes of the state board of equalization, not in the record but proffered here for the first time in the litigation, in order to learn whether the state court was correct in presuming that disparities of assessment had been equalized, as required by the state law. P. 366.
3. The Equal Protection Clause of the Fourteenth Amendment permits a State to classify the property of railroads and other public utilities separately from other property and to tax it higher. P. 367.

4. Where a State for many years systematically assessed the property of railroads and other utilities at full cash value and all other kinds of property at less than cash value,—*held* that the practice was the "law" of the State, within the meaning of the Equal Protection Clause of the Fourteenth Amendment, although uniformity of taxation was commanded by the state constitution, and although it were true that the tax in question was sustained by the State Supreme Court by a resort to fiction. P. 369.
5. The contention that an assessment, continued without change for a series of years, had become confiscatory because of decrease in value of the property due to economic causes, is rejected because
   (1) The Court finds in the record no warrant for upsetting the administrative determination, sustained by the state courts. P. 370.
   (2) The maintenance of an assessment in the face of declining value is merely a way of increasing the tax. P. 370.

140 S. W. 2d 781, affirmed.

CERTIORARI, 309 U. S. 651, to review a decree sustaining the dismissal of a suit to reduce, as excessive, a tax assessment of railroad property.

Mr. William H. Swiggart, with whom *Mr. Edwin F. Hunt* was on the brief, for petitioner.

Mr. W. F. Barry, Assistant Attorney General of Tennessee, with whom *Messrs. Roy H. Beeler,* Attorney General, and *Dudley Porter, Jr.,* Assistant Attorney General, were on the brief, for respondents.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case is here to review a judgment of the Supreme Court of Tennessee sustaining an assessment of petitioner's property, tangible and intangible, under that state's *ad valorem* tax law. All Tennessee property is subject to such a tax; but there are two schemes of procedure for making assessments, one for public service corporations and one for other taxpayers. As to ordinary property the task of valuation rests upon officials of the various counties. For public service corporations the assessments

must be made by the Railroad and Public Utilities Commission, which is commanded to ascertain the "actual cash value" of corporate property situated in Tennessee. Tennessee Code, § 1526. Since petitioner operates an interstate railroad, the value of its entire system and not merely of that portion within Tennessee had first to be ascertained. This the Commission estimated at $23,996,604.14. From this figure was deducted the value of petitioner's "localized" property, that is, its terminal buildings, shops, and non-operating real estate. The remaining sum served as the base for calculating the value of what in the language of Tennessee law is called the utility's "distributable" property attributable to Tennessee, § 1528, which the Commission ascertained by taking the ratio which petitioner's mileage in Tennessee bears to its total mileage. This was found to be $12,925,944; and that is the amount of the assessment here in dispute. From this action by the Commission petitioner appealed, in accordance with the local statute, to the State Board of Equalization, respondent here. After hearing and by formal opinion, the Board confirmed the Commission's valuation.

In anticipation of a certification by the Board of its final assessment preliminary to the collection of taxes based upon it, the Railway brought an appropriate proceeding in the state courts to set aside what it claimed was the void "excess of the fair taxable value" of its property. This suit was dismissed by the trial court and its judgment was affirmed by the Supreme Court of Tennessee with two justices separately dissenting. 140 S. W. 2d 781. Because of petitioner's claim that the result below was inconsistent with decisions of this Court, we granted certiorari. 309 U. S. 651. The assessment was contested below on objections grounded in both state and federal constitutions. Here, of course, only federal questions are open. Petitioner claims that the challenged

assessment violates the Fourteenth Amendment in its guarantees of due process and the equal protection of the laws, and is offensive to the Commerce Clause.

We shall first consider the claim based on the historic implications of the Commerce Clause as a limitation upon the state's taxing power. Petitioner argued that Tennessee has taxed values which are in truth outside its borders, thereby burdening that which the Commerce Clause has left free. The guiding principles for adjustment of the state's right to secure its revenues and the nation's duty to protect interstate transportation are by this time well settled. The problem to be solved is what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Basic to the accommodation of these conflicting state and national interests is realization that by its very nature the problem is incapable of precise and arithmetical solution. In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Wallace* v. *Hines,* 253 U. S. 66. In the light of these principles, Tennessee has not overstepped its bounds.

In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421; *Branson* v. *Bush,* 251 U. S. 182. See 2 Cooley on Taxation, pp. 1660–64. Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. In a matter where exactness is con-

cededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we displace the tax officials' judgment with our own. Certainly we cannot say that the combined judgment of Commission, Board, and state courts is baseless. Wherever the states' taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis. *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; *Wallace* v. *Hines, supra; Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76. No such circumstances are here presented.

This brings us to the Company's claims under the Fourteenth Amendment. The Railway first asserts that it is a victim of such invidious discrimination in the administration of Tennessee's tax statutes as is proscribed by the guaranty of "the equal protection of the laws." The claim is founded upon the following circumstances. As we have already indicated, there are two separate modes for the assessment of property in Tennessee, each with its distinctive procedure. The property of public service corporations is assessed by the Commission; all other property by local officials. This broad classification, separating two very different types of property, has been reflected, according to petitioner's contention, by a corresponding difference in the bases of assessment. For more than forty years, so it was urged before the courts of Tennessee and later here, the county assessors have systematically valued property at far less than its true worth, while utility and railroad properties have been assessed by the Commission at full value.[1]

[1] For a history of Tennessee railroad taxation, see Brannen, Taxation in Tennessee, pp. 62 *et seq.;* Robison, Bob Taylor and the Agrarian Revolt in Tennessee, pp. 123 *et seq.*

This systematic differentiation, petitioner claims, has been continuous and state-wide in its operation; has been "repeatedly brought to the attention of the General Assembly of the State of Tennessee"; has been left uncorrected by that body; and until the present case, so far as we are informed, has been unchallenged. In support of its claim the Railway adduced official and unofficial reports as well as a volume of affidavits from local assessing officials in the counties through which its lines run—all to the effect that locally assessed property was undervalued. The issue of forbidden discrimination was thus squarely raised below. But the Tennessee Supreme Court did not deem petitioner's evidence sufficient to overcome the presumption that in the exercise of its reviewing function, the Board had equalized assessments in accordance with the command of state law. We should be reluctant on such a question to reject the state court's determination as without foundation, and there is not enough in the record to warrant its repudiation. At the bar of this Court petitioner proffered the minutes of the State Board of Equalization—not in the record—to show the absence of equalization. Considering the nature of the litigation, the vigor and ability with which it was contested before the Circuit Court of Davidson County, on motion for new trial there, on the original appeal to the Supreme Court of Tennessee and finally on petition for rehearing, it would indeed turn this Court into a board of tax review if we were now to receive evidence not offered in any of the tribunals below.

But were we to take judicial notice of that which these minutes were offered to show, and therefore to regard the ground taken by the state court as a strained evasion of the differentiation between utility property on the one hand and all the rest on the other, we should still find no denial of the equal protection of the laws. It must be emphasized that the Company makes no claim

that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20; *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350; *Sioux City Bridge* v. *Dakota County,* 260 U. S. 441; *Bohler* v. *Callaway,* 267 U. S. 479; *Cumberland Coal Co.* v. *Board,* 284 U. S. 23; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239. All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. *Greene* v. *Louisville & I. R. Co.,* 244 U. S. 499; *Louisville & N. R. Co.* v. *Greene,* 244 U. S. 522. This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure. See *Puget Sound Co.* v. *King County,* 264 U. S. 22, 27.

That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate—these are among the commonplaces of taxation and of constitutional law. *Kentucky Railroad Tax Cases,* 115 U. S. 321; *Pacific Express*

Co. v. *Seibert,* 142 U. S. 339; *Florida Central & P. R. Co.* v. *Reynolds,* 183 U. S. 471; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519; *Atlantic Coast Line* v. *Daughton,* 262 U. S. 413; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573. Since, so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another, the only question relevant for us is whether the state has done so. If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment. Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. Compare *Cariño* v. *Insular Government,* 212 U. S. 449, 459. And if the state supreme court chooses to cover up under a formal veneer of uniformity the established system of differentiation between two classes of property, an exposure of the fiction is not enough to establish its unconstitutionality. Fictions have played an important and sometimes fruitful part in the development of law; and the Equal Protection Clause is not a command of candor.

So we are of opinion that such a discrimination, not invidious but long-sanctioned and indeed conventional, would not be offensive to the Fourteenth Amendment simply because Tennessee had reached it by a circuitous road. It is not the Fourteenth Amendment's function to uproot systems of taxation inseparable from the state's tradition of fiscal administration and ingrained in the habits of its people.

Finally, the Railway claims that the valuation of its entire system, on the basis of which the Commission has measured Tennessee's shares, is so far in excess of "full cash value" as to offend the Due Process Clause. The details on which this claim is based are fully set forth in the opinions below and call only for summary treatment here. The argument basically derives from the fact that the Commission's valuation of petitioner's system was the same as that for the previous biennium, although numerous adverse economic factors are alleged to have greatly reduced the property's worth. But railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a "full cash value" for a railroad is in many respects artificial. See 1 Bonbright, The Valuation of Property, pp. 511–632. Whatever may be the pretenses of exactitude in determining such a "value," to claim for it "scientific" validity, is to employ the term in its loosest sense. Compare *Chicago, B. & Q. Ry. Co.* v. *Babcock,* 204 U. S. 585, 598. Thorough canvass by the state courts found no justification for upsetting the determination of the Commission, and we could scarcely find warrant in the record for doing so. But even assuming that there was an overassessment, constitutional invalidity would not follow. If the needs of a state require higher taxes, the Fourteenth Amendment certainly does not bar their imposition. The maintenance of higher assessment in the face of declining value is merely another way of achieving the same result.

Great Northern Ry. Co. v. *Weeks,* 297 U. S. 135, does not bar the way. That is the only case, and it was decided by a sharply divided Court, in which a non-discriminatory assessment was struck down simply because it was thought excessive. Plainly, therefore, the case must have rested upon considerations peculiar to its own facts. Those are not the facts now before us. We conclude, therefore, that the Commission's over-assessment of petitioner's property, if over-assessment there was, constitutes no deprivation of any right under the Federal Constitution.

Affirmed.

UNITED STATES *v.* GEORGE S. BUSH & CO., INC.

CERTIORARI TO THE COURT OF CUSTOMS AND PATENT APPEALS.

No. 613. Argued April 23, 24, 1940.—Decided May 20, 1940.

The President, acting on a report and recommendation of the Tariff Commission pursuant to the flexible tariff provisions of the Tariff Act of 1930, proclaimed an increase of duty on a Japanese product, to equalize the difference between Japanese and domestic costs of production. In fixing the increase, foreign cost of production was determined, under § 336 (e), on the "weighted average of the invoice prices or values for a representative period," taking as representative the period from December 1, 1930, to September 30, 1932; but, as the invoice prices were in yen and as § 336 contains no provision for conversion of currency, the Commission, in order to compare those prices with domestic cost, had converted them into dollars at the average rate of exchange for 1932, selecting that period because the value of yen in dollars had declined steadily from December 1931 to November 1932. *Held:*

1. There is no express provision in the Act requiring that the rate of exchange be taken from the same period as the invoice prices, and none can be implied. P. 378.

2. The President's judgment in the matter is not subject to scrutiny by the Court of Customs and Patent Appeals or by this Court. P. 379.

3. Section 501 of the Act does not permit judicial examination of the judgment of the President that the rates of duty recommended

by the Commission are necessary to equalize the differences in domestic and foreign costs of production. P. 379.

4. Under § 336, the Commission serves the President as an adviser. It is the judgment of the President on the facts submitted to him by the Commission that determines whether or not the recommended rate will be promulgated. P. 379.

5. In substance, and to a large extent in form, the action of the Commission and the President is but one stage of the legislative process. P. 379.

27 C. C. P. A. —; 104 F. 2d 368, reversed.

CERTIORARI, 309 U. S. 643, to review a judgment of the Court of Customs and Patent Appeals ordering a reappraisement under § 501 of the Tariff Act of 1930.

Mr. Warner W. Gardner argued the cause, and *Solicitor General Biddle, Assistant Attorney General Oliver, Messrs. Charles D. Lawrence, Richard H. Demuth, John R. Benney,* and *Edwin G. Martin* were on the brief, for the United States.

The action taken by the President and the Commission was in substance one stage of the legislative process. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. Such action is not subject to judicial impeachment if the prescribed forms of legislation have been regularly observed. *Id.* Here the investigation conducted by the Commission, the hearing which it held after due notice to all interested parties, its report to the President, and his proclamation approving the Commission's recommendation, constituted a full and regular observance of the forms prescribed.

Moreover, it does not appear from the proclamation whether the President accepted the reasoning of the Tariff Commission or predicated his approval of the Commission's recommendation upon his own conclusions drawn from the facts set forth in the Commission's report. If the reasoning of the Commission was in fact based on an erroneous interpretation of the statute, the presumption

that the President acted properly requires the courts to assume that he followed the latter course.

The holding of the court below that, under § 336 (e) (2) (A), if the weighted average of the invoice prices for a representative period is used to determine foreign costs of production, those prices must be converted into terms of dollars at the rate of exchange prevailing during that period, has no warrant in the provisions of the Act and to a very large extent nullifies the intention of Congress in enacting the flexible tariff provision.

Sec. 336 contains no mention of conversion of currency. In the absence of express statutory provision it seems clear that in converting foreign costs into dollars the Commission may, as it did in this case, use the rate of exchange prevailing at the time of its investigation, since this rate reflects the then existing differences in costs of production. If, as held by the court below, the Commission is required to convert foreign costs into dollars at the rate of exchange which prevailed during the period used to ascertain the foreign costs but which, due to subsequent exchange fluctuations, is not the rate prevailing at the time of the investigation, the Commission will be utterly unable to perform its function of determining what change in duty will equalize the differences in costs of production at the time when the change becomes effective. Although the legislative history of § 336 shows plainly that fluctuating foreign exchange was one of the important factors which Congress considered as creating the need for a flexible tariff law, the decision below renders the provision largely useless for this purpose.

Even if the construction by the court below is correct, the action of the Commission was still authorized under other provisions of § 336.

Mr. George R. Tuttle for respondent.

Neither the Tariff Commission, nor the President in his review of the facts submitted by the Commission, com-

plied with the provisions of § 336 when they ascertained the foreign cost of production, the differences in cost of production between the foreign and domestic article, and the "duties expressly fixed by statute."

If the procedure followed by the Commission and the President is not in violation of the terms of § 336, then the statute is an unconstitutional delegation of legislative power in that it grants to an administrative agent discretion as to what the law shall be.

The conversion from yen into dollars at the average rate of exchange for the year 1932 was illegal, for by this action the Commission obtained a value which did not represent the cost of production referred to in the statute, i. e., the cost for the selected "representative period."

In violation of § 336 (a) the Commission failed to ascertain the amount of "duties expressly fixed by statute" and to compare this amount with the differences in costs of production. Although the Commission found that "foreign value" was dutiable value, it disregarded § 402 (c) of the Act, requiring the date of exportation to be taken in ascertaining foreign value, and also disregarded § 522 requiring foreign currency to be converted to dollars in a particular manner.

The Commission failed to compare the amount of duty based on the American selling price as defined in § 402 (g), with the difference in cost of production computed as of the same period of time.

The Commission did not ascertain the required facts from "the investigation," but ascertained them by use of an unauthorized and illegal currency-conversion factor.

The Commission did not specify in its report to the President such increase or decrease in rate of duty or change in basis of value as was "shown by the investigation" to be necessary to equalize the differences in cost of production.

As to the court's power to review, see: *Hampton* v. *United States,* 276 U. S. 394, 409; *Robertson* v. *Frank,* 132 U. S. 17, 24; *Muser* v. *Magone,* 155 U. S. 240, 247; *United States* v. *Passavant,* 169 U. S. 16, 21; *Waite* v. *Macy,* 246 U. S. 606; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *Moss* v. *United States,* 26 C. C. P. A. 381, 385; 103 F. 2d 395; *Foster* v. *United States,* 20 C. C. P. A. 15, 23; *Fox River Butter Co.* v. *United States,* 20 C. C. P. A. 38, 45; *United States* v. *Sears, Roebuck & Co.,* 20 C. C. P. A. 295, 301; cert. den. 290 U. S. 633.

As to what constitutes "legal investigation" by the Tariff Commission, and "proceeding in conformity with law" by the President, the following decisions are pertinent: *Foster* v. *United States,* 20 C. C. P. A. 15, 22, 25–6; *Zeiss* v. *United States,* 23 C. C. P. A. 7, 14; *Norwegian Nitrogen Products Co.* v. *United States,* 20 C. C. P. A. 27, 34–5; 288 U. S. 294; *Fox River Butter Co.* v. *United States,* 20 C. C. P. A. 38, 45; *Moss* v. *United States, supra.*

As both decisions by this Court in cases pertaining to the flexible-tariff provisions (*Hampton* v. *United States, supra,* and *Norwegian Nitrogen Products Co.* v. *United States, supra*), and many of the decisions by the Court of Customs and Patent Appeals in similar litigation, relate to actions brought under the Tariff Act of 1922 (§ 315), rather than the Act of 1930 (§ 336), the differences in the respective provisions of the two Acts must be kept in mind when considering the present case in the light of these decisions.

Mr. Justice Douglas delivered the opinion of the Court.

The Court of Customs and Patent Appeals held invalid the Proclamation made by the President of the United States on May 1, 1934, increasing the duty on canned clams imported from Japan. 104 F. 2d 368. We granted certiorari because of the importance of that deci-

sion to the administration of the flexible tariff provisions of the Tariff Act of 1930 (46 Stat. 590).

In compliance with § 336 (a) of that Act, the Tariff Commission, in response to an application for an increased duty on canned clams, instituted an investigation in June 1932, gave public notice of the hearing, held the hearing in October 1932 and gave interested parties an opportunity to be present, to produce evidence, and to be heard. As a result of that investigation the Commission found that the statutory duty of 35% *ad valorem* on the foreign dutiable value [1] did not equalize the difference in the costs of production of the domestic article and the Japanese article. On such a finding the Commission was authorized by § 336 (a) to recommend to the President an increase or decrease in the statutory rate but not in excess of 50 per cent; or in case the differences could not be equalized in that manner, it was empowered by § 336 (b) to specify such *ad valorem* rate of duty based upon the American selling price [2] of the domestic article as it found necessary to equalize such differences. In the latter event, however, the statutory rate could not be increased. The Commission found that the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeded the then existing statutory rate by more than 50 per cent. Accordingly it proceeded under § 336 (b) to specify an *ad valorem* rate based on American selling price, and recommended to the President an increase in the duty, to be effected by assessing the rate of 35 per cent *ad valorem* on the American selling price.

It is provided in § 336 (c) that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment

[1] § 1, Sch. 7, Par. 721 (b).

[2] As defined in § 402 (g).

such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Proclamation referred to the report and findings of the Commission and concluded that the change in duty recommended was "in the judgment of the President" necessary for that purpose. After the President issued his Proclamation, respondent imported some canned clams and they were appraised on the basis of the American selling price. It was on an appeal for reappraisement pursuant to § 501 that the Proclamation was held invalid by the Court of Customs and Patent Appeals. Its invalidity, according to that court, flowed from the basis on which the Commission computed the Japanese cost of production. By § 336(e)(2) the Commission was authorized, when the cost of production of a foreign article was not "readily ascertainable," to accept as evidence thereof the "weighted average of the invoice prices or values for a representative period." The Commission took the weighted average of such prices for the period from December 1, 1930, to September 30, 1932. Those prices were in Japanese yen. Sec. 336 contains no provision for conversion of currency. But the Commission in order to compare those prices with domestic costs converted them into United States dollars, at the average rate of exchange for 1932. That period was selected because Japan went off the gold standard in December 1931 and the value of the yen in terms of United States dollars declined steadily from that date to November 1932.[3]

[3] The Commission in its report to the President, dated April 5, 1934, stated on this point:

"The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much

The Court of Customs and Patent Appeals held that it was error to convert invoice prices for one period into United States dollars at the average rate of exchange for another period. In its view the phrase "weighted average of the invoice prices or values for a representative period" contained in § 336 (e) (2) must be construed as though it read, "weighted average of the invoice prices or values in United States currency for a representative period." The government, however, urges that if the Commission were forced to take the conversion rate for the earlier period, to which it had to resort in order to obtain the invoice prices, it would use a rate which had merely an historical interest and which did not reflect the conditions which made desirable an increase in the duties, viz. the depreciation in the value of the yen.

The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the Commission nor for that of the President.[4] There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what

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below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932."

[4] Sec. 522 (b) provides that for "the purpose of the assessment and collection of duties" upon imports, foreign currency shall be converted at values proclaimed by the Secretary of the Treasury for the quarter in which the merchandise was exported. This section clearly has no application to the issue here, since it applies only to assessment and collection of duties—matters outside the functions and duties of the Tariff Commission.

Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930,[5] it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production.

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 308 *et seq.,* for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. In substance and to a great extent in form (*Norwegian Nitrogen Products Co.* v. *United States, supra*) the action of the Commission and the President is but one stage of the legislative process. *Hampton & Co.* v. *United States,* 276 U. S. 394. "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Products Co.* v. *United States, supra,* p. 318. And the judgment of the

[5] That section gives either party a right to appeal to the Court of Customs and Patent Appeals on "a question or questions of law only."

President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott,* 12 Wheat. 19; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott, supra,* pp. 31–32: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

The other points raised are so unimportant as not to merit discussion.

Reversed.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.

Syllabus.

SUNSHINE ANTHRACITE COAL CO. *v.* ADKINS, COLLECTOR OF INTERNAL REVENUE.

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

No. 804. Argued April 29, 1940.—Decided May 20, 1940.

1. The 19½% tax imposed by § 3 (b) of the Bituminous Coal Conservation Act (1937) on sales of such coal by producers, "which would be subject to the application of the conditions and provisions of the code provided for in § 4, or of the provisions of § 4A," applies to producers who are not members of the code, although under § 4 the provisions of the code are for code members only. P. 391.

   A contrary construction would read the 19½% tax out of the Act, (since by § 3 (b) code members are exempt from it); the essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. Section 4 is made expressly applicable "only to matters and transactions in or directly affecting interstate commerce." It seems plain that the tax was intended to apply only to those *sales* by non-code members which "would be" subject to *regulation* under § 4. P. 392.
2. The constitutionality of the Act is *upheld* over the contentions that the 19½% tax is not a tax but a penalty; that Congress lacks power to fix minimum prices for bituminous coal sold in interstate commerce; that there has been an invalid delegation of legislative and judicial power; and that the division of bituminous coal into code and non-code classes is improper. Pp. 393 *et seq.*
3. The taxing power of Congress may be used as a sanction for the exercise of another granted power. P. 393.
4. The regulatory provisions of the Act are within the commerce power; they apply only to sales or transactions in, or intimately affecting, interstate commerce. P. 393.
5. Price control is a means available to Congress for the protection and promotion of the public economy. P. 394.

   Courts are not concerned with the wisdom, policy or appropriateness of this legislation. But the state of the bituminous coal industry and its history and public importance, plainly support the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures. P. 394.

6. Congress may modify the prohibitions of the Sherman Act by placing the machinery of price-fixing in the hands of public agencies. P. 396.
7. Congress may single out a particular industry and remove as to it the penalties of the Sherman Act. P. 396.
8. The commerce clause empowers Congress to stabilize an interstate industry through a process of price-fixing which safeguards the public interest by placing price-control in the hands of its administrative representative. P. 396.
9. The standards specified by § 4, II (c) of the Bituminous Coal Act to control the Commission in fixing maximum and minimum prices binding code members, are adequate, and there is no invalid delegation of legislative power. P. 397.
10. In the matter of price-making, code members are subordinated by the Act to the Commission, so that there is no delegation of legislative authority to the industry. P. 399.
11. The definition of bituminous coal in the Act, § 17 (b), is adequate as a standard for the Commission's action in determining what coal is subject to the Act. P. 399.
12. The Act makes no invalid delegation of judicial power to the Commission for determining whether a particular coal producer falls within its provisions; and it grants sufficient judicial review. P. 400.
13. A contention that the Act, by classifying the coal as code and non-code and applying the 19½% tax to the latter alone, violates the Fifth Amendment, is *rejected*, since the procedural features satisfy due process, and the Fifth Amendment has no equal protection clause; nor is uniformity required by the commerce clause. P. 400.
14. A judgment sustaining on review a determination by the Bituminous Coal Commission that a producer's coal is "bituminous" within the meaning of § 17 (b) of the Bituminous Coal Conservation Act, thus subjecting him to the 19½% tax laid on sales by producers who have not joined the code, is *res judicata* in a suit by the producer to enjoin the Commissioner of Internal Revenue from collecting the tax. P. 401.
15. Where Congress has created a special administrative procedure for determining the status of persons and companies under a regulatory Act, and has prescribed a procedure satisfying due process, that remedy is exclusive. P. 404.

16. In the circumstances of this case, appellant is not entitled to relief from payment of taxes accrued during the litigation since the date fixed by the decree below. P. 404.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill to enjoin the collection of taxes. See also 31 F. Supp. 125 and 105 F. 2d 559.

Mr. Henry Adamson, with whom *Mr. George O. Patterson* was on the brief, for appellant.

This case does not challenge either directly or indirectly any order of the Commission, and, in any event, there is no privity between the National Bituminous Coal Commission or its successor and the appellee herein.

No power to hold hearings and make determination of what is or is not bituminous coal within the meaning of the Bituminous Coal Act of 1937 is delegated by the Act, either directly or inferentially, to the National Bituminous Coal Commission or its successor.

If the statute be construed as delegating to the Commission power to determine the object to which the law is to be applied, without fixed standards, it is invalid as an unconstitutional delegation of legislative power. If it be construed as delegating power to exercise the judicial function of construction of the Act, then it is invalid as an unlawful delegation of judicial power.

Construction of the Act as to the meaning of "bituminous, semi-bituminous and sub-bituminous" is a judicial function and can not be delegated to an administrative tribunal.

Since appellant is a non-code producer, sale of appellant's coal is not subject to the application of provisions of the Code provided for in § 4 or of the provisions of § 4–A, and therefore is not subject to the so-called 19½% tax.

The Bituminous Coal Act of 1937 is unconstitutional for the following reasons: (a) The division of a natural class, bituminous coal, into artificial classes of code and non-code for regulatory purposes is unreasonable and arbitrary, and violates the Fifth Amendment. (b) The so-called 19½% tax on sale price of coal is obviously not a tax, but a confiscatory penalty assessed without fault on the part of the appellant. Exemption from said so-called tax is based not upon difference in either conduct or product, but solely upon membership in the code. Such classification for exemption purposes is clearly unreasonable and arbitrary, and not in any wise a proper method of accomplishing a proper congressional purpose, and violates the Fifth Amendment. Membership or nonmembership in an organization certainly cannot be a proper basis for classification either for purposes of regulation or taxation. (c) Congress is without power to fix minimum prices for bituminous coal sold in interstate commerce. *Nebbia* v. *New York,* 291 U. S. 502, 536; *United States* v. *Rock Royal Co-operative,* 307 U. S. 533. *Mulford* v. *Smith,* 307 U. S. 38, distinguished.

Attorney General Jackson, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Robert E. Sher, Hugh B. Cox,* and *Abe Fortas* were on the brief, for appellee.

The price-fixing provisions of the Bituminous Coal Act of 1937 are in substance the same as those contained in the Bituminous Coal Conservation Act of 1935. Although the majority of the Court in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, did not pass upon the validity of these provisions, the dissenting opinions indicated that they were valid.

Since the regulatory provisions apply only to sales in or directly affecting interstate commerce, they are a valid exercise of the federal commerce power. *United States* v. *Rock Royal Co-operative,* 307 U. S. 533.

Statutes fixing prices do not violate the due process clause. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310. Even if conditions in an industry be deemed material, the burden of proving that the regulation is arbitrary or capricious and of overcoming the presumption of constitutionality is upon the person assailing the validity of the statute, and that burden has not been sustained by appellant here. Moreover, both the record in this case and facts subject to the Court's notice demonstrate that the regulatory provisions are not arbitrary, capricious, or unreasonable.

The circumstances warranting the establishing of minimum prices in the coal industry were substantially the same as those described by this Court in *Nebbia* v. *New York*, 291 U. S. 502, with respect to the milk industry.

The price-fixing provisions contain much more detailed standards than those prescribed for the use of the Interstate Commerce Commission and the Secretary of Agriculture in fixing rates under the Interstate Commerce Act and the Packers and Stockyards Act and in other regulatory statutes. The argument that there is an invalid delegation of legislative power is plainly without substance. The definition of "bituminous coal" in § 17 (b) constitutes a satisfactory standard, which is not rendered inadequate because of the possible existence of borderline cases where its application may be difficult. Cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

The grant of authority to the Commission to determine the question of fact as to the status of coal under the Act is not an invalid delegation of judicial power. The decision is reviewable by the courts. *Crowell* v. *Benson*, 285 U. S. 22, is not in point; appellant is admittedly engaged in interstate commerce, and no constitutional rights depend upon the factual question here in issue. Cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177.

Section 3 (b) provides specifically that producers who become code members are exempt from the 19½% tax. If the tax is not applicable to non-code members, it cannot apply to any one. Both the language of the statute and its legislative history show that Congress did not intend to accomplish any such absurd result.

The 19½% tax is valid regardless of whether it is a tax or a penalty, inasmuch as the regulatory provisions which the section is aimed to effectuate are a legitimate exercise of the commerce power. There can be no question of the power of Congress to impose penalties in order to enforce laws enacted under any of the enumerated powers.

If the tax be a penalty, there can be no improper classification in applying it only to those who fail to comply with the regulatory plan which it is designed to enforce. Furthermore, the choice of whether to subject itself to the tax or the regulatory scheme lay entirely with appellant, and appellant can not complain because the burden of the tax now turns out to be greater than that of the system of regulation which it could voluntarily have accepted instead. In any event, the differentiation between code members and non-code members is valid as a means of equalizing the burdens imposed upon the two groups. *New York Rapid Transit Corp.* v. *New York,* 303 U. S. 573, 580.

The decision in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 105 F. 2d 559, is clearly *res judicata* with respect to the status of appellant's case. Although the National Bituminous Coal Commission and the collector of internal revenue may nominally be different parties, they are in legal effect the same, both representing the United States. Under the statute the Commission determines the applicability of the Coal Act both for regulatory and tax purposes. It is settled that there is privity between officers representing the same government, and that although a judgment entered

in a case against a collector may not be binding in a suit against the United States, a judgment in an action against the United States or its representative is conclusive in a suit against a collector. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620.

The District Court also was barred from determining the status of appellant's coal because of the existence of a complete administrative and statutory remedy, the adequacy of which has been demonstrated with respect to appellant itself. Moreover, the power to review the orders of the Commission is vested by the Act exclusively in the Circuit Courts of Appeals (§ 6 (b), (d)). This statutory limitation upon the jurisdiction of the District Courts is valid. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The labor provisions of the Bituminous Coal Conservation Act of 1935 (49 Stat. 991) were held unconstitutional by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. The Bituminous Coal Act of 1937 (50 Stat. 72) was thereupon enacted. It eliminated those provisions of the earlier Act and made other substantive and structural changes.[1] The basic problem here involved is the constitutionality of the 1937 Act.

That Act provides for the regulation of the sale and distribution of bituminous coal by the National Bituminous Coal Commission,[2] with the coöperation of the bi-

[1] H. Report No. 294, 75th Cong., 1st Sess., pp. 2–3.

[2] Though we refer throughout to the Commission, it should be noted that its functions have been administered since July 1, 1939, by the Bituminous Coal Division of the Department of the Interior. Reorganization Plan No. II, § 4 (a) and (b), submitted by the President to the Congress May 9, 1939. Pub. Res. No. 20, 76th Cong., 1st Sess., c. 193, approved June 7, 1939.

tuminous coal industry. Its aim is the stabilization of the industry primarily through price-fixing and the elimination of unfair competition. It is provided in § 4 that the coal producers, accepting membership, shall be organized under the Bituminous Coal Code. Some twenty district boards of code members are provided for, which are to operate as an aid to the Commission but subject to its pervasive surveillance and authority. The statute specifies in detail the methods of their organization and operation, the scope of their functions, and the jurisdiction of the Commission over them. The Commission is empowered to fix minimum prices for code members in accordance with stated standards. Under § 4, II (a) each board shall "on its own motion or when directed by the Commission" propose minimum prices pursuant to prescribed statutory standards. These may be approved, disapproved, or modified by the Commission as the basis for the coördination of minimum prices. Somewhat comparable machinery is provided for such coördination of minimum prices "in common consuming market areas upon a fair competitive basis," § 4, II (b), and for establishment of rules and regulations incidental to the sale and distribution of coal by code members. § 4, II (a). The Commission is also given power by § 4, II (c) to establish maximum prices for code members pursuant to standards prescribed therein. The sale, delivery, or offer for sale of coal below the minimum or above the maximum prices established by the Commission is made a violation of the code. § 4, II (e). So are numerous practices, specified in § 4, II (i) as unfair methods of competition. And contracts for the sale of coal at prices below the prescribed minimum or above the maximum are invalid and unenforceable. § 4, II (e). The Commission may, after hearing, revoke the code membership of any coal producer for willful violation of the code or of any regulation made thereunder. § 5 (b).

Sec. 3 (a) imposes an excise tax of 1 cent per ton of two thousand pounds upon the sale or other disposition by the producer of bituminous coal produced in the United States.[3] Sec. 3 (b) imposes an additional 19½% tax (based on sale price or in certain cases on fair market value) on sales of bituminous coal by producers "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4–A."[4] Producers who are members of the code are exempt from that tax. As we shall see, the interpretation of § 3 (b) is a subject of controversy. But if, as the government contends, the 19½% tax is applicable to sales by non-members, there are strong inducements for joining the code.

Machinery is provided in § 4–A for obtaining exemptions. A producer who believes that any commerce in coal is not, or may not be made, subject to the provisions of § 4 may file an application for exemption with the Commission. Subject to qualifications not material here, the filing of such application "in good faith" exempts the applicant from any "obligation, duty or liability" imposed by § 4 pending action by the Commission on the application. The Commission shall grant the application, or,

[3] These provisions are now found in § 3520 of the Internal Revenue Code. (53 Stat. 430). The 1¢ tax was apparently designed to cover the administrative costs of the Act. See H. Report No. 294, *supra* note 1, pp. 2–3, recommending a ½% tax which in conference was changed to 1¢ per ton. H. Report No. 578, 75th Cong., 1st Sess., p. 5.

[4] Sec. 4, as we have seen, governs the constitution and operation of the code. Sec. 4–A provides, *inter alia*, that the Commission shall subject coal in intrastate commerce to the provisions of § 4 if it finds after hearing that transactions in that coal "cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal."

after notice and opportunity for hearing, shall deny or otherwise dispose of it. An applicant aggrieved by such denial or other disposition may obtain a review of the order in the Court of Appeals for the District of Columbia or in the Court of Appeals in the circuit where he resides or has his principal place of business. § 6 (b). The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

Appellant is lessee of coal lands in Arkansas and is engaged in the business of mining and shipping coal. It has not subscribed to or accepted the provisions of the Bituminous Coal Code provided for in § 4 of the Act. In August 1937 it filed an application for exemption on the grounds that its coal was not bituminous coal as defined in § 17 (b) of the Act.[5] The Commission held a public hearing on that application in October 1937.[6] Appellant appeared, introduced evidence, and was heard on oral argument before the Commission.[7] In August 1938 the Commission handed down an opinion with findings of fact and conclusions of law and entered an order denying appellant's application for exemption on the grounds that its coal was bituminous within the meaning

[5] Sec. 17 (b) provides: "The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

[6] This hearing was not restricted to appellant's application. Other producers in the same field intervened.

[7] The liberal notice and opportunity to be heard afforded appellant are illustrated by the following: In January 1938 the report of the examiner was served on appellant. In May 1938 a proposed report of the Commission was issued giving appellant 30 days to file exceptions and briefs and in that event to apply for oral argument. Appellant filed exceptions and asked for oral argument. Notice of oral argument was issued and oral argument was had. Thereafter the Commission issued its order denying the application.

of § 17 (b). Appellant obtained a review of this order in the Circuit Court of Appeals. That court held that the Commission had jurisdiction to determine the status of coal claimed to be exempt and that the Commission's decision was based on substantial evidence. It accordingly affirmed the order. *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission,* 105 F. 2d 559. We denied certiorari. 308 U. S. 604.

In May 1938, while the above proceeding was pending before the Commission, appellee demanded that appellant pay the taxes, penalties and interest accruing under § 3 (b) of the Act for the period ending February 1938; and filed a notice of tax lien against appellant's property. Thereupon appellant filed its complaint in this suit to enjoin the collection of the tax. A three-judge court was convened, which issued a temporary injunction. Apparently no further action was taken in this case until after the decision of the Circuit Court of Appeals in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission, supra,* when appellee filed a supplemental answer stating that the decision in that case was *res judicata* as to the status of appellant's coal under the Act and that the district court had no jurisdiction over that subject matter. The court below denied appellant's motion to strike that portion of the answer. 31 F. Supp. 125. The case was tried. The court held the Act to be constitutional and dismissed the bill on the merits.[8] The case is here on appeal (50 Stat. 752; 28 U. S. C. § 380a).

I. Appellant argues that it is not subject to the 19½% tax imposed by § 3 (b) because that section does not ap-

[8] It granted, however, a permanent injunction against collection of taxes prior to December 4, 1939 the date on which this Court denied a petition for rehearing on the petition for certiorari. 308 U. S. 638. Appellee has not appealed from that part of the decree. The Court also granted a stay with respect to collection of taxes accruing after December 4, 1939, pending final disposition of this appeal.

ply to producers who are not members of the code. Its argument rests on the construction of § 3 (b) and § 4. As we have seen, the former places the 19½% tax on the sale or other disposition of coal "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A." Sec. 4 provides that the "provisions of such code shall apply only to such code members." Appellant therefore contends that the tax is not applicable to its coal, since the coal produced by a non-code producer such as appellant is not subject to the provisions of the code.

But if the 19½% tax is not applicable to non-code members, it is not applicable to anyone since § 3 (b) exempts code members from that tax. That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question. See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 333 and cases cited. Only a highly strained construction of § 3 (b) would lead to the conclusion that non-code members are exempt from the 19½% tax. It seems that Congress made a deliberate choice of words when it said that the tax applied to the sale or other disposition of coal which "would be" subject to § 4 and § 4–A. Sec. 4 is made expressly applicable "only to matters and transactions in or directly affecting interstate commerce in bituminous coal." Hence it seems plain that the tax was intended to apply only to those *sales* by non-code members which "would be" subject to *regulation* under § 4. Appellant's coal plainly falls in that class since practically its entire output is sold to purchasers outside the state of Arkansas. To sustain appellant's position we would not only have to substitute "is" for "would be"; we would have to override the express Congressional

plan to make the 19½% tax "in aid of the regulation of interstate commerce" in bituminous coal.[9] That would be not only to rewrite § 3 (b) but to remake the whole statutory scheme. Obviously such a task is not for the courts.

II. Appellant challenges the constitutionality of the Act on the grounds that the 19½% tax is not a tax but a penalty, that Congress lacks the power to fix minimum prices for bituminous coal sold in interstate commerce, that there has been an invalid delegation of legislative and judicial power, and that the division of bituminous coal into code and non-code classes is improper.

Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. *Head Money Cases,* 112 U. S. 580, 596. And see *Sonzinsky* v. *United States,* 300 U. S. 506. It is so utilized here.

The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution. These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce. The fixing of prices, the proscription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause. As stated by Mr. Justice Cardozo in

[9] H. Report, No. 294, *supra* note 1, states concerning this tax (p. 4): "Under subsection (b) a tax of 19½ percent is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4A."

his dissent in *Carter* v. *Carter Coal Co., supra,* p. 326, "To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420. What is true of prices is true of the attachment of other conditions to the flow of a commodity in interstate channels. *Mulford* v. *Smith,* 307 U. S. 38 and cases cited. Since this power when it exists is complete in itself, *Gibbons* v. *Ogden,* 9 Wheat. 1, 196, there can be no question but that the provisions of this Act are an exertion of the paramount federal power over interstate commerce. See *United States* v. *Rock Royal Co-operative,* 307 U. S. 533.

Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the states (*Nebbia* v. *New York,* 291 U. S. 502 and to the Congress (*United States* v. *Rock Royal Co-operative, supra*) in their respective domains (*Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511) for the protection and promotion of the welfare of the economy. But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in nowise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain. And if we undertook to narrow the scope of federal intervention in this field, as suggested by appellant, we would be blind to at least

thirty years of history. For a generation there have been various manifestations of incessant demand for federal intervention in the coal industry.[10] The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry.[11] Official [12] and private [13] records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been "degraded into anarchy" in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink.

It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny

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[10] National Resources Committee, Energy Resources and National Policy (1939) pp. 41–123, 338–346, 405–423.

[11] Hearings on H. R. 8479, 74th Cong., 1st Sess.

[12] National Resources Committee, Energy Resources and National Policy, *supra* note 10; H. Rep. No. 1800, 74th Cong., 1st Sess., covering the 1935 Act; S. Rep. No. 252, H. Rep. No. 294, 75th Cong., 1st Sess., covering the 1937 Act; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; Third Annual Report Under the Bituminous Coal Act of 1937 (1940), pp. 4–5.

[13] Hamilton & Wright, The Case of Bituminous Coal (1926); Report of the Fifteenth Annual Meeting of the National Coal Assoc., Oct. 1934, pp. 9–11, 96–97.

the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could not be taken without plain disregard of the Constitution. There are limits on the powers of the states to act as respects these interstate industries. *Baldwin* v. *G. A. F. Seelig, Inc., supra.* If the industry acting on its own had endeavored to stabilize the markets through price-fixing agreements, it would have run afoul of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co., ante,* p. 150. But that does not mean that there is a no man's land between the state and federal domains. Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions,[14] a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative. *United States* v. *Rock Royal Co-operative, supra.* That was the choice which Congress made here. There is nothing

[14] See *United States* v. *Socony-Vacuum Oil Co., supra,* p. 225.

in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act.

Nor does the Act contain an invalid delegation of legislative power. Under § 4, II (c) the Commission may fix maximum prices when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices. These maximum prices must be fixed at a uniform increase above minimum prices so that in the aggregate they will yield a reasonable return above the weighted average total cost of the district. And no maximum price shall be established for any mine which will not yield a fair return on the fair value of the property. The minimum prices to be fixed must conform to the following standards: the weighted average cost for each minimum price area must be computed, the elements of cost being defined; a classification of the various sizes and grades of coal shall be made which reflects as nearly as possible the relative market value of the various kinds, qualities, and sizes of coal, which is just and equitable as between producers within the district and which has due regard to the interests of the consuming public; and coördinated minimum prices shall be established for such coal (a) which reflect as nearly as possible the relative market values at points of delivery taking into account specifically enumerated factors, (b) which preserve as nearly as may be existing fair competitive opportunities, (c) which are just and equitable as between the districts, and (d) which, consistently with the process of coördination, yield a return to each area approximating its weighted average cost per ton.

The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. § 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. § 211). The latter provide the standard of "just and reasonable" to guide the administrative body in the rate-making process. The validity of that standard (*Tagg Bros. & Moorhead v. United States, supra*), the appropriateness of the criterion of the "public interest" in various contexts (*New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24; *United States* v. *Chemical Foundation,* 272 U. S. 1; *Avent* v. *United States,* 266 U. S. 127), the legality of the standard of "unreasonable obstruction" to navigation (*Union Bridge Co.* v. *United States,* 204 U. S. 364) all make it clear that there is a valid delegation of authority in this case. The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. *Currin* v. *Wallace,* 306 U. S. 1, 15 and cases cited. But the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues. For these reasons we hold that the standards with which Congress has supplied the Commission are

plainly valid. *United States* v. *Rock Royal Co-operative, supra.*

Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin* v. *Wallace, supra,* and cases cited.

But appellant maintains that the delegation of authority to the Commission to determine what coal is subject to the Act is unlawful because of uncertainty in the statutory definition of bituminous coal. Sec. 17 (b) defines the term "bituminous coal" as follows:

"The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

As in the case of the term "interurban" electric railway in the Railway Labor Act (*Shields* v. *Utah Idaho Central R. Co.,* 305 U. S. 177) we think the definition of bituminous coal is wholly adequate as a standard for administrative action. The fact that it is not a chemist's or an engineer's definition is not fatal. The definition is not devoid of meaning. We are unable to say that it cannot be applied so as to delineate the areas in which Congress intended to make this system of control effective. The fact that many instances may occur where its application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for sup-

plying merely a statutory guide. Cf. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 312. That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts.

Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields* v. *Utah Idaho Central R. Co., supra,* p. 180. The fact that such determination involved an interpretation of the term "bituminous coal" is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an "interurban" electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under § 6 (b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

Appellant contends that the statutory classification of coal into code and non-code classes and the application

of the 19½% tax to the latter are improper under the Fifth Amendment. Its objection is not premised on lack of due process. Nor could it be in view of the elaborate machinery and procedure for the Act's enforcement which the Congress has provided. Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584 and cases cited. And there is "no requirement of uniformity in connection with the commerce power." *Currin* v. *Wallace, supra,* p. 14. The lack of similarity in treatment of the two classes of coal is an integral and essential feature of this Act. As we have said, it is through that device that Congress sought to obtain an effective sanction for the Act's enforcement. Coercion is the very essence of any penalty exacted for failure of submission. "It is of the essence of the plenary power conferred" by the commerce clause "that Congress may exercise its discretion in the use of the power." *Currin* v. *Wallace, supra,* p. 14. A part of that discretion is the selection of the sanction for the law's enforcement. Discrimination constitutionally may be the price of non-compliance. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky* v. *United States, supra,* pp. 513–514. And see *Mulford* v. *Smith, supra,* p. 48.

III. Appellant contends here, as it did below, that *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission, supra,* is not determinative of the present issues since that case did not involve the assessment of taxes and since the Commission had no authority to determine the status of appellant's coal.

These contentions are untenable. In the first place, the Commissioner of Internal Revenue is merely the agency to collect taxes levied under the Act; he is not the

administrative agent whom Congress has designated to determine what coal is exempt from the 19½% tax. That function is entrusted to the Commission. By the terms of § 4–A it is the Commission which determines whether an application for exemption should be granted or denied. By the provisions of § 3 (b) it is the Commission which certifies to the Commissioner those who are code members and consequently exempt from the 19½% tax. Hence the Commission determines the scope of the provisions of the Act and their applicability to various producers. The Commissioner is given no administrative functions whatsoever except tax collection. In the second place, the underlying issue in each of these two suits is the same. In *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission, supra,* the question was whether or not appellant's coal was "bituminous" within the meaning of § 17 (b). When that issue was decided adversely to appellant, liability for the 19½% tax followed unless appellant joined the code, in which event it would be entitled to a certificate from the Commission evidencing its tax exemption. In the present suit, appellant is seeking to raise the identical issue, since its purpose is to enjoin collection of the self-same tax.

The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R. I. & P. Ry. Co.* v. *Schendel,* 270 U. S. 611, 620, "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *County of Sac,* 94 U. S. 351. There is privity between officers of the same government so that a judg-

ment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait* v. *Western Maryland Ry. Co.,* 289 U. S. 620. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 284–289. Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage* v. *United States,* 250 U. S. 33; *Bankers Pocahontas Coal Co.* v. *Burnet,* 287 U. S. 308) are not in point, since the suit against the collector is "personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." *Sage* v. *United States, supra,* p. 37. But here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait* v. *Western Maryland Ry. Co., supra.* The suggestion that the doctrine of *res judicata* does not apply unless the court rendering the judgment had jurisdiction of the cause is sufficiently answered by *Stoll* v. *Gottlieb,* 305 U. S. 165 and *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66. As held in those cases, in general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties. Accordingly the lower court correctly held that it had no jurisdiction to determine

whether appellant's coal was "bituminous" as defined in the Act. Furthermore where, as here, Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act and has prescribed a procedure which meets all requirements of due process, that remedy is exclusive. See *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337.

The decree below subjected appellant to payment of taxes accrued or assessed against it under § 3 (b) after December 4, 1939. To relieve against payment of taxes until final termination of the litigation would be to put a premium on dilatory tactics in a situation where under the authority of *Currin* v. *Wallace, Mulford* v. *Smith,* and *United States* v. *Rock Royal Co-operative, supra,* the subject of the Act was clearly one over which the jurisdiction of Congress was complete.

Affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the Act under review is beyond any power granted to Congress and that the judgment below should be reversed.

ANDERSON *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.*

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

No. 682. Argued April 2, 1940.—Decided May 20, 1940.

Oil properties, including fee interests, were sold for a specified money consideration payable part in cash and the balance, with interest,

*Together with No. 683, *Prichard* v. *Helvering, Commissioner* of *Internal Revenue,* also on writ of certiorari, 309 U. S. 645, to the Circuit Court of Appeals for the Tenth Circuit.

from one-half of the proceeds to be received by the vendee from the oil and gas to be produced from the properties and from the sale by him of the fee of any or all of the land conveyed. The vendor was to have a first lien and claim against the one-half of oil and gas production and fee interests from which the balance was payable. The proceeds from production and sales were to go directly to the vendee, who was to deposit one-half to the credit of the vendor. The agreement recited the vendor's desire to sell all interest in the properties; and immediately upon its execution they were conveyed to the vendee without reservation. *Held* that the part of the gross proceeds which the vendee received from production and sale of oil from the properties, and paid over to the vendor pursuant to the contract, should be included in the gross income of the vendee, in computing his income tax under the Revenue Act of 1932. P. 407.

107 F. 2d 459, affirmed.

CERTIORARI, 309 U. S. 645, to review a judgment affirming a ruling of the Board of Tax Appeals.

Mr. Charles H. Garnett for petitioners.

Mr. J. Louis Monarch, with whom *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Richard H. Demuth* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Oklahoma City Company in 1931 owned certain royalty interests, fee interests, and deferred oil payments in properties in Oklahoma. During that year it entered into a written contract with petitioner Prichard providing for the conveyance to him of these interests for the agreed consideration of one hundred sixty thousand dollars, payable fifty thousand in cash and one hundred ten thousand from one-half of the proceeds received by him which might be derived from oil and gas produced from the properties and from the sale of fee title to any or all of

the land conveyed. Interest at the rate of 6% per annum was to be paid from the proceeds of production and of sales upon the unpaid balance. Oklahoma Company was to have in addition a first lien and claim against "that one half of all oil and gas production and fee interest . . . from which the $110,000 is payable," the lien and claim "not in any way [to] affect the one-half interest in all oil and gas production and fee interest or the revenue therefrom which . . . [it] is to have and receive under this agreement." The proceeds derived from the oil and gas produced and from sales of the fee interests were to be paid directly to Prichard who was to deposit one-half of them at a designated bank, at intervals of 90 days, to the credit of Oklahoma Company. The agreement recited that Oklahoma Company desired "to sell all of its right, title and interest of whatsoever nature" in the described properties, and provided that a copy of the agreement and a release be placed in escrow for delivery to Prichard upon payment in full of the one hundred ten thousand dollars and interest. Immediately upon the execution of the contract the properties were conveyed to Prichard without reservation.[1] In entering into the agreement Prichard acted not only for himself but also for petitioner Anderson, each of them having a 45% interest.[2]

The gross proceeds derived from the production and sale of oil from the properties [3] during 1932 amounted to

[1] Petitioners state that "the instruments of transfer of those properties were absolute and unqualified assignments and conveyances" and that there was "no reservation of any sort of interest, much less any legal interest, specified in those assignments and conveyances."

[2] The remaining 10% interest was acquired for one Olsen, whose case was consolidated with those of Prichard and Anderson, and disposed of in the same opinion below, but who has not sought review here.

[3] The record does not indicate what portion of the gross proceeds was derived from the production and sale of oil and gas and what

some eighty-one thousand dollars. Prichard, upon receiving this sum, distributed one-half to Oklahoma Company pursuant to the contract. The question for decision is whether the proceeds thus paid over to Oklahoma Company should be included in the gross income of petitioners for the tax year 1932.[4] The ruling of the Board of Tax Appeals against petitioners was affirmed by the Circuit Court of Appeals. 107 F. 2d 459. Because of an asserted conflict with the applicable decisions of this Court, we granted certiorari. March 4, 1940.

It is settled that the same basic issue determines both to whom income derived from the production of oil and gas is taxable and to whom a deduction for depletion is allowable. That issue is, who has a capital investment in the oil and gas in place and what is the extent of his interest. *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 367; *Helvering* v. *O'Donnell,* 303 U. S. 370; *Helvering* v. *Elbe Oil Co.,* 303 U. S. 372; *Thomas* v. *Perkins,* 301 U. S. 655, 661, 663; *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321; *Palmer* v. *Bender,* 287 U. S. 551. Compare *Helvering* v. *Clifford,* 309 U. S. 331.

Oil and gas reserves like other minerals in place, are recognized as wasting assets. The production of oil and gas, like the mining of ore, is treated as an income-producing operation, not as a conversion of capital investment as upon a sale, and is said to resemble a manufac-

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portion, if any, was derived from sales of fees and from royalties on leases. The Commissioner in determining deficiencies against petitioners, however, added $11,276.39 to the gross income of each with the explanation that this amount represented "In-oil payments received in connection with the Patterson [Oklahoma Company] Deal" not reported by petitioners. Respondent, in view of this explanation by the Commissioner and the omission from the record of any disclosure of the method of computing the $11,276.39 addition to gross income, accepts petitioners' statement that "the only income from the properties here in dispute is from oil production."

[4] Revenue Act of 1932, c. 209, 47 Stat. 169.

turing business carried on by the use of the soil. *Burnet* v. *Harmel,* 287 U. S. 103, 106–107; *Bankers Coal Co.* v. *Burnet,* 287 U. S. 308; *United States* v. *Biwabik Mining Co.,* 247 U. S. 116; *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 521, 522; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 414. The depletion effected by production is likened to the depreciation of machinery or the using up of raw materials in manufacturing. *United States* v. *Ludey,* 274 U. S. 295, 302–303; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370. Compare *Von Baumbach* v. *Sargent Land Co., supra,* at 524–525. The deduction is therefore permitted as an act of grace and is intended as compensation for the capital assets consumed in the production of income through the severance of the minerals. *Helvering* v. *Bankline Oil Co.,* 303 U. S. 362, 366–367. The granting of an arbitrary deduction, in the interests of convenience, of a percentage of the gross income derived from the severance of oil and gas, merely emphasizes the underlying theory of the allowance as a tax-free return of the capital consumed in the production of gross income through severance. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321; *United States* v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 467.

The sole owner and operator of oil properties clearly has a capital investment in the oil in place, if anyone has, and so is taxable on the gross proceeds of production and is granted a deduction from gross income as compensation for the consumption of his capital. See *Burnet* v. *Harmel, supra,* at 107–108; *Helvering* v. *Clifford,* 309 U. S. 331. By an outright sale of his interest for cash, such an owner converts the form of his capital investment, severs his connection with the production of oil and gas and the income derived from production, and thus renders inapplicable to his situation the reasons for the depletion allowance. "The words 'gross income from the property,' as used in the statute governing the allowance for deple-

tion, mean gross income received from the operation of the oil and gas wells by one who has a capital investment therein,—not income from the sale of the oil and gas properties themselves." *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375–376.

Other situations, falling between the two mentioned, have been put on one side or the other as the cases arose. The holder of a royalty interest—that is, a right to receive a specified percentage of all oil and gas produced during the term of the lease—is deemed to have "an economic interest" in the oil in place which is depleted by severance. *Palmer* v. *Bender*, 287 U. S. 551, 557; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Burnet* v. *Harmel*, 287 U. S. 103. See *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364. Cash bonus payments, when included in a royalty lease, are regarded as advance royalties, and are given the same tax consequences. *Burnet* v. *Harmel*, 287 U. S. 103; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Compare *Helvering* v. *Elbe Oil Land Co.*, 303 U. S. 372, 375. A share in the net profits derived from development and operation, on the contrary, does not entitle the holder of such interest to a depletion allowance even though continued production is essential to the realization of such profits. *Helvering* v. *O'Donnell*, 303 U. S. 370; *Helvering* v. *Elbe Oil Co.*, 303 U. S. 372. Similarly, the holder of a favorable contract to purchase wet gas at the mouth of the well is denied a depletion allowance on the difference between the contract price and the fair market value. *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362. Such an interest has been characterized by us as a "mere economic advantage derived from production, through a contractual relation to the owner." *Helvering* v. *Bankline Oil Co., supra*, at 367.

Thomas v. *Perkins*, 301 U. S. 655, relied upon by petitioners, presented the issue whether the right to oil pay-

ments—that is, the right to a specified sum of money, payable out of a specified percentage of the oil, or the proceeds received from the sale of such oil, if, as and when produced—should be treated for tax purposes like the right to oil royalties or like the right to cash payments upon a sale. In that case, the assignment of lease provided for payments in oil only without the reservation of a royalty interest. The question was whether the assignees' gross income should include moneys paid to the assignors by purchasers of the oil. We stated (p. 659): "The granting clause in the assignment would be sufficient, if standing alone, to transfer all the oil to the assignee. It does not specifically except or exclude any part of the oil. But it is qualified by other parts of the instrument. The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000." Under these circumstances, the moneys received by the assignors from the sale of the oil were deemed not to be income to the assignees. See also *Palmer* v. *Bender,* 287 U. S. 551.

The holder of an oil payment right, as an original proposition, might be regarded as having no capital investment in the oil and gas in place. The value of the right, even though dependent upon the extent of the oil reserves, is fixed at the moment of creation and does not vary directly with the severance of the mineral from the soil. In this sense it resembles the right to cash payments more closely than the right to royalty payments. Yet it does depend upon the production of oil, ordinarily can be realized upon only over a period of years, and permits of a simple and

convenient allocation between lessor and lessee of both the gross income derived from production and the allowance for depletion. Compare *Burnet* v. *Harmel,* 287 U. S. 103, 106–107. Accordingly, this Court in *Thomas* v. *Perkins* decided that the provision in the lease for payments solely out of oil production should be regarded as a reservation from the granting clause of an amount of oil sufficient to make the agreed payments, and should be given the same tax consequences as a provision for oil royalties. The decision did not turn upon the particular instrument involved, or upon the formalities of the conveyancer's art, but rested upon the practical consequences of the provision for payments of that type. See *Palmer* v. *Bender,* 287 U. S. 551, 555–557; *Burnet* v. *Harmel,* 287 U. S. 103, 111.

The Government maintains that the present case is distinguishable from *Thomas* v. *Perkins* for the reason that the basis for decision there was that ownership of sufficient oil to make the payments had not been conveyed to the assignee but remained in the assignor. It asserts that the terms of the contract and the instruments of conveyance here negative any intention on the part of the parties to withhold from the operation of the grant an amount of oil equal to the oil payments. The following factors, among others, are relied upon as supporting this contention: (1) the contract contains no qualifying language reserving from the grant any interest in the oil and gas in place; (2) the deferred payments of one hundred ten thousand dollars were payable in cash and not directly in oil; (3) the deferred payments drew interest until paid; (4) Oklahoma Company had a first lien and claim against one-half of the oil and gas production and fee interest; (5) petitioner Prichard had the right to sell the fee interest covered by the contract and discharge the deferred payments out of the proceeds of such sale rather than out of the proceeds of the oil and gas production.

Several of the distinctions urged upon us by the Government are without substance. The economic consequences of the transaction are not materially affected by the circumstance that the provision for oil payments is not phrased in terms of a reservation from the conveyance to Oklahoma Company of an interest in the oil and gas in place. And the fact that the payments to Oklahoma Company are in cash rather than directly in oil is of no moment in determining the issues presented for decision. Compare, however, *General Utilities Co.* v. *Helvering,* 296 U. S. 200. Similarly, the retention of a lien, if it were construed as a lien only upon the oil and gas production, and nothing more,[5] would not make Oklahoma Company any the less dependent upon such production for payment of the amounts reserved.

The reservation of an interest in the fee, in addition to the interest in the oil production, however, materially affects the transaction. Oklahoma Company is not dependent entirely upon the production of oil for the deferred payments; they may be derived from sales of the fee title to the land conveyed. It is clear that payments derived from such sales would not be subject to an allowance for depletion of the oil reserves, for no oil would thereby have been severed from the ground; an allowance for depletion upon the proceeds of such a sale would result, contrary to the purpose of Congress, in a double deduction—first, to Oklahoma Company; second, to the vendee-owner upon the production of oil. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312, 321. We are of opinion that the reservation of this additional type of security for the deferred payments serves to distinguish

[5] The lien here appears to cover both the oil and gas production and the fee interest from which the deferred payments were to be derived.

this case from *Thomas* v. *Perkins*. It is similar to the reservation in a lease of oil payment rights together with a personal guarantee by the lessee that such payments shall at all events equal the specified sum. In either case, it is true, some of the payments received may come directly out of the oil produced. But our decision in *Thomas* v. *Perkins* does not require that payments reserved to the transferor of oil properties shall for tax purposes be treated distributively, and not as a whole, depending upon the source from which each dollar is derived. An extension of that decision to cover the case at bar would create additional, and in our opinion unnecessary, difficulties to the allocation for income tax purposes of such payments and of the allowance for depletion between transferor and transferee. In the interests of a workable rule, *Thomas* v. *Perkins* must not be extended beyond the situation in which, as a matter of substance, without regard to formalities of conveyancing, the reserved payments are to be derived solely from the production of oil and gas. The deferred payments reserved by Oklahoma Company, accordingly, must be treated as payments received upon a sale to petitioners, not as income derived from the consumption of its capital investment in the reserves through severance of oil and gas.

Petitioners, as purchasers and owners of the properties, are therefore taxable upon the gross proceeds derived from the oil production, notwithstanding the arrangement to pay over such proceeds to Oklahoma Company. See *Helvering* v. *Clifford*, 309 U. S. 331; *Reinecke* v. *Smith*, 289 U. S. 172, 177; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716.

Affirmed.

UNITED STATES *v.* SUMMERLIN, ANCILLARY ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 715. Argued April 29, 1940.—Decided May 27, 1940.

1. A claim assigned to the Federal Housing Administrator became a claim of, and enforcible by, the United States. Act of June 27, 1934. P. 416.
2. Whether the United States sues in its own court or in a state court, it is not bound by state statutes of limitations or subject to the defense of laches. P. 416.

   The fact that the claim in question was acquired by the United States under the National Housing Act does not take the case out of the rule. P. 416.
3. A state statute providing that claims against a decedent's estate not filed within a specified period shall be void might deprive the state probate court of jurisdiction to receive and pass upon a claim of the United States, but can not affect its validity. P. 417.

140 Fla. 475; 191 So. 842, reversed.

CERTIORARI, 309 U. S. 647, to review the affirmance of a judgment declaring a claim of the United States against a decedent's estate void because not filed within the time prescribed by a state statute.

Mr. Frederick Bernays Wiener, with whom *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Melvin H. Siegel* were on the brief, for the United States.

Mr. Asbury Summerlin for respondent.

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

By a series of transactions, which it is unnecessary to review, the Federal Housing Administrator, acting on behalf of the United States, became the assignee of a claim against the estate of one J. F. Andrew, deceased.

Respondent was appointed ancillary administratrix of that estate by the County Judge of Polk County, Florida. Respondent, on August 13, 1937, gave notice by publication to the creditors of the estate to file proof of their claims within eight months as required by the state statute.

The United States filed its claim in the office of the County Judge on July 1, 1938, with a petition asking that the claim be allowed with the priority accorded by the federal statutes (31 U. S. C. 191, 192) and also asserting that the state statute as to the time for filing claims did not apply to claims of the United States. The County Judge denied the petition, holding that the state statute was applicable and further adjudging that the claim of the United States be "disallowed as a claim against the estate" of the decedent.

The United States appealed to the Circuit Court for Polk County, where the order of the County Judge was in all respects affirmed. The judgment explicitly declared the claim of the United States to be "void," because not filed within the time prescribed. An appeal to the Supreme Court of Florida resulted in affirmance of the judgment of the Circuit Court. 140 Fla. 475; 191 So. 842. We granted certiorari because of the importance of the question. 309 U. S. 647.

The statute of Florida (§ 5541 (92) Compiled General Laws of 1927, Supp.) provides:

"No claim or demand, whether due or not, direct or contingent, liquidated or unliquidated, or claim for personal property in the possession of the personal representative or for damages, shall be valid or binding upon an estate, or upon the personal representative thereof, or upon any heir, legatee, or devisee of the decedent unless the same shall be in writing and contain the place of residence and post office address of the claimant and shall be sworn to by the claimant, his agent or attorney, and be filed in the office of the county judge granting letters.

Any such claim or demand not so filed within eight months from the time of the first publication of the notice to creditors shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise: . . ."

The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it. Act of June 27, 1934, 48 Stat. 1246. Compare *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 477; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32, 33.

It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. The same rule applies whether the United States brings its suit in its own courts or in a state court. *Davis* v. *Corona Coal Co.,* 265 U. S. 219, 222, 223.

We are of the opinion that the fact that the claim was acquired by the United States through operations under the National Housing Act does not take the case out of this rule. The state court treated the case as in the same category as one of "statutes providing for conveyancing and marketing negotiable instruments, and conducting other business relations." But this is not a case relating to the application of the law merchant as to the transfer of negotiable paper and the diligence necessary to charge an endorser or as to the incurring by the United States of certain responsibilities by becoming a party to such paper. *United States* v. *Barker,* 12 Wheat. 559; *Cooke* v. *United States,* 91 U. S. 389, 396. Even as a holder of such paper,

as *e.g.* negotiable bonds, the United States suing the maker is not bound by a state statute of limitations. *United States* v. *Nashville, C. & St. L. Ry. Co., supra.* When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 126, 127.

The state court, however, has said that the statute in question is not a statute of limitations, but rather a statute of "non-claim" for the orderly and expeditious settlement of decedents' estates. Presumably the court refers to the provision of the statute that if a claim is not filed within the specified period it "shall be void even though the personal representative has recognized such claim or demand by paying a portion thereof or interest thereon or otherwise."

If this were a statute merely determining the limits of the jurisdiction of a probate court and thus providing that the County Judge should have no jurisdiction to receive or pass upon claims not filed within the eight months, while leaving an oportunity to the United States otherwise to enforce its claim, the authority of the State to impose such a limitation upon its probate court might be conceded. But if the statute, as sustained by the state court, undertakes to invalidate the claim of the United States, so that it cannot be enforced at all, because not filed within eight months, we think the statute in that sense transgressed the limits of state power. *Davis* v. *Corona Coal Co., supra.*

Mr. Justice Story had occasion to consider the application to the Government of a state statute purporting to bar claims against decedents' estates in *United States* v. *Hoar,* Fed. Cas. No. 15,373; 2 Mason 311. There an action was brought by the United States against an ad-

ministrator of an estate and the defendant pleaded the general statute of limitation of Massachusetts as to personal actions and also the particular statute limiting suits against executors and administrators to four years after the acceptance of the trust. Mr. Justice Story thought it clear that the defense of these statutes of limitations could not avail. The question whether a further defense of *plene administravit* was good, that is, whether a distribution of surplus assets after the payment of all known debts among the heirs, either voluntary or under a probate decree, would protect the administrator from suit by the United States, it was thought not necessary to decide. Nor have we such a question here.

We hold that the state statute in this instance requiring claims to be filed within eight months cannot deprive the United States of its right to enforce its claim; that the United States still has its right of action against the administrator, even though the probate court is to be regarded as having no jurisdiction to receive a claim after the expiration of the specified period.

So far as the judgment goes beyond the question of the jurisdiction of the probate court and purports to adjudge that the claim of the United States is void as a claim against the estate of the decedent because of failure to comply with the statute, the judgment is reversed.

The cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Syllabus.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION *v.* COLBURN ET AL.

CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 563. Argued February 26, 1940.—Decided May 27, 1940.

1. The construction of a compact made between two States and sanctioned by an Act of Congress involves a federal "title, right, privilege or immunity" which, when "specially set up and claimed" in a state court, may be reviewed under § 237 (b) of the Judicial Code. P. 427.
2. The compact of 1934 between New Jersey and Pennsylvania created a commission to perform state functions, including the location, construction and operation of bridges over the Delaware River; to that end it authorized the commission to acquire real property by purchase or eminent domain, defining real property as embracing "interests in land," including "claims for damages to real estate," and provided that, where resort to eminent domain was needful for the acquisition of such interests, the exercise of the power should be "in the manner provided" by an Act of New Jersey of April 1, 1912, as amended. *Held:*

   (1) That, beyond payment for the land or interests therein of the price agreed upon by the Commission or fixed by proceedings in eminent domain, the Compact imposes no obligation on the Commission to compensate for damages inflicted by its acts, but leaves the Commission to such liability as is imposed by the law of the State within which the Commission acts, including the Act of 1912, as amended, in so far as the Compact has made that Act applicable. P. 428.

   (2) Under the generally applicable decisions and statutes of New Jersey the Commission is not liable to pay such consequential damages. P. 430.

   (3) The New Jersey statute of 1912, mentioned in the Compact, was by its terms applicable to a commission other than petitioner, and authorized the former to acquire by a prescribed procedure, existing bridges by purchase or eminent domain and to determine "damages for property taken, injured or destroyed." P. 429.

   (4) Under the Compact, the New Jersey statute of 1912 is excluded from the operation of the Compact except as it affords a manner or procedure for exercising the right of eminent domain,

which is called into operation by the Compact only if the Commission is unable to acquire needed property by purchase and then only as a means of fixing the compensation which under the Compact the Commission is required to pay. P. 431.

3. Even though it were intended by the Compact to adopt the rule of damages prescribed by Art. XVI, § 8 of the Pennsylvania Constitution (1874), which provides that "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements . . .," that section, as construed by the Supreme Court of Pennsylvania before the adoption of the Compact, applies only where there is a taking by eminent domain, and, in the absence of statute, gives no right of recovery from a landowner for consequential damages resulting from structures erected wholly on his own land whether acquired by purchase or by eminent domain. P. 432.

123 N. J. L. 197; 8 A. 2d 563, reversed.

CERTIORARI, 308 U. S. 549, to review the affirmance of a judgment sustaining a special verdict and awarding a peremptory mandamus (119 N. J. L. 600; 197 A. 896) requiring the Bridge Commission to pay consequential damages resulting from the construction of a bridge abutment on land purchased by the Commission, or to take further proceedings for a determination of the amount.

Mr. Edward P. Stout, with whom *Mr. John H. Pursel* was on the brief, for petitioner.

The meaning and application of the Compact present a federal question for ultimate adjudication by this Court. U. S. Const., Art. III, § 2; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U. S. 92, 110; *Kentucky* v. *Indiana,* 281 U. S. 163; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518; *Green* v. *Biddle,* 8 Wheat. 1.

Even though the construction of interstate compacts involves determination of the effect of the legislation of

either State, this Court has the authority and duty to determine for itself all questions pertaining to the compact.

The two States are not necessary parties to this review. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co., supra.*

The Compact is to be governed not by the statutes or judicial decisions of either State, or by decisions construing federal statutes, but by the "federal common law." *Hinderlider* case, *supra; Smith* v. *Alabama,* 124 U. S. 465, 477, 478.

The Compact is a contract, and the rule of law is that contracts to which the State is a party should be construed in favor of the State. *Panama-Pacific International Exposition Co.* v. *Panama-Pacific International Commission,* 178 Cal. 746; 174 P. 890.

The Compact did not give respondents a right to consequential damages.

In New Jersey there was and is no constitutional provision for damages for "injury" to property, but there is a provision only for damages for "taking" (Art. I, § 16).

Under the New Jersey decisions there was no right to light, air and view over other lands, nor in eminent domain proceedings was there any right to an award for consequential damages for obstruction of view, limitation of light and air, or from the closing of streets. *Barnett* v. *Johnson,* 15 N. J. Eq. 481; *Harwood* v. *Tompkins,* 24 N. J. L. 425; *Hayden* v. *Dutcher,* 31 N. J. Eq. 217; *Newark* v. *Hatt,* 79 N. J. L. 548; *R. & A. Realty Corp.* v. *Pennsylvania R. Co.,* 16 N. J. Misc. Reps. 537.

The Pennsylvania Constitution provides for damages to property "injured" as well as damages for "taking," (Art. 16, § 8).

The Courts of Pennsylvania have held that even under their Constitution there could be no recovery by adjoining landowners for consequential damages unless, in addition

to the constitutional provision, there was a statute expressly giving a right thereto. *In re Soldiers and Sailors Memorial Bridge,* 308 Pa. 487; *Hoffer* v. *Reading Co.,* 287 Pa. 120; *Westmoreland C. & C. Co.* v. *Public Service Commission,* 294 Pa. 451; *Pennsylvania R. Co.* v. *Marchant,* 119 Pa. 541; aff'd 153 U. S. 380; *Pennsylvania R. Co.* v. *Lippincott,* 116 Pa. 472; *Holmes* v. *Public Service Commission,* 79 Pa. Sup. Ct. 381.

In other jurisdictions, even with constitutional provisions similar to those of Pennsylvania and with statutory provisions similar to the language of the Compact in question, injuries of the kind here involved were held to be *damnum absque injuria.* Cf. *Howell* v. *New York, N. H. & H. R. Co.,* 221 Mass. 169; *Eachus* v. *Los Angeles R. Co.,* 103 Cal. 614, 617.

The "federal common law," under which the compact is to be construed, adopts the general common law, *Smith* v. *Alabama,* 124 U. S. 465; and in construing the Compact between Pennsylvania and New Jersey, both of which are common law states, the sound and safe principles of the general common law should be applied.

The Compact should be strictly construed against the enlargement of the common law principle. *Shaw* v. *Railroad Co.,* 101 U. S. 557.

The Compact fails to bring to light any intention to create new, undefined and unlimited rights to consequential damages. The definition in the Compact of the term "real property" as including "claims for damage to real estate" relates only to that which the Bridge Commission may acquire by purchase or condemnation, and not to claims against the Commission.

The words "damage to real estate" clearly mean that when the Bridge Commission acquires real property by purchase or condemnation, it may also acquire claims for damage to real estate existing in favor of the property owners and against third parties.

The 1912 Act, as amended in 1919, only provided for the acquisition of existing toll bridges and turning of them into free bridges, and did not contemplate the construction of new bridges.

Reference in the Compact to the Act of 1912, as amended, provided only a specific eminent domain method, and gave no right to consequential damages.

Mr. Egbert Rosecrans for respondents.

The Court is without jurisdiction because the question presented for review is the construction of a state statute. *People* v. *Central R. Co. of N. J.,* 42 N. Y. 283, 294; 12 Wall. 455; *Adams* v. *Russell,* 229 U. S. 353; *Kenney* v. *Craven,* 215 U. S. 125.

The meaning and application of an interstate compact do not present a federal question.

The Compact clause does not make the Supreme Court the final arbiter with respect to the interpretation of interstate compacts. 34 Yale Law Journal 685, 694–695; *Virginia* v. *Tennessee,* 148 U. S. 503, 519.

This Court in *People* v. *Central Railroad,* 12 Wall. 455, has held that the adjudication by the highest state court as to the meaning of an interstate compact does not present a federal question. *People* v. *Central R. Co.,* 42 N. Y. 283. Cf. *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.,* 304 U. S. 92.

The cases cited by petitioner do not hold that the interpretation of an interstate compact standing alone presents a federal question. *Hinderlider* v. *LaPlata River Co., supra; Kentucky* v. *Indiana,* 281 U. S. 163, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13 How. 518; *Green* v. *Biddle,* 8 Wheat. 1; *People* v. *Central Railroad,* 12 Wall. 455; *Fleming* v. *Fleming,* 264 U. S. 29. See 35 Col. L. Rev. 76.

There is no showing that a federal question was presented for decision to the Court of Errors and Appeals of New Jersey.

The language of the statutes creating the bridge commission and granting it the power of eminent domain expressly provides for the allowance of consequential damages. Chapter 297 of the Laws of New Jersey of 1912, as amended by c. 76 of the Laws of 1919, now Revised Statutes of 1937; *Burns Holding Corp.* v. *State Highway Commission,* 8 N. J. Misc. 452; *Sommer* v. *State Highway Commission,* 106 N. J. L. 26; *Wolfson* v. *Commission of Perth Amboy,* 9 N. J. Misc. 161.

The Constitution of Pennsylvania required compensation for property in that State "taken, injured or destroyed" for public use. Art. 16, § 8.

Under this provision a taking is not a prerequisite to an award for damages caused by a public improvement. The provision was intended for the protection of not only the person whose property was taken, but equally for those who suffered consequential damages by reason of a public improvement. *Pennsylvania R. Co.* v. *Miller,* 132 U. S. 75; *Chester County* v. *Brower,* 117 Pa. 647; 12 Atl. 577.

The Pennsylvania courts in interpreting statutes similar to the statute in question have held that the statutes create new rights to consequential damages. Distinguishing *In re Soldiers and Sailors Memorial Bridge,* 308 Pa. 487; 162 Atl. 309; *Hoffer* v. *Reading Co.,* 287 Pa. 120; 134 Atl. 415; *Westmoreland Chemical & Color Co.* v. *Public Service Commission,* 294 Pa. 451; 144 Atl. 407; *Pennsylvania Railroad* v. *Lippincott,* 116 Pa. 462; 9 Atl. 871; *Pennsylvania Railroad* v. *Marchant,* 119 Pa. 541; 13 Atl. 690. See: *Pennsylvania S. F. R. Co.* v. *Walsh,* 124 Pa. 544, 558; 17 Atl. 186, 187; *Holmes & Holmes* v. *Public Service Commission,* 79 Pa. Super. Court, 381, 386.

The Pennsylvania courts in interpreting the constitutional provision and legislation thereunder allowing damages to property injured by an improvement have consistently held that new rights are created in favor of owners who suffer diminution in value of their property

irrespective of their location with reference to the improvement. *Mellor* v. *Philadelphia,* 160 Pa. 614; 28 Atl. 991; *Bodemer* v. *County of Northampton,* 101 Pa. Super. Ct. 492; *In re Melon Street,* 182 Pa. 397; 38 Atl. 482; *In re Construction of Walnut St. Bridge,* 191 Pa. 153; 43 Atl. 88; *Re Chatham Street,* 191 Pa. 604; 43 Atl. 365; *Lewis* v. *Homestead,* 194 Pa. 199; 45 Atl. 123.

The authorities recognize that statutes providing for damages for "property taken, injured or destroyed" apply to all classes of property which is depreciated in value by reason of the improvement. Lewis on Eminent Domain (3d ed.) Vol. 1, §§ 359, 360 and 354; Nicholas on Eminent Domain, Vol. 1, p. 324.

The New Jersey Act of 1912, as amended, was the exclusive method prescribed for exercising the general power of eminent domain granted the Commission by the Compact.

Mr. Justice Stone delivered the opinion of the Court.

The question is of the right of respondents to recover consequential damages to their New Jersey land, due to interference with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land. The answer turns on the question whether the Compact of 1934 between New Jersey and Pennsylvania authorizing the construction of the bridge and its approaches, excluded the application to petitioner of a New Jersey statute without which respondents would enjoy no right of recovery under New Jersey law.

Petitioner, the Bridge Commission, is a "body corporate and politic" created by the Compact adopted by the legislatures of the two states, N. J. P. L. 1934, Ch. 215 (now N. J. R. S. 1937, 32: 8–1 *et seq.*), 1931 Pa. P. L. 1352; 1933 Pa. P. L. 827, and consented to by Congress, 49 Stat. 1058 (1935). The Compact authorized the

Commission to build bridges across the Delaware River between the two states, and for that purpose gave the Commission authority to acquire real property by purchase or by the exercise of eminent domain. The Commission, in the exercise of its authority in construction of a bridge between Phillipsburg, New Jersey and Easton, Pennsylvania, acquired by purchase land in the town of Phillipsburg, upon which it has located and constructed a highway approach to the bridge, on an embankment or abutment leading to the New Jersey end of the bridge. The property thus acquired and used includes land adjoining the rear of property owned by respondents, having its front on a public street. The embankment and the land on which it rests also crosses certain streets in the neighborhood not immediately adjacent to respondents' land which have been permanently closed by the public authorities, in order to provide for the bridge approach.

The present suit is a proceeding in mandamus, brought in the New Jersey Supreme Court to compel the Commission to take proceedings, which it is alleged are authorized and required by the Compact, to fix and award compensation to respondents for damages to their land, suffered by reason of the Commission's action in the construction of the abutment. The State Supreme Court sustained the special verdict of a jury which found that the Commission's action had damaged respondents by depriving them of access to their land and their enjoyment of light, air and view. The court found as a matter of law that as the abutment was located wholly on land acquired by the Commission, and as the streets in the neighborhood had been closed and grades changed by state authority, respondents were without right of recovery for the damages suffered, in the absence of some statute authorizing recovery. But it found such a statute in Ch. 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919

(now N. J. R. S. 1937, 32:9–1 *et seq.*), which it construed with the Compact as requiring the Commission to compensate for the damages which respondents had suffered. 119 N. J. L. 600; 197 A. 896.

Respondents, being without other adequate legal remedy, the court awarded a peremptory mandamus directing petitioner to compensate them for the damage or to take proceedings for the determination of the amount to be awarded as compensation pursuant to the provisions of Article III of the Compact, which it also held required the proceedings for that purpose to be taken according to Chapter 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919 (now N. J. R. S. 1937, 32:9–1 *et seq.*) On appeal the New Jersey Court of Errors and Appeals affirmed on the same grounds as those on which the Supreme Court rested its decision. 123 N. J. L. 197; 8 A. 2d 563. We granted certiorari, 308 U. S. 549, the questions of the construction of the Compact between states and of the jurisdiction of this Court being of public importance.

In *People* v. *Central Railroad,* 12 Wall. 455, jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, see *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110, note 12, and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which when "specially set up and claimed" in a state court may be reviewed here on certiorari under § 237 (b) of the Judicial Code, 28 U. S. C. § 344. See *Green* v. *Biddle,* 8 Wheat. 1; *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 13

How. 518; *Wedding* v. *Meyler,* 192 U. S. 573; cf. *Wharton* v. *Wise,* 153 U. S. 155; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 161; *Hinderlider* v. *La Plata Co., supra.* Hence we address ourselves to the language of the Compact on which respondents rely to sustain a right of recovery for injury to their lands, for which, apart from the New Jersey statute of 1912, referred to in the Compact, the New Jersey courts have held there is no support in state law.

The Compact created the Commission as a "public corporate instrumentality" of the two states, to perform state functions, among others, the location, construction, operation and maintenance of bridges extending between the two states and across a specified section of the Delaware River. To this end it conferred upon the Commission the power:

"(b) To sue and be sued; . . .

"(h) To enter into contracts; . . .

"(j) To acquire, own, use, lease, operate and dispose of real property and interest in real property, and to make improvements thereon; . . . and

"(m) To exercise the power of eminent domain."

In connection with the acquisition of any real property for any authorized purpose, Article III of the Compact provides:

"If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by an act of the State of New Jersey, entitled 'An Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River, and providing for free travel across the same,' approved the first day of April, one thousand

nine hundred and twelve (chapter two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of interstate toll bridges over the Delaware River."

It further provides:

"The term 'real property,' as used in this compact, includes lands, . . . and interests in land, . . . and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

It will be noted that the effect of these provisions is to authorize the Commission to acquire "real property" by purchase or by eminent domain, and that by definition real property includes "interests in land" which are so defined as to include "claims for damage to real estate," and that, where resort to eminent domain is needful for the acquisition of such interests, the exercise of that power is to be "in the manner provided" in the New Jersey statute of 1912 as amended. By its terms the Compact confers upon the Commission the power to acquire the specified interests in land or relating to land, conditioned upon payment for the interests acquired, an amount agreed upon or fixed by proceedings in eminent domain. Beyond this it imposes no duty or obligation on the Commission to compensate for damages inflicted by its acts, but leaves the Commission subject to such liability as is imposed by the law of the state within which the Commission acts.

The New Jersey statute of 1912 which, as prescribed by Article III of the Compact affords the procedure by which the Commission is to exercise its power of eminent

domain, does not enlarge the duties or liability of the Commission as prescribed by the Compact. The amended statute of 1912 authorized a state commission, acting in coöperation with a like commission of Pennsylvania, to acquire the rights, franchises and property of bridge companies owning and operating existing toll bridges across the Delaware River within a specified territory and to operate and maintain them as free bridges.

It authorized the Commission to acquire the bridges by purchase or by eminent domain and for that purpose "to determine the compensation to be allowed as of the time of entry upon the property and taking possession thereof, for the value of property, franchises, easements or rights in the two States." It commands that after view of the premises and hearing, the Commission, in determining the amount of compensation, "shall estimate the value of the property taken, including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

Respondents insist that this direction that the commission created under the 1912 Act "shall estimate . . . damages for property taken, injured or destroyed" is, by the Compact, made a direction to petitioner for payment of consequential injuries to property to which the Compact makes no reference. Under the generally applicable decisions and statutes of New Jersey, as her courts have held in this case, the Commission is without liability to pay consequential damages. But it found a statutory creation of such liability in the Act of 1912 as amended in 1919. At the time of the adoption of the Compact there was no statute in New Jersey purporting to impose such a liability which was on its face applicable to the Commission. If the Act of 1912 as amended imposed such a liability, it appeared to be applicable only to a different corporate body from petitioner and then only in the case

of the transfer of ownership of existing toll bridges to the commission the acquisition of which could inflict no consequential damages. In entering into a compact it was then competent for the states to provide by its terms the extent to which they were to take over and apply to the new Commission, performing a different function under different circumstances, the substantive rules governing compensation upon the acquisition of existing toll bridges under the 1912 Act. The Compact was explicit in its specifications of what property interests should be taken and compensated for, and of the right and authority of the Commission to acquire them by purchase or by eminent domain. By its silence it left the Commission subject to such liability for consequential damages only as was imposed by the laws of the state, including the Act of 1912, except in so far as the Compact restricted the application of that Act. The Compact was equally explicit in its statement of the effect which was to be given to the 1912 Act and its amendments.

It is plain that, under the Compact, without reference to that legislation, the Commission could have acquired land by purchase and built a bridge upon it without subjecting itself to liability for consequential damages. But it was necessary that a procedure should be adopted for the exercise of the power of eminent domain conferred on the Commission by the Compact and this was done by the provision of the Compact that "the Commission may acquire such property by the exercise of the right of eminent domain, in the manner provided" by the 1912 Act. Under the Compact that Act is given effect only to the extent that it affords a manner or procedure of exercising the right of eminent domain, which is called into operation only if the Commission is unable to acquire needed property by purchase and then only as a means of fixing the compensation which, under the Compact, the Commission is required to pay. The Compact can be given

a more extensive effect only by disregarding its language and by attributing to its draftsmen an intention to adopt a rule of damages not generally applicable in the state and now for the first time adopted by a construction plainly inapplicable to the acquisition of existing toll bridges to which the Act of 1912 and its amendments alone referred.

Only by reading into the words of the Compact such a strained and unnatural meaning, is it possible to find in it a modification of the settled law of the state defining the recoverable damages upon the construction of public works. Nothing in the history of the Compact has been brought to our attention to suggest any reason or purpose for such modification in the special case of bridges to be constructed between the two states. Both the New Jersey courts thought they discerned such a reason in Article XVI, § 8 of the Pennsylvania constitution of 1874, which provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements . . ." In passing upon this case they thought that this provision of the Pennsylvania constitution as construed by two decisions of the Pennsylvania Supreme Court in 1888 and 1889, *Chester County* v. *Brower,* 117 Pa. 647; 12 A. 577; *Appeal of Delaware County,* 119 Pa. 159; 13 A. 62, required compensation for consequential damages in eminent domain proceedings.

From this they reasoned that by the provisions of the Compact for the acquisition of property by eminent domain proceedings "in the manner" provided by the 1912 Act with its stipulation for payment of "damages for property taken, injured or destroyed" it was intended by the Compact to make the rule of damage under the Pennsylvania constitution applicable to property similarly ac-

quired by the Commission in New Jersey. But this reasoning overlooks the important circumstance that the Pennsylvania courts have consistently ruled that the constitutional provision is without application where there is no taking by eminent domain, and that municipal corporations or others, although possessed of the power of eminent domain, are not liable for consequential damages inflicted by the erection of structures wholly on their own land acquired by purchase. *Pennsylvania R. Co.* v. *Lippincott,* 116 Pa. 472; 9 A. 871; *Pennsylvania R. Co.* v. *Marchant,* 119 Pa. 541; 13 A. 690; *Hartman* v. *Pittsburgh Incline Plane Co.,* 159 Pa. 442; 28 A. 145; *Gillespie* v. *Buffalo, R. & P. Ry. Co.,* 226 Pa. 31; 74 A. 738; *Ridgeway* v. *Philadelphia & Reading Ry. Co.,* 244 Pa. 282; 90 A. 652.

Moreover, in 1928, six years before the Compact, the Supreme Court of Pennsylvania, in *Westmoreland Chemical & Color Co.* v. *Public Service Comm'n,* 294 Pa. 451; 144 A. 407, departed from its ruling in *Chester County* v. *Brower, supra,* and *Appeal of Delaware County, supra,* and has since held that the constitutional provision in the absence of a statute requiring it gives no right of recovery from a landowner for consequential damages resulting from structures located wholly on his own land whether acquired by purchase or eminent domain. *Hoffer* v. *Reading Co.,* 287 Pa. 120; 134 A. 415; *Soldiers and Sailors Memorial Bridge,* 308 Pa. 487, 491; 162 A. 309; *McGarrity* v. *Commonwealth,* 311 Pa. 436, 439; 166 A. 895.

Even though it be thought that it was intended to adopt, by the 1912 Act, the then prevailing interpretation of the Pennsylvania constitutional provision, that fact could have no force here, both because the constitutional provision has never been regarded by the Pennsylvania courts as applicable to the use of land acquired by purchase and because the Compact by its terms excludes

the 1912 Act from its operation except in so far as it affords a manner or method of procedure when the Commission resorts to eminent domain.

Reversed.

SECURITIES AND EXCHANGE COMMISSION *v.* UNITED STATES REALTY & IMPROVEMENT CO.

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

No. 796. Argued April 29, 30, 1940.—Decided May 27, 1940.

1. A bankruptcy court has jurisdiction to make orders not subject to collateral attack in a proceeding for an "arrangement" with unsecured creditors brought by a debtor corporation under Chapter XI of the Chandler Act, although the financial and corporate setup of the debtor are such that adequate protection and relief can not be obtained under the limitations of that chapter but require a reorganization under Chapter X with the special procedure and safeguards which that chapter affords. P. 446.

   Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public through the intervention of the Securities and Exchange Commission, while Chapter XI, which is peculiarly adapted to the speedy composition of debits of small individual and corporate businesses, omits the machinery for reorganization set up by Chapter X, and contains no provision for participation by the Commission in a proceeding under Chapter XI.
2. Chapters X and XI of the Chandler Act, in providing that a plan or arrangement, to warrant its confirmation, shall be "fair and equitable," use those words with the meaning attached to them, as words of art, in cases of reorganization through equity receiverships or under former § 77B, viz., that, in any plan of corporate reorganization, creditors are entitled to priority over stockholders to the full extent of their debts, and that any scaling down of

creditors' claims, without some fair compensating advantage to them which is prior to the rights of stockholders, is inadmissible. *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482. P. 452.

3. Since Chapter XI admits of an "arrangement" only with respect to unsecured creditors, without alteration of the relations of any other class of security holders, and since it contemplates (as required by § 366) that the arrangement shall be fair and equitable within the meaning of the *Boyd* case, it is evident that it gives no appropriate scope for an arrangement of an unsecured indebtedness held by hundreds of creditors of a corporation having thousands of stockholders. P. 452.

   The hope of securing an arrangement which is fair and equitable and in the best interests of unsecured creditors, without some readjustment of the rights of stockholders such as may be had under Chapter X, but is precluded by Chapter XI, is at best but negligible and, if accomplished at all, must be without the aids to the protection of creditors and the public interest, including participation by the Securities and Exchange Commission, which are provided by Chapter X, and which would seem to be indispensable to a just determination whether the plan is fair and equitable.

4. Whether confirmation of an arrangement proposed in this case would be "for the best interest of the creditors," as § 366 (2) requires, depends upon whether the stockholders should be eliminated or the creditors receive some substitute compensation and whether that compensation would be fair and equitable. It is for the best interest of the creditors that these questions be answered in a Chapter X proceeding. P. 453.

5. Chapter XI has special scope in the case of small businesses, where there are no public or private interests involved requiring protection by the procedure and remedies of Chapter X. P. 454.

6. Under § 146 (2) a petition may not be filed under Chapter X unless the judge is satisfied that "adequate relief" would not be obtainable under Chapter XI. The adequacy of the relief under Chapter XI must be appraised in comparison with that to be had under Chapter X, and in the light of its effect on all the public and private interests concerned including those of the debtor. P. 454.

7. If the case is such that adequate relief can not be obtained under Chapter XI, the court, exercising its equity power, should dismiss the proceeding under that chapter, leaving the petitioner free to proceed under Chapter X, which affords every remedy obtainable under Chapter XI, and more. Pp. 455, 456.

8. A bankruptcy court is a court of equity, § 2, 11 U. S. C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act; and an Act dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence, of which it is a part. Pp. 455, 457.
9. A court of equity may, in the exercise of its discretionary jurisdiction, condition relief on fulfillment of a requirement which will safeguard the public interest. It may withhold relief altogether, in the public interest, when private right will not suffer. P. 455.
10. What the court can decide under the express terms of § 146 of Chapter X as to the adequacy of the relief afforded by Chapter XI, it can decide in the exercise of its equity powers under Chapter XI for the purpose of safeguarding the public and private interests involved and protecting its own jurisdiction from misuse. P. 456.
11. It was the duty of the District Court in this case, in the exercise of a sound discretion, to dismiss the petition under Chapter XI, leaving the debtor to proceed under Chapter X. P. 456.
12. The Securities and Exchange Commission, in view of the duties and functions laid upon it in the public interest by Chapter X of the Chandler Act, may be permitted, under Rule 24 of the Rules of Civil Procedure and paragraph 37 of the General Orders in Bankruptcy, to intervene in a Chapter XI proceeding and move its dismissal upon the ground that resort to that chapter rather than Chapter X interferes with performance of the Commission's duties and violates the policy of the Act. P. 458.
13. Upon a denial of such motion to dismiss, the Commission is entitled to appeal, under §§ 24 and 25 of the Bankruptcy Act. P. 460.

108 F. 2d 794, reversed.

CERTIORARI, 309 U. S. 649, to review a judgment which reversed an order of the District Court permitting the above-named Commission to intervene in a proceeding under Chapter XI of the Bankruptcy Act, and which dismissed the Commission's appeal from the denial of its motions that an approval of the debtor's petition be vacated and that the petition be dismissed, etc.

Solicitor General Biddle, with whom *Messrs. Richard H. Demuth, Chester T. Lane, Martin Riger, Samuel H. Levy, Raoul Berger,* and *Homer Kripke* were on the brief, for petitioner.

The District Court had no jurisdiction to entertain respondent's petition under Chapter XI because Chapter X is the exclusive method by which corporations with securities outstanding in the hands of the public may reorganize under the Bankruptcy Act. Although literal construction of the definition provisions of the Act would permit a publicly held corporation to file under Chapter XI, the structure of the Act as a whole, as well as its legislative history, shows unmistakably that such literal construction does not reflect the meaning of Congress. The rule is firmly established that the real purpose and intent of the legislative body must prevail over the literal import of the words used.

Chapters X and XI embody strikingly different schemes of reorganization. Chapter X provides detailed safeguards designed to protect the interests of public investors; Chapter XI provides merely a rudimentary system of creditor control designed for the corporation which has only trade and commercial creditors. The contrast between the procedures prescribed makes it plain that Congress intended that all public security holders should have the protection afforded by Chapter X and that Chapter XI should be confined to corporations with only trade and commercial creditors.

This conclusion is confirmed by analysis of the present record which strikingly shows the inadequacy of the procedure prescribed by Chapter XI for a corporation in which there is a public investor interest. It is also confirmed by the legislative history of the statute which demonstrates that in enacting Chapters X and XI Congress had clearly in mind the distinction between a closely held corporation and a corporation with securities outstanding in the hands of the public.

The District Court should have dismissed the petition because no "fair and equitable" plan can be consummated in the proceeding and no arrangement can be proposed

in good faith. Chapter XI provides only for the modification of unsecured obligations; under this chapter, therefore, alteration of the guaranty on the Trinity certificates must be accomplished without altering the Debtor's large stock issue and probably also without modifying its debentures. Yet the Trinity certificate holders have a claim against the Debtor which must be satisfied before the stockholders receive anything and which ranks on a par with that of the debenture holders, since the security behind the debentures is valueless. No plan which modified the Debtor's obligation on the guaranty but left the stockholders and perhaps also the debenture holders unaffected would be "fair and equitable" as required by § 366 (3); yet such a plan is the only one which could be consummated under Chapter XI. A disclosure that a plan cannot be consummated in the proceeding goes to the jurisdiction and requires dismissal.

Moreover, under the circumstances presented in this case, no arrangement proposed can meet the requirement of "good faith" contained in § 366 (5). And, even apart from the "good faith" provision, the District Court should have dismissed the proceeding on the ground that the procedure prescribed by Chapter X was more appropriate.

The holding of the court below that the District Court should not have permitted the Commission to intervene in the proceeding is clearly erroneous. In effect, the decision establishes the principle that, in the absence of express statutory provision, a governmental agency may never intervene to protect the public from evasion or emasculation of the statute under which the agency functions, unless the agency has some property or pecuniary right affected by the litigation. This drastic restriction upon the power of the Government to protect the public interest finds no support in precedent or policy.

The interest of the Commission in the present proceeding is twofold. First, as the agency designated by Congress to participate in Chapter X proceedings on behalf of public investors, it has a very real interest in assuring that such investors are not deprived of the safeguards contained in Chapter X through improper exercise of jurisdiction under Chapter XI. Second, it has an equally great interest in protecting its own functions under Chapter X from impairment through improper resort to Chapter XI by corporations which should file under Chapter X. The applicable decisions of this Court clearly establish that this interest is sufficient to support the District Court's order permitting the Commission to intervene. *Coleman* v. *Miller,* 307 U. S. 433, 442, 466; *Pennsylvania* v. *Williams,* 294 U. S. 176; *The Exchange,* 7 Cranch 116; *Percy Summer Club* v. *Astle,* 110 F. 486, 489; *In re Debs,* 158 U. S. 564; *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315, 339–341; *New York* v. *New Jersey,* 256 U. S. 296, 307–308; *United States Trust Co.* v. *Chicago Terminal T. R. Co.,* 188 F. 292, 296. Cf. *State* v. *Superior Court for Walla Walla County,* 159 Wash. 335; 293 P. 986; *State* v. *Superior Court of Marion County,* 202 Ind. 589; 177 N. E. 322. There can be no question that it was properly permitted to intervene under clause (b) (2) of Rule 24.

If the District Court properly exercised its discretion in permitting the Commission to intervene, the Commission had the right to appeal from the orders denying its motion. An interest sufficient to warrant intervention is plainly sufficient to warrant appeal, after intervention, from a decision adverse to that interest.

The restriction imposed by § 208 does not apply.

Messrs. Joseph M. Hartfield and *Henry M. Marx,* with whom *Mr. Charles W. Dibbell* was on the brief, for respondent.

The Commission contends that a corporation with securities outstanding in the hands of the public can not proceed under Chapter XI. It is submitted that this conclusion is clearly erroneous, inasmuch as any corporation which can become a bankrupt may by the express terms of the statute institute a proceeding under Chapter XI, which contains no requirement that the debtor's securities shall not be publicly held. The statute is entirely reasonable and is so clear and unambiguous that the courts are powerless to enlarge or modify its meaning under the guise of "construction." Under the provisions of the Act the Debtor could not file a petition under Chapter X unless it could affirmatively show that it could not obtain relief under Chapter XI (§§ 130, 146, 147).

Even if this were a proper case for construction, neither in the testimony before the Congressional Committees which considered the Chandler Bill, nor in the Committee Reports, nor in the factual background and historical derivation of Chapter XI, nor in the structure of the Bankruptcy Act, can there be found evidence of any intent of Congress to prohibit corporations with publicly held securities from proceeding under Chapter XI. In fact the evidence is to the contrary.

The fairness, equity and feasibility of any arrangement are not properly in issue at this time, inasmuch as the District Court has not yet confirmed or refused to confirm any arrangement.

It is clear that this Debtor can propose an arrangement which meets the requirements of Chapter XI. The arrangement originally filed, which is to so great an extent the object of the Commission's objections, has been amended in substantial respects and is no longer even before the District Court.

Northern Pacific R. Co. v. *Boyd,* 228 U. S. 482, and *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106,

do not apply to a proceeding instituted under Chapter XI for a settlement of unsecured debts. The use of the phrase "fair and equitable" in both Chapters X and XI is not significant, since the same words may have different meanings in different parts of the same statute. That phrase is employed in all the debtor relief chapters of the Bankruptcy Act, and it is obvious that it can not have the meaning ascribed to it in the *Boyd* and *Los Angeles* cases in chapters such as Chapter XIII, which applies to compositions and extensions of indebtedness of wage earners. However, even if such doctrine were held to be applicable, it is clear that an arrangement which is fair and equitable thereunder can be proposed by the Debtor in this proceeding.

The Securities and Exchange Commission has no authority to intervene in a proceeding under Chapter XI even with the permission of the court.

The Commission has no status to appeal from the orders of the District Court. Chapter XI does not authorize such an appeal and Chapter X expressly denies it in an analogous situation. Furthermore, the Commission is not a proper party to appeal within §§ 24 and 25 of the Bankruptcy Act or within the general principles requiring an appellant to have a real interest in the proceeding.

MR. JUSTICE STONE delivered the opinion of the Court.

The questions are whether respondent's petition for an arrangement of its unsecured debts under Chapter XI of the Bankruptcy Act should be dismissed because the relief obtainable under that chapter is inadequate, and whether the Securities and Exchange Commission is entitled to raise and litigate that question by intervention and appeal.

Respondent, a New Jersey corporation doing business in New York as owner of and manager of real estate invest-

ments, has outstanding 900,000 shares of capital stock without par value, which are listed on the New York Stock Exchange and are stated by respondent to be held by some seven thousand stockholders. It has liabilities of $5,051,-416, of which only $74,916 is current. This indebtedness includes two series of publicly held debentures aggregating $2,339,000, maturing January 1, 1944, which are secured by a pledge of corporate stock of little value and a $3,000,000 note, due August 12, 1939, which is secured by a first mortgage owned by respondent. In addition respondent is also liable as a guarantor of payment, principal and interest, and sinking fund of mortgage certificates in the sum of $3,710,500, issued by its wholly owned subsidiary Trinity Building Corporation of New York and now in the hands of some nine hundred holders. These certificates have been in default for failure to pay interest, principal and sinking fund since January 1, 1939. They are secured by mortgage of real estate and buildings which are Trinity's only substantial assets. Each year since 1936 respondent has suffered a net loss in the conduct of its business and is now unable to pay its debts as they mature.[1]

Before maturity of the first mortgage certificates, respondent and the Trinity Company joined in proposing to certificate holders a plan for the modification of the

[1] The alleged value of debtor's assets is $7,076,515. Of this $5,200,000 is represented by the stock of the subsidiary and a first mortgage on a building owned by the subsidiary which is pledged to secure respondent's $3,000,000 note. Current assets are less than $400,000. The balance of the assets consists chiefly of mortgages, loans and other securities in the amount of $555,655, an investment of $477,300 in securities of an independent company, unimproved real estate valued at $290,000, and a note receivable from a subsidiary of $137,500. As against the total nominal value of these assets of $7,076,515, the debtor's total liabilities, including its liability on the matured debenture certificates, are $9,261,916.

obligation of the certificates, leaving unaffected the other indebtedness and stock of respondent. By this plan the maturity of the certificates was to be extended, the rate of interest reduced, and the terms of the provisions for payment of the sinking fund modified. Respondent's guarantee as to the extension and interest was to be modified accordingly, and its guarantee of sinking fund payments was to be eliminated. The plan was to be consummated by resort to two proceedings, one to be instituted by respondent under Chapter XI of the Bankruptcy Act, 11 U. S. C. Supp. V, § 701 *et seq.*, 52 Stat. 840, 905, for an "arrangement" modifying its guarantee of the certificates in the manner already indicated. The other was to be instituted on behalf of Trinity in the New York state courts under the Burchill Act, New York Real Property Law, §§ 121–123, to secure the appropriate modification of Trinity's primary obligation on the certificates. The plan provided that the modification of respondent's guarantee by the Chapter XI proceeding should stand, even though the state court should refuse to confirm the proposed modification of Trinity's obligation on the certificates. When the assent to the plan of holders of certificates amounting to approximately 55 per cent. in number and amount, had been obtained, the present proceeding was begun May 31, 1939, by the filing in the district court for Southern New York of a petition praying that the proposed "arrangement" affecting the unsecured indebtedness of respondent be approved.

The district court found that the petition was properly filed [2] under § 322 of Chapter XI of the Bankruptcy Act,

[2] The record shows that counsel for one of the committees of bondholders interposed objections to the Chapter XI proceedings and proposed to file an involuntary petition under Chapter X. The district judge expressed the opinion that a Chapter X proceeding was preferable, but when the debtor agreed to make an immediate interest

and directed that respondent debtor continue in possession of the property. On July 18, 1939, the district court entered an order permitting the Securities and Exchange Commission to intervene. The motions of the Commission to vacate the order approving the debtor's petition, to dismiss the proceeding under Chapter XI, and to deny confirmation of the proposed arrangement, were denied by the district court and the cause was referred to a referee for further proceedings. On appeal by the Commission from these several orders and on appeal of the respondent from the order of the district court permitting the Commission to intervene, the appeals being consolidated and heard together, the Court of Appeals for the Second Circuit reversed the order permitting the Commission to intervene and dismissed the appeal of the Commission. 108 F. 2d 794. We granted certiorari, 309 U. S. 649, the questions raised being of public importance in the administration of the Bankruptcy Act.

The Court of Appeals held that the proceeding to secure approval of the arrangement, embodied in the plan proposed by respondent, was properly brought under Chapter XI of the Bankruptcy Act; that the intervention by the Commission was not authorized by any provision of the Bankruptcy Act and that it had no interest affected by the proceeding under that chapter entitling it to intervene under the applicable rules controlling intervention in the federal courts, and that consequently it was not aggrieved by the order appealed from and so was not entitled to maintain its appeal.

The Commission argues that Chapter X of the Bankruptcy Act prescribes the exclusive procedure for reorganization of a large corporation having its securities

payment of one and one-half per cent. for the purpose of dissuading the creditors from filing the Chapter X petition, and when the objecting creditors accepted the offer and dropped the involuntary petition, the judge felt compelled to continue the Chapter XI proceeding.

outstanding in the hands of the public such as respondent,[3] and that consequently the district court was without jurisdiction to entertain respondent's petition under Chapter XI; that in any case the district court should have dismissed the petition because in the circumstances no fair and equitable arrangement affecting respondent's unsecured creditors alone such as is prescribed by Chapter XI, can be consummated in a proceeding under that chapter. Such being the status of the cause under Chapter XI, the Commission insists that it was properly allowed to intervene in order to protect the interest of the public specially committed to its guardianship by the provisions of Chapter X, and to forestall the impairment of its own functions under that chapter by an unauthorized or improper resort by respondent to Chapter XI, and that for the same reason the Commission was entitled to appeal from the order of the district court refusing to dismiss the Chapter XI proceedings.

To this it is answered, as the Court of Appeals held, that respondent, although a large corporation with its securities widely distributed in the hands of the public, is nevertheless within the literal terms of Chapter XI, which unqualifiedly authorizes a debtor to petition under that chapter for an arrangement with respect to its unsecured indebtedness, and that the district court was accordingly bound to entertain the petition, however desirable it might be that the reorganization should proceed

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[3] By § 126 a corporation or three or more creditors may file a petition under Chapter X.

By § 130 every petition shall state:

"(1) that the corporation is insolvent or unable to pay its debts as they mature;

"(2) the applicable jurisdictional facts requisite under this chapter;

. . . . . .

'(7) the specific facts showing the need for relief under this chapter and why adequate relief cannot be obtained under chapter XI of this Act; . . .'

under Chapter X, whose procedure is better adapted in cases like the present to protect the public interest and to secure a fair and equitable reorganization, than are the provisions of Chapter XI.

Chapter XI provides a summary procedure by which a debtor may secure judicial confirmation of an "arrangement" of his unsecured debts. The debtor, who is defined as a "person who could become a bankrupt under § 4 of the Act," § 306 (3), may, according to §§ 4 and 1 (23), be any person (which includes corporations), except a municipal, railroad, insurance or banking corporation or a building and loan association. The debtor files his original voluntary petition for an arrangement in such a court as would have jurisdiction of a petition in ordinary bankruptcy [4] and must file with the petition the proposed arrangement. §§ 322, 323. An arrangement is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts upon any terms." § 306 (1). The unsecured debtors may be treated generally or in classes. §§ 356, 357.

It is evident that the language of the sections to which we have referred in terms confers on the court jurisdiction of a petition for an arrangement, which the present petition is, filed by a debtor, which the respondent is, in the technical sense that it confers on the court power to make orders in the cause which are not open to collateral attack. See *Pennsylvania* v. *Williams,* 294 U. S. 176, 180, *et seq.* But the Commission points out that a proceeding begun under Chapter X may be begun and continued under that chapter only if the petition is filed in good faith, §§ 130 (7), 143, 146 (2), 221, and that under § 146 (2) "a petition shall be deemed not to be filed in good faith if . . . (2) adequate relief would be obtainable by a debtor's peti-

[4] § 311 confers on the court in which the petition is filed exclusive jurisdiction of the debtor and his property, where not inconsistent with the provisions of the chapter.

tion under the provisions of chapter XI"; that Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public through the intervention of the Commission, while Chapter XI, which is peculiarly adapted to the speedy composition of debts of small individual and corporate businesses, omits the machinery for reorganization set up by Chapter X, and contains no provision for participation by the Commission in a proceeding under Chapter XI. From this it argues that the district court was without jurisdiction to entertain respondent's petition under Chapter XI, and the readjustment of its indebtedness through judicial action can properly proceed only with the safeguards, public and private, afforded by Chapter X.

While we do not doubt that in general, as will presently appear more in detail, the two chapters were specifically devised to afford different procedures, the one adapted to the reorganization of corporations with complicated debt structures and many stockholders, the other to composition of debts of small individual business and corporations with few stockholders, we find in neither chapter any definition or classification which would enable us to say that a corporation is small or large, its security holders few or many, or that its securities are "held by the public," so as to place the corporation exclusively within the jurisdiction of the court under one chapter rather than the other. But granting the jurisdiction of the court, the question remains of the propriety, in the circumstances, of its order retaining jurisdiction, and of the extent of its duty to go forward with the proceeding under Chapter XI in the face of the contention that Chapter X alone affords a remedy adequately protecting the public and private interests involved. The answer

turns not on the court's statutory jurisdiction to entertain a proceeding under Chapter XI, but on considerations growing out of the public policy of the Act found both in its legislative history and in an analysis of its terms, and of the authority of the court clothed with equity powers and sitting in bankruptcy to give effect to that policy through its power to withhold relief under Chapter XI when relief is available under Chapter X, which is adequate and more consonant with that policy.

Before the enactment of § 77B of the Bankruptcy Act, 48 Stat. 911, 912, the bankruptcy mechanism was designed for the final liquidation of the bankrupt's estate, except to the extent only that a compromise with creditors was authorized by §§ 12, 74. Bankruptcy afforded no facilities for corporation reorganization, which, in consequence, could be effected only through resort to the equity receivership with its customary mortgage foreclosures and its attendant paraphernalia of creditors' and security holders' committees, and of rival reorganization plans. Lack of knowledge and control by the court of the conditions attending formulation of reorganization plans, the inadequate protection of widely scattered security holders, the frequent adoption of plans which favored management at the expense of other interests, and which afforded the corporation only temporary respite from financial collapse, so often characteristic of reorganizations in equity receiverships, led to the enactment of 77B.[5]

The creation of the Securities and Exchange Commission, specially charged by various statutes with the protection of the interests of the investing public,[6] and

[5] See S. Doc. No. 65, 72d Cong., 1st Sess., p. 90; H. Rept. No. 1049, 75th Cong., 1st Sess., p. 2.

[6] The basic assumption of Chapter X and other acts administered by the Commission is that the investing public dissociated from control or active participation in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the

observed inadequacies of § 77B,[7] led to its revision and enactment in changed form as Chapter X, so as to provide for a larger measure of control by the court over security holders' committees and the formulation of reorganization plans and to secure impartial and expert administrative assistance in corporate reorganizations through participation of the Commission. Except where the liabilities are less than $250,000, Chapter X requires the appointment of a disinterested trustee, §§ 156–158, and a thorough examination and study by the trustee of the debtor's financial problems and management, § 167 (3) (5). The trustee is required to report the result of his study, to send the report to all security holders with

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detection of fraud, and in the understanding of complex financial problems. See, e. g., Securities Act of 1933, 48 Stat. 74, 15 U. S. C. §§ 77a-77aa; Securities and Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78; Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. Supp. V, § 79; Trust Indenture Act of 1939, 53 Stat. 1149, 15 U. S. C. Supp. V, §§ 77aaa-77bbbb.

[7] The revision of 77B resulted from the investigation of a Special Senate Committee to Investigate Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d Sess.; and from a study by the Securities and Exchange Commission of the degree of protection afforded to the investing public in reorganizations. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1936–1939). See Hearings before the Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess.; Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess.; H. Rept. No. 1409, 75th Cong., 1st Sess.; S. Rept. No. 1916, 75th Cong., 3d Sess. See Dodd, The Securities and Exchange Commission's Reform Program for Bankruptcy Reorganizations, 38 Col. L. Rev. 223; Swaine, "Democratization" of Corporate Reorganizations, 38 Col. L. Rev. 256; Heuston, Corporate Reorganizations under the Chandler Act, 38 Col. L. Rev. 1199; Teton, Reorganization Revised, 48 Yale L. J. 573; Gerdes, Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev. 1; Rostow and Cutler, Competing Systems of Reorganization, Chapters X and XI of the Bankruptcy Act, 48 Yale L. J. 1334.

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notice to submit to him proposals for a plan of reorganization, § 167 (5) (6). He then formulates a plan or reports the reasons why a plan cannot be formulated, § 169. By § 176 consent to a plan in advance of its initial approval by the judge is void unless procured with his consent. A large measure of control is given to the court over the reorganization and of committees of security holders and their compensation, §§ 163, 165, 209, 212, 241–243.

If the judge finds the plan presented worthy of consideration he may refer it to the Commission for report and must do so where the liabilities of the debtor, as in the present case, exceed $3,000,000, § 172. When the plan is submitted to creditors after approval by the judge it is accompanied by the report of the Commission and the opinion of the judge approving the plan, § 175. The Commission with the approval of the court is authorized to participate generally in the proceedings as a party, and it is its duty to do so upon request of the court, § 208.

No comparable safeguards are found in Chapter XI.[8] Every phase of the procedure bearing on the administration of the estate and the development of the arrangement is under the control of the debtor. The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and disinterest-

[8] Chapter XI was sponsored by the National Association of Credit Men and other groups of creditors' representatives expert in bankruptcy. Hearings before the House Committee on the Judiciary on H. R. 6439 (reintroduced and passed in 1938 as H. R. 8046), 75th Cong., 1st Sess., pp. 31, 35. Their business of representing trade creditors in small and middle-sized commercial failures is an important factor in the background of the chapter. See, Montgomery, Counsel for the Association of Credit Men, on Arrangements, 13 J. N. A. Ref. Bankruptcy, 17.

edness, provided in Chapter X. The debtor is generally permitted to stay in possession and operate the business under the supervision of the court, § 342, and a trustee is provided for only in the case where a trustee in bankruptcy has previously been appointed and is in possession, or if "necessary" a receiver may be appointed. § 332. The debtor proposes the arrangement, §§ 306 (1), 323, 357, and the only opportunity afforded the creditors in respect to the proposed plan is to accept or reject it as submitted by the debtor. Acceptances may be solicited either before or after filing the petition and always before approval of the plan by the court, § 336 (4). Section 361 authorizes confirmation of an arrangement when accepted by all the creditors affected by it, "if the court is satisfied that the arrangement and the acceptance are in good faith," and § 362 permits confirmation if only a majority of the creditors affected accept. The arrangement is to be confirmed if the court is satisfied that "(1) the provisions of this chapter have been complied with; (2) it is for the best interests of the creditors; (3) it is fair and equitable and feasible . . .; and (5) the proposal and its acceptance are in good faith . . ." § 366.

There are no provisions for an independent study of the debtor's affairs by court or trustee, or for advice by them to creditors with respect to their rights or interests in advance of their consent to the arrangement. Committees of the creditors are permitted, §§ 334, 338, but there is no restriction on or supervision over their selection and conduct as in Chapter X. The arrangement may be consummated at the conclusion of a single creditors' meeting. The court in passing upon the arrangement, is without the benefit of investigation and study by the trustee or Commission, which Congress has required in reorganization proceedings under Chapter X, and is then faced with the fact that a majority of the creditors have already accepted the plan.

Still more important are the differences in the remedies obtainable under the two chapters which result from differences in the nature of the two proceedings and in the securities which may be affected by them. A plan under Chapter X may affect one or more classes of debts or securities of the corporation to be reorganized, and a subsidiary of the debtor may be brought into such a proceeding and reorganized with the debtor. § 129. Under Chapter XI only the rights of unsecured creditors of the debtor may be arranged and this without alteration of the status of any other classes of security holders or of subsidiaries. Both chapters provide for confirmation of the plan or arrangement by the judge "if satisfied that" it "is fair and equitable and feasible" and if "the proposal" of the plan or arrangement "and its acceptance are in good faith," §§ 221, 366. "Fair and equitable," taken from § 77B and made the condition of confirmation under both Chapter X or Chapter XI are "words of art" having a well understood meaning in reorganizations in equitable receiverships and under § 77B which is incorporated in the structure of both Chapters X and XI. See *Case* v. *Los Angeles Lumber Products Co.,* 308 U. S. 106, 115, *et seq.* The phrase signifies that the plan or arrangement must conform to the rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, which established the principle which we recently applied in the *Los Angeles* case, that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible.

Since the sections under Chapter XI already considered admit of an "arrangement" only with respect to unsecured creditors without alteration of the relations of any other

class of security holders, and since it contemplates, as required by § 366, that the arrangement shall be fair and equitable within the meaning of the *Boyd* case, it is evident that Chapter XI gives no appropriate scope for an arrangement of an unsecured indebtedness held by some nine hundred individual creditors of a corporation having seven thousand stockholders. The hope of securing an arrangement which is fair and equitable and in the best interests of unsecured creditors, without some readjustment of the rights of stockholders such as may be had under Chapter X, but is precluded by Chapter XI, is at best but negligible, and, if accomplished at all, must be without the aids to the protection of creditors and the public interest which are provided by Chapter X, and which would seem to be indispensable to a just determination whether the plan is fair and equitable.

Respondent suggests that the proposed arrangement may be taken to satisfy the test of the *Boyd* case since under it the certificate holders would receive a new guarantee, enforcible as to principal notwithstanding the New York moratorium law, in place of the old guarantee to which that law applies. See *Honeyman* v. *Hanan,* 275 N. Y. 382; 9 N. E. 2d 970, appeal dismissed 302 U. S. 375. It also insists that it is not impossible that an arrangement of its unsecured indebtedness under Chapter XI may be proposed which would meet the test. It states that, availing itself of the privilege afforded by § 363, it has proposed an amended arrangement which is not in the record and the terms of which are not disclosed. But it suggests that the arrangement could be amended so as to provide for a ratable distribution to certificate holders of preferred stock of Trinity, respondent's subsidiary, held by respondent or for a similar distribution of cash. But such suggestions raise the question whether the supposed advantage to the creditors is a fair and adequate substitute for the elimination of stockholders within the

requirements of the *Boyd* case—a question which obviously cannot be answered with any assurance in the present case without resort to the facilities for investigation of the financial condition and structure of the debtor and its subsidiary, and to the expert aid and advice of the Commission available under Chapter X.

Confirmation of an arrangement follows a finding of the court that it is for the best interests of the creditors, § 366 (2). Here determination of what is in the "best interest of the creditors" depends on the answer to the question whether the stockholders should be eliminated or the creditors should receive some substitute compensation, and whether that compensation is fair and equitable. In a situation like the present it is in the best interests of the creditors that these questions should be answered in a Chapter X proceeding.

While this means that arrangements of unsecured debts of corporations, like respondent, may not be "in the best interests of creditors" and "feasible" under Chapter XI, it does not mean that there is no scope for application of that chapter in many cases where the debtor's financial business and corporate structure differ from respondent's. This is especially the case with small individual or corporate business where there are no public or private interests involved requiring protection by the procedure and remedies afforded by Chapter X. In cases where subordinate creditors or the stockholders are the managers of its business, the preservation of going-concern value through their continued management of the business may compensate for reduction of the claims of the prior creditors without alteration of the management's interests, which would otherwise be required by the *Boyd* case. See *Case* v. *Los Angeles Lumber Products Co., supra,* 121, 122.

Under § 146 (2) a petition may not be filed under Chapter X unless the judge is satisfied that "adequate relief" would not be obtainable under Chapter XI.

Obviously the adequacy of the relief under Chapter XI must be appraised in comparison with that to be had under Chapter X, and in the light of its effect on all the public and private interests concerned including those of the debtor. Applying this test, if respondent had proceeded under Chapter X the judge would have been compelled upon inquiry to approve its petition on the ground that it complied with the requirements of Chapter X, and that adequate relief could not be obtained under Chapter XI. That being the case the question here is whether, in the absence of any provision of Chapter XI specifically authorizing the dismissal of the petition, the district court should on that ground have dismissed the proceeding under Chapter XI, leaving respondent free to proceed under Chapter X, which affords every remedy which could be obtained under Chapter XI and more.

A bankruptcy court is a court of equity, § 2, 11 U. S. C. §11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. *Bardes* v. *Hawarden Bank,* 178 U. S. 524, 534, 535; *Continental Illinois Nat. Bank & T. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 294 U. S. 648, 675; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* 300 U. S. 131; *Pepper* v. *Litton,* 308 U. S. 295. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. It may in the public interest, even withhold relief altogether, and it would seem that it is bound to stay its hand in the public interest when it reasonably appears that private right will not suffer. *Pennsylvania* v. *Williams, supra,* 185 and cases cited; *Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 549, *et seq.* Before the provisions for alternative remedies were brought into the Bankruptcy Act by Chapters X and XI the occasion was rare when a court could have felt free to deny a petition in order to serve some public

or collateral interest at the expense of the petitioner's right to an adjudication. But here respondent, if dismissed, need not go without remedy. All that it can secure rightly or equitably in a Chapter XI proceeding is to be had in a Chapter X proceeding. The case stated most favorably to respondent is that it has proposed an arrangement which appears on its face not to be "fair and equitable" and hence not to be entitled to confirmation under Chapter XI. Respondent's circumstances, as disclosed by its petition and proposed arrangement, are such as to raise a serious question whether any fair and equitable arrangement in the best interest of creditors can be effected without some re-arrangement of its capital structure. In any case, that and subsidiary questions cannot be answered in the best interest of creditors without recourse to the procedure of a Chapter X proceeding. Pending the litigation respondent seeks to stay the hand of its creditors and in the meantime to avoid that inquiry into its financial condition and practices and its business prospects, provided for by Chapter X, without which there is at least danger that any adjustment of its indebtedness will not be just and equitable, and that its revived financial life will be too short to serve any public or private interest other than that of respondent.

In this situation, we think the court was as free to determine whether the relief afforded by Chapter XI was adequate as it would have been if respondent had filed its petition under Chapter X. What the court can decide under § 146 of Chapter X as to the adequacy of the relief afforded by Chapter XI, it can decide in the exercise of its equity powers under Chapter XI for the purpose of safeguarding the public and private interests involved and protecting its own jurisdiction from misuse. Here, we think it was plainly the duty of the district court in the exercise of a sound discretion to have dismissed the

petition, remitting respondent if it was so advised to the initiation of a proceeding under Chapter X, in which it may secure a reorganization which, after study and investigation appropriate to its corporate business structure and ownership, is found to be fair, equitable and feasible, and in the best interest of creditors. While a bankruptcy court cannot, because of its own notions of equitable principles, refuse to award the relief which Congress has accorded the bankrupt, the real question is, what is the relief which Congress has accorded the bankrupt and is it more likely to be secured in a Chapter X or Chapter XI proceeding? In answering it we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be "fair and equitable and feasible." Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part.

If respondent had sought relief by way of an equity receivership such would have been the duty of the court. *Pennsylvania* v. *Williams, supra.* We think it is no less so here. Before the enactment of Chapters X and XI, the district court in a 77B proceeding was "not bound to clog its docket with visionary or impracticable schemes of resuscitation," however honest the efforts of the debtor and however sincere its motives, and it was its duty to dismiss the proceeding whenever it appeared that a fair and equitable plan was not feasible, leaving the debtor to the alternative remedy of bankruptcy liquidation, see *Tennessee Publishing Co.* v. *American National Bank,* 299 U. S. 18, 22. And it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition, to move for the vacation of an adjudication

or the dismissal of a petition on grounds, whether strictly jurisdictional or not,[9] that the proceeding ought not to be allowed to proceed.

The Court of Appeals thought that the Commission had no such special interest as to entitle it to intervene as of right in the Chapter XI proceeding and concluded that the district court erred in permitting the intervention and that from this it followed that the Commission had no right to appeal. Its decision is in effect that a governmental agency not asserting the right to possession or control of specific property involved in a litigation may not be permitted to intervene without statutory authority. Neither Chapter X nor Chapter XI, in terms, gives a right of "intervention," but the Commission is authorized, with the permission of the court, to appear in any Chapter X proceedings, § 208. Such right as the Commission may have to intervene in a Chapter XI proceeding is, therefore, governed by the Rules of Civil Procedure and the general principles governing intervention. We are not here concerned with the refinements of the distinction between intervention, as a matter of right, which the Court of Appeals thought was restricted to cases where the intervenor has a direct pecuniary interest in the litigation, and permissive intervention, a distinction which has been preserved by Rule 24 of the Rules of Civil Procedure. For here the question is not of the Commission's intervention "as of right," but whether the district court abused its discretion in permitting it to intervene.

The Commission is, as we have seen, charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the

[9] *Royal Indemnity Co.* v. *American Bond & Mortgage Co.*, 61 F. 2d 875, aff'd 289 U. S. 165; *In re Ettinger*, 76 F. 2d 741; *Chicago Bank of Commerce* v. *Carter*, 61 F. 2d 986; *Vassar Foundry Co.* v. *Whiting Corp.*, 2 F. 2d 240; *In re Nash*, 249 F. 375.

public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when, upon the applicable principles which we have discussed, he should be required to proceed, if at all, under Chapter X. The Commission's duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding in violation of the public policy of the Act which it is the duty of the court to safeguard by relegating respondent to a Chapter X proceeding. The Commission did not here intervene to perform the advisory functions required of it by Chapter X, but to object to an improper exercise of the court's jurisdiction which, if permitted to continue, contrary to the court's own equitable duty in the premises, would defeat the public interests which the Commission was designated to represent. Sen. Rep. No. 1916, 75th Cong., 3d Sess., p. 31.

Rule 24 of the Rules of Civil Procedure, made applicable to bankruptcy proceedings by paragraph 37 of the General Orders in Bankruptcy, authorizes "permissive intervention." It directs that "upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. Cf. *Pennsylvania* v. *Williams, supra.* If, as we have said, it was the duty of the court to dismiss the Chapter XI proceeding because its maintenance there would defeat the public interest in having any scheme of reorganization of re-

spondent subjected to the scrutiny of the Commission, we think it plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it. *The Exchange,* 7 Cranch 116; *Stanley* v. *Schwalby,* 147 U. S. 508; *Interstate Commerce Comm'n* v. *Oregon-Washington R. Co.,* 288 U. S. 14; *Pennsylvania* v. *Williams, supra.* See, *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315. Cf. *In re Debs,* 158 U. S. 564; *New York* v. *New Jersey,* 256 U. S. 296, 307–308.

This interest of the Commission does not differ from that of a liquidator under a state statutory proceeding who may, in a proper case, intervene in an equity receivership in a federal court to ask the court to relinquish its jurisdiction in favor of the state proceeding. *Pennsylvania* v. *Williams, supra.* Neither the liquidator nor the state has any personal, financial or pecuniary interest in the property in the custody of the federal court. Their only interest, like that of the Commission, is a public one, to maintain the state authority and to secure a liquidation in conformity to state policy. The "claim or defense" of the Commission founded upon this interest has a question of law in common with the main proceeding in the course of which any party or a creditor could challenge the propriety of the court's proceeding under Chapter XI.[10] The claim or defense is thus within the requirement of Rule 24 and intervention was properly allowed. The Commission was, therefore, a party aggrieved by the court's order refusing to dismiss and was entitled to appeal under §§ 24 and 25 of the Bankruptcy Act. See *Interstate Commerce Comm'n* v. *Oregon-Washington R. Co., supra; Texas* v. *Anderson, Clayton & Co.,* 92 F. 2d 104.

[10] See Note 8 *supra.*

Section 208, applicable to proceedings under Chapter X, gives the Commission, upon filing its notice of appearance, "the right to be heard on all matters arising in such proceeding," but provides that it "may not appeal or file any petition for appeal in any such proceeding." As § 208 has no application to a proceeding under Chapter XI, it is unnecessary to consider the suggestion of the Commission that the limitation of the section is upon appeals to review questions arising in the proceeding from the performance by the Commission of its advisory functions and does not preclude it from appealing to challenge the exercise or non-exercise by the district court of its jurisdiction under Chapter X.

Reversed.

MR. JUSTICE DOUGLAS did not participate in the decision of this case.

MR. JUSTICE ROBERTS:

The Chandler Act[1] revised the Bankruptcy Act of 1898, as amended, and, in chapters X, XI, XII, XIII, and XIV, provided for corporate reorganizations, arrangements, real property arrangements, wage earners' plans, and Maritime Commission liens. These, with chapter VIII, authorizing agricultural compositions, chapter IX, dealing with indebtedness of local taxing agencies, chapter XV, added by Act of July 28, 1939, 53 Stat. 1134, and § 77, relating to reorganization of interstate railroads, in addition to the seven chapters of the original Act, constitute a comprehensive system for accommodating or liquidating indebtedness in the interest of both debtors and creditors. In chapters X to XIII, inclusive, added by the Chandler Act, the first section states: "The provisions of this chapter shall apply exclusively to proceedings under this chapter," thus evidencing the purpose to

[1] Act of June 22, 1938, 52 Stat. 840.

make each type of proceeding complete and exclusive of the others.

The proceeding instituted by the respondent, as is conceded, falls precisely within the terms of chapter XI, which deals with arrangements, and confers jurisdiction on the District Court to entertain the cause. But it is said that for the court to exercise that jurisdiction would be so contrary to the unexpressed purpose of Congress that the court should have refused to act. The decision assumes that if Congress had been interrogated as to its intent it would have expressed its will that an arrangement by one having such a financial structure as the respondent should not be permitted, and that, in order to prevent such a result, Congress, if it had been prescient, would have so stated. This seems to me to go beyond the construction of the Act as it is written and to amount to an amendment of it. I think that this is not admissible on the ground advanced that to hold otherwise would be to nullify rather than to effectuate the intent of Congress which is thought to pervade the statutory scheme.

Where the words are as plain and unambiguous as they are in chapter XI, recourse cannot be had to legislative history or other extraneous aids to construe them in some other sense, to add to, or to subtract from, what is written.[2]

But if resort to conventional aids to construction were admissible, they seem to me to confirm the statutory right of the respondent to proceed under chapter XI and to

[2] *Thompson* v. *United States,* 246 U. S. 547, 551; *Iselin* v. *United States,* 270 U. S. 245, 250; *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 277; *United States* v. *Shreveport Grain & Elevator Co.,* 287 U. S. 77, 83; *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, 89; *Wallace* v. *Cutten,* 298 U. S. 229, 237; *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101; *Palmer* v. *Massachusetts,* 308 U. S. 79, 83.

preclude a holding that it should have proceeded under chapter X.

Under § 12 of the Bankruptcy Act of 1898 a corporation could propose a composition, but, as recourse to bankruptcy, whether for the purpose of liquidation or of proposing a composition, was dependent upon insolvency as defined in the statute rather than mere inability to pay debts as they accrued, a company finding itself in the latter condition could not avail itself of the bankruptcy jurisdiction but had to resort to an equity receivership.

In 1932 the Solicitor General, in a report to the President on the Bankruptcy Act and its administration,[3] pointed out the difficulties of proposing a composition in bankruptcy and suggested relief of the sort which was ultimately accorded by the adoption of § 77B.

By an Act of March 3, 1933,[4] there was added to the Act a provision which permitted "any person excepting a corporation," by petition, or by answer in an involuntary proceeding, to assert his insolvency or his inability to meet his debts as they accrued and his desire to effect a composition or an extension of time to pay his debts, and to adjust his indebtedness in that way. Thus an arrangement procedure was provided for individuals who were not insolvent in the bankruptcy sense. The same legislation also provided for agricultural compositions and extensions and for reorganizations of interstate railroads, but Congress did not, at that time, afford any further relief to corporations generally.

By the Act of June 7, 1934,[5] § 77B was added, permitting the reorganization of a corporation unable to meet its debts as they mature.

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[3] Sen. Doc. 65, 72d Cong., 1st Sess.

[4] 47 Stat. 1467, § 74.

[5] 48 Stat. 911.

When, by the Chandler Act, Congress determined to revise and codify the entire bankruptcy system, it repealed § 12 and § 74, and, in lieu of them, adopted chapter XI, permitting arrangements of unsecured debts by individuals, partnerships, and corporations.[6] It thus clearly drew a distinction between a reorganization which affects various classes of creditors and stockholders and an arrangement which is merely an extension, adjustment, or accommodation of unsecured claims without disturbing either secured claims or stock interests. Where this simple form of accommodation would suffice, it was not intended that the corporation should have the privilege of a reorganization under chapter X, the successor of § 77B, for it is provided in chapter X (§ 146) that a petition shall not be deemed to be filed in good faith if adequate relief would be obtainable by a debtor's petition under the provisions of chapter XI and further (§ 147) that a petition filed under chapter X improperly, because adequate relief can be obtained under chapter XI, may be amended to comply with chapter XI and may be proceeded with as if originally filed under the latter. No such provision is found in chapter XI with respect to a case properly falling under chapter X. Obviously the right to proceed under chapter X was deemed a privilege of which a corporation could not avail itself if it could proceed under chapter XI.

The gravamen of petitioner's argument is that Congress intended the more detailed and cumbersome procedure of chapter X to apply wherever securities of the corporation were held by the public whereas chapter XI was intended to apply only in the case of individuals or corporations not having such securities outstanding.

The Act will be searched in vain for any hint of such a distinction. Small corporations are permitted to avail

[6] 11 U. S. C. §§ 706, 707.

themselves of chapter X if stockholders' or secured creditors' rights are to be affected; large corporations, under the very letter of chapter XI, may avail themselves of its provisions if all they desire to do is to extend or accommodate their unsecured indebtedness. The smallest corporation cannot come in under chapter XI if it desires what has been traditionally known as a reorganization. The largest corporation may proceed under chapter XI if it does not desire a reorganization.

The argument of the Commission comes merely to this: That foresight and providence on the part of Congress would have dictated a different line of demarcation between the two chapters and that what Congress should have said in chapter XI was that any debtor which did not have securities outstanding in the hands of the public might file a petition under chapter XI but that all others must file under chapter X.

The legislative history furnishes but the scantiest support for the argument. Indeed it bears quite as strongly against the Commission's contention as in its favor. The only item to which counsel is able to point is a committee report to the House [7] wherein it is said:

"Section 12 has been recast; such features of section 74 are incorporated as are deemed of value, and the combined sections are made chapter XI of the act under the title 'Arrangements' . . . The inclusion of corporations will permit a large number of the smaller companies such as are now seeking relief under section 77B but do not require the complex machinery of that section, to resort to the simpler and less expensive, though fully adequate, relief afforded by section 12."

It is undoubtedly true that many more small corporations will find chapter XI available than large ones but this does not at all support the Commission's claim that

[7] H. Rep. 1409, 75th Cong., 1st Sess., pp. 50–51.

the chapter was not intended to be available to companies having securities in the hands of the public.

On the other hand, testimony before the Congressional Committee was to the effect that large corporations would not come under chapter X if they were seeking merely to adjust their unsecured debts and should go, therefore, under chapter XI.[8]

One of the draftsmen of the Chandler Act, in a public exposition,[9] has said:

"What is the line of demarcation between proceedings under Chapter X and Chapter XI? Without attempting to go into detail, Chapter XI proceedings are intended for the reorganization of corporations with simple debt structures—reorganizations under which the interests of stockholders and secured creditors are not to be modified or readjusted. If secured claims or stock interests are to be changed without the consent of all of the stockholders and secured creditors, proceedings must be instituted under Chapter X."

That chapters X and XI were not written in ignorance of the distinction between corporations having publicly owned securities and those which have not, is shown by the fact that a special committee's report called attention to this difference and suggested that corporations not having such securities outstanding be permitted to go under the arrangements chapter whereas the first named should be required to file under what is now chapter X.[10] With this suggestion before it Congress adopted a different criterion.

When all is considered it is evident that little support for the Commission's argument can be gained from the

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[8] Hearings, Subcommittee Senate Judiciary Committee on H. R. 8046, 75th Cong., 2d Sess., p. 75.

[9] Journal of the National Association of Referees in Bankruptcy (Jan. 1939), p. 72.

[10] Sen. Doc. 268, 74th Cong., 2d Sess., pp. 9–15.

legislative history. It is of no avail to urge that it would have been far better for Congress to adopt a different scheme and that the public interest which Congress had in mind in writing chapter X extends quite as much to a composition such as that proposed in the instant case as to the reorganizations envisaged in chapter X. These considerations may well be urged upon Congress in support of an amendment of the statute but they can have no weight with a court called upon to apply its plain language.

Equally unavailing is the argument that the present case must belong under chapter X since secured creditors and stockholders must be brought into the reckoning and because one of the requirements of § 366 is that the court must find the arrangement is "fair and equitable and feasible." It is said that this phrase is a term of art, given meaning by our decision in *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482, and that, within that meaning, no fair, equitable, and feasible plan can here be accomplished under chapter XI although it could be under chapter X.

The short answer is that the phrase is used not only in chapter XI and chapter X but also in chapter XII respecting real property arrangements, and in chapter XIII respecting wage earners' plans.[11] Obviously the phrase as used in the Chandler Act must be given the connotation appropriate to the section in which it is used.

Another argument put forward is that, as courts of bankruptcy are courts of equity, they may, as a chancellor might in the case of a bill for receivership, find that the balance of convenience requires a refusal to exercise a jurisdiction possessed. I think this is a complete misapplication of the principle that a court of bankruptcy is a court of equity. That has been many times stated but never in connection with the right of a debtor to invoke the remedy provided by Congress in the bankruptcy laws.

[11] See §§ 472 and 656, 11 U. S. C. §§ 872, 1056.

The legislature has specified who is entitled to the relief provided by the statute and in what circumstances. The court has no power to refuse that relief on the ground that some other relief would better serve the purpose. What is meant by the statement that a court of bankruptcy is a court of equity is that its function is to make an equitable distribution of the estate among the creditors, but the principle has not been applied in the sense that the court may, in its better judgment, refuse to award the relief which Congress has accorded the bankrupt.

No stockholder or creditor, secured or unsecured, has attempted to raise the question of the District Court's jurisdiction under chapter XI. The Securities and Exchange Commission, although charged with no duty by the Act in connection with proceedings under chapter XI, has sought to intervene and to appeal from a decision by the District Court adverse to the Commission's views. Although the Commission may be permitted to appear in chapter X proceedings, it is expressly provided that it may not appeal from any decision.[12] No analogous provision is found in chapter XI although that chapter does, in certain instances, grant interested parties the right to be heard.[13]

By general order the Rules of Civil Procedure are made applicable in bankruptcy so far as practicable. It is suggested that Rule 24 authorizes the Commission's intervention but a mere reading of the rule shows that neither intervention of right, nor permissive intervention, is available to the Commission in this case. The Commisson may not intervene as of right under the rule because no statute confers on it an unconditional right to intervene; the Commission has no interest which may be bound by a judgment in the action; and it cannot be

[12] § 208, 11 U. S. C. § 608.

[13] §§ 334 and 365, 11 U. S. C. §§ 734 and 765.

adversely affected by the court's decision. It is not entitled to permissive intervention because no statute confers a conditional right to intervene and because it has no claim or defense which will be affected by any decision of law or fact by the court. The cases in which bankruptcy courts have allowed creditors to raise questions of venue or of jurisdiction to adjudicate under the terms of the statute, where the proceeding would affect the creditors' financial interest, are inapposite, as are also equity receivership cases where an official intervenes in order to claim the right, as such official, to take over and administer the property in the possession of the court.

I am of the opinion that the judgment should be affirmed.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS agree with this opinion.

APEX HOSIERY CO. *v.* LEADER ET AL.*

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

No. 638. Argued April 1, 2, 1940.—Decided May 27, 1940.

Members of a labor union, bent on unionizing a hosiery factory in which but a few of them were employed, forcibly, and in violation of civil and criminal laws of the State, took possession of the plant and held it during a protracted "sit-down" strike, during which much of the machinery was willfully injured or destroyed and during which the business, largely interstate, was entirely suspended. When the plant was seized there were on hand 130,000 dozen pairs of finished hose, of a value of $800,000, ready for shipment on unfilled orders, mostly destined to points outside of the State. Shipment was prevented by the strikers, who repeatedly refused requests made by the owner for permission to

*William Leader and American Federation of Full Fashioned Hosiery Workers, Philadelphia, Branch No. 1, Local No. 706, respondents.

remove the merchandise for shipment in filling the orders. It was not shown that the interruption of business caused by the strike affected or was intended to affect competition and prices in the market. *Held:*

1. That there was no conspiracy "in restraint of trade or commerce among the several States" within the meaning of the Sherman Anti-Trust Act, and that, therefore, the District Court in a suit by the employer, based on the Act, in which there was no diversity of citizenship, was without jurisdiction to give judgment for the damages suffered by the employer. *First Coronado Case*, 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457, followed. Pp. 481, 486.

2. The effect of the strike was to restrict substantially the interstate transportation of the manufactured product, so as to bring the acts causing it within the reach of the commerce power, but the question for decision is not one of constitutional power but of the extent to which Congress has exercised it under the Sherman Act. P. 484.

3. The jury's verdict must be taken, in view of the instructions of the court, as a finding supported by evidence that the strikers intended to prevent shipments in interstate commerce in the sense that they must be taken to have intended the natural and probable consequences of their acts. P. 485.

4. The liability of the strikers for damages under the Sherman Act turns not on the power of Congress to regulate commerce, but on the extent to which Congress has exerted its power in the enactment of the law. P. 488.

5. In the application of the Sherman Act, it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. Restraints not within the Act when achieved by peaceful means are not brought within it merely because without other differences they are attained by violence. P. 485.

6. Labor organizations and their activities are not wholly excluded from the operation of the Sherman Act. P. 487.

7. The Sherman Act does not condemn all combinations and conspiracies which interrupt interstate transportation. P. 486.

8. The Act is to be interpreted in the light of its legislative history and of the particular evils at which it was aimed. P. 489.

9. The end sought by the Act was prevention of restraints to free competition in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to

the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. P. 493.

10. The phrase "restraint of trade" had a well-understood meaning at common law. The words "or commerce among the several States" were added to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, so that Congress through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. It was in this sense of preventing restraints on commercial competition that Congress exercised all the power it possessed. P. 494.

11. The contracts and combinations in restraint of trade made illegal by the common law were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. P. 497.

12. The Sherman law took over the common law concept of illegal restraints by condemning them wherever they occur in or affect commerce between the States. It extended its condemnation to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and it gave both private and public remedies for the injuries flowing from such restraints. P. 497.

13. Restraint on competition or on the course of trade in articles moving in interstate commerce does not violate the Act, unless the restraint is shown to have, or is intended to have, an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. P. 500.

14. A combination of employees necessarily restraining competition among themselves in the sale of their services to their employer was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." P. 501.

15. Since the enactment of the declaration in § 6 of the Clayton Act it would seem plain that restraints on the sale of the employee's

services to the employer are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act. P. 502.

16. The mere fact that strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict the power of such employers to compete in the market with those not subject to such demands does not bring the agreements within the condemnation of the Sherman Act. P. 503.

17. This Court has held the Sherman Act inapplicable in cases like the present in which local strikes, although conducted by means illegal under local law, in a production industry, prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain or were intended to restrain commercial competition in some substantial way. P. 508.

18. The Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are actionable under state law and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity. P. 512.

19. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. P. 513.

108 F. 2d 71, affirmed.

CERTIORARI, 309 U. S. 644, to review the reversal of a judgment for triple-damages recovered in an action under the Sherman Anti-Trust Act.

Mr. Sylvan H. Hirsch, with whom *Messrs. Allen J. Levin, Arno P. Mowitz,* and *Stanley Folz* were on the brief, for petitioner.

The rights of labor will in no way be impaired or destroyed by a decision that the Sherman Act was violated in this case. Clayton Act, §§ 6, 20; *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 253.

There are no words in the Sherman Act limiting the field or scope of interstate commerce to which it is meant to

apply. Its language is as broad as the Commerce Clause.

Despite the fact that, during the fifty years since the Sherman Act was enacted, it has constantly been contended that labor unions are not subject to its provisions, the Act has never been so limited in its interpretation. It has long been firmly established by the decisions of this Court without a single dissent, that labor organizations are subject to the Act, when, pursuant to a conspiracy, they engage in unlawful activities which restrain or obstruct the free flow of interstate commerce. *Loewe* v. *Lawlor,* 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Lawlor* v. *Loewe,* 235 U. S. 522; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *United States* v. *Brims,* 272 U. S. 549; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37; *Local 167* v. *United States,* 291 U. S. 293.

The Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce.

In construing the Act this Court has held that there is a restraint of commerce in violation of the Act: When the conspiracy affects commerce, *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Loewe* v. *Lawlor,* 208 U. S. 274; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1; when the conspirators intended to restrain commerce, even if ordinarily the conspirators' acts affected commerce only indirectly, *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 547.

When respondents completely stopped petitioner's manufacturing and shipping operations, commerce was directly affected and restrained.

The stoppage of operations of a plant "in the flow of commerce" directly affects, burdens and restrains commerce. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 41; *Labor Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58.

Both Congress, in enacting the National Labor Relations Act, and this Court, in sustaining it, have recognized that under our existing economic structure the stoppage of manufacturing and shipping operations in a single plant "in the flow of commerce" directly burdens and restrains commerce.

The decisions of this Court in the *Jones & Laughlin* and *Friedman-Harry Marks* cases did not turn upon nor even involve the scope of the word "affect" in the Labor Relations Act. In those cases, this Court found, as had Congress in the preamble to the Labor Relations Act, that industrial strife caused by unfair labor practices in a manufacturing plant results in the stoppage of its operations. The issue then was whether this stoppage of operations had a direct effect upon commerce, for unless the effect was direct, Congress would not have the power to prohibit local practices resulting in such a stoppage. When this Court decided that issue by holding that such a stoppage did have a direct effect upon commerce, it announced a legal principle in no way confined to nor dependent on the use of the word "affect" in the Labor Relations Act, but one which was equally applicable to the present case or to any case where that is the issue to be decided.

The question in those cases, it is said, was the constitutionality of the Labor Relations Act, whereas the question in the present case is the applicability of the Sherman Act. While the ultimate question for decision in each case is different, the issue upon which the answer to that question depends is exactly the same, namely, whether the effect upon commerce of a stoppage of operations is

direct or indirect. Indeed, in the *Jones & Laughlin* case, p. 38, this Court pointed out that the power of Congress to pass the Labor Relations Act was to be determined by the same test which this Court applies in determining whether there is a restraint of commerce in violation of the Sherman Act, namely, whether the conduct involved directly affects commerce. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 546.

Therefore, the holding in the *Jones & Laughlin* and *Friedman-Harry Marks* cases that the stoppage of operations in a single plant has a direct effect upon commerce is conclusive of that same issue in the case at bar.

Even if it be said that the stoppage of petitioner's manufacturing operations had but an indirect effect on commerce, nevertheless, when respondents wrongfully prevented the interstate shipments of the finished merchandise Apex had on hand against orders, they thereby directly restrained interstate commerce. *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 303; *United Leather Workers* v. *Herkert,* 265 U. S. 457, 463; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37, 47; *Loewe* v. *Lawlor,* 208 U. S. 274; *Duplex* v. *Deering,* 254 U. S. 443.

The evidence clearly shows and the jury found that respondents intended to restrain commerce.

The fact that respondents carried out their conspiracy through the medium of a sit-down strike and with the stated purpose of not surrendering possession of petitioner's plant until their demands were granted is complete proof of their intent to restrain commerce. Such a conspiracy, by its very nature, contemplated the complete throttling of petitioner's interstate commerce.

Proof of an intent to restrain commerce having been shown, it is immaterial whether respondents' conspiracy is said to have directly or indirectly restrained commerce—in either case there is a violation of the Sherman Act.

Coronado Coal Co. v. *United Mine Workers,* 268 U. S. 295, 310.

Even in the absence of the finding by the jury, respondents' intent to restrain commerce will be presumed as a matter of law.

This Court has frequently declared, in Sherman Act cases, that the conspirators are presumed to have intended the necessary consequences of their acts and can not be heard to say the contrary. *United States* v. *Patten,* 226 U. S. 525, 543; *Labor Board* v. *Jones & Laughlin, supra,* p. 40.

The "intent," in the sense of "purpose" or "ultimate object," of the labor union, involved in every Sherman Act case heretofore decided by this Court, has merely been to unionize the particular plant involved or to obtain some other union objective, rather than to restrain commerce. Nevertheless this Court has squarely held that such an ultimate object cannot justify a restraint of commerce in violation of the Sherman Act. *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37, 47; *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64, 77; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 468.

The court below erred in holding that the Sherman Act was not violated because a large proportion of the national volume of commerce in hosiery was not restrained. Such a test is in complete conflict with the decisions of this Court and other Circuit Courts of Appeals.

In so holding, the court purported to apply the so-called "rule of reason" laid down in *Standard Oil Co.* v. *United States,* 221 U. S. 1. See *United States* v. *American Tobacco Co.,* 221 U. S. 106, 178.

That rule has never been applied by this Court in any case involving the unlawful activities of a labor union. The reason is clear. In business combination cases, the activities engaged in are lawful and proper activities and

only became violative of the Sherman Act when they unreasonably control or restrain commerce. Because they are otherwise lawful activities, the "rule of reason" furnishes a "yardstick" for determining when these lawful activities have reached a point where they result in an unlawful restraint of commerce.

Where, however, commerce is directly restrained by acts which in themselves are flagrantly unlawful, as in the case at bar, such a restraint can never be considered "reasonable" and therefore not in violation of the Sherman Act, simply because the volume of commerce restrained is but a small proportion of the national volume. Cf. *Second Coronado Coal Case,* 268 U. S. 295; *Lawlor* v. *Loewe,* 235 U. S. 522; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606; *Steers* v. *United States,* 192 F. 1; *O'Brien* v. *United States,* 290 F. 185; *Patterson* v. *United States,* 222 F. 599.

Mr. Isadore Katz for respondents.

The Sherman Anti-Trust Act does not apply to labor unions.

The terms "contract in restraint of trade" and "combination or conspiracy in restraint of trade" must be given their common law meaning, otherwise the entire Sherman Act is unconstitutional and void.

At common law the terms "contract in restraint of trade" and "combinations or conspiracies in restraint of trade" did not apply to labor unions in their relation with employers.

The Congressional debates establish the intent to exclude labor unions from the purview of the Act.

Labor unions in their relations with employers were not within that field of common law which dealt with combinations in restraint of trade.

The Court was in error in applying the Act to a labor union in *Loewe* v. *Lawlor,* 208 U. S. 274.

The foregoing argument is independent of any consideration of § 6 of the Clayton Act. A consideration of the history of the period immediately preceding and accompanying the passage of the Clayton Act and of the mischief to be remedied, as well as the general trend of debate on § 6 of the Clayton Act in the Congress, sanctions the conclusion that Congress meant to undo the decision of the Court in *Loewe* v. *Lawlor, supra.* Although the Court adhered to the doctrine of *Loewe* v. *Lawlor* in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, and in *Bedford Cut Stone Co.* v. *Journeymen Stonecutters Association,* 274 U. S. 37, the Court should nevertheless overrule a construction of the Sherman Act which makes that statute applicable to labor unions with respect to their relations to employers.

To obviate the judicial construction of the Sherman Act in *Loewe* v. *Lawlor, supra,* Congress enacted § 6 and § 20 of the Clayton Act.

In every case involving the Sherman Act, there are two problems involved, one of jurisdiction and the other of substance. The failure to differentiate these two problems distinguishes most of the significant labor cases decided by the Court.

Even if the Sherman Act is applicable to labor unions, and their activities, that Act has not been violated by the respondents, because the local strike activities were not part of a conspiracy directly aimed at interstate commerce nor vitalized by an intent to monopolize the supply of the article entering and moving in interstate commerce or to fix the price of it in interstate markets.

Local activities of employees on strike are not within the reach of the federal power.

The case is squarely within *First Coronado Coal Case,* 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel,* 265 U. S. 457; and *Levering & Garrigues* v. *Morrin,*

289 U. S. 103; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1; *Second Coronado Coal Case,* 268 U. S. 295.

In the case at bar the requisite intent was neither alleged nor proved. There was nothing more than concerted action to unionize the mill by means of a sit-down strike with the intent and purpose of preventing the petitioner from carrying on its business.

The jury did not and indeed could not find the requisite intent. The jury found an intent to conduct a sit-down strike. *First Coronado Coal Case, supra,* p. 411; *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64.

The damages which the petitioner seeks to recover in this case are such as resulted from a trespass under the common law, and to recover them the petitioner may bring an action in the state courts. *Wilder Manufacturing Co.* v. *Corn Products Co.,* 236 U. S. 165; *Nash* v. *United States,* 229 U. S. 373.

The Labor Relations Act was formulated to complement the Anti-Trust Act. In view of this, how can it be said that the Sherman Act, though it is unable to fulfill its fundamental purpose, has vitality against labor organizations, which Congress believed would be able to achieve that same purpose through the process of collective bargaining?

Bargaining power may very well depend upon the strike and the boycott. How can it be said that employees may organize and form unions for the purpose of bargaining collectively with their employer, but that, if they engage in a strike, which, to the degree that it is successful, necessarily stops production, they come within the domain of the Sherman Act?

The principle of collective bargaining requires that the organization extend its influence throughout the entire industry. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184.

It is clear that the doctrine of the *Second Coronado Case* has been overcome by the policy underlying the Wagner Act.

Section 13 of the Labor Relations Act specifically provides: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The Act and the decisions of this Court upholding its constitutionality have not expanded the meaning of "commerce" nor extended the application of the Anti-Trust Act.

The Circuit Court of Appeals did not err in holding that a substantial amount of the commodity must be involved in a violation of the Anti-Trust Act.

Application of the Sherman Act does not depend upon the illegality of the means.

By leave of Court, briefs of *amici curiae* were filed by *Mr. Louis B. Boudin,* on behalf of the Labor Law Committee of the National Lawyers Guild; by *Messrs. John F. Finerty* and *Morris Shapiro* on behalf of the Workers Defense League; and by *Messrs. Lee Pressman, Joseph Kovner,* and *Anthony Wayne Smith* on behalf of the Congress of Industrial Organizations, in support of the judgment below.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Pennsylvania corporation, is engaged in the manufacture, at its factory in Philadelphia, of hosiery, a substantial part of which is shipped in interstate commerce. It brought the present suit in the federal district court for Eastern Pennsylvania against respondent Federation, a labor organization, and its officers, to recover treble the amount of damage inflicted on it by respondents in conducting a strike at petitioner's factory alleged

to be a conspiracy in violation of the Sherman Anti-Trust Act. 26 Stat. 209, 15 U. S. C. § 1. The trial to a jury resulted in a verdict for petitioner in the sum of $237,310, respondents saving by proper motions and exceptions the question whether the evidence was sufficient to establish a violation of the Sherman Act. The trial judge trebled the verdict to $711,932.55, in conformity to the provision of the Sherman Act as amended by § 4 of the Clayton Act, 1914, 38 Stat. 731, 15 U. S. C. § 15, and gave judgment accordingly. The Court of Appeals for the Third Circuit reversed, 108 F. 2d 71, on the ground that the interstate commerce restrained or affected by respondents' acts was unsubstantial, the total shipment of merchandise from petitioner's factory being less than three per cent. of the total value of the output in the entire industry of the country, and on the further ground that the evidence failed to show an intent on the part of respondents to restrain interstate commerce. We granted certiorari, 309 U. S. 644, the questions presented being of importance in the administration of the Sherman Act.

The facts are undisputed. There was evidence from which the jury could have found as follows. Petitioner employs at its Philadelphia factory about twenty-five hundred persons in the manufacture of hosiery, and manufactures annually merchandise of the value of about $5,000,000. Its principal raw materials are silk and cotton, which are shipped to it from points outside the state. It ships interstate more than 80 per cent. of its finished product, and in the last eight months of 1937 it shipped in all 274,791 dozen pairs of stockings. In April, 1937, petitioner was operating a non-union shop. A demand of the respondent Federation at that time for a closed shop agreement came to nothing. On May 4, 1937, when only eight of petitioner's employees were members of the Federation, it ordered a strike. Shortly after midday on

May 6, 1937, when petitioner's factory was shut down, members of the union, employed by other factories in Philadelphia who had stopped work, gathered at petitioner's plant. Respondent Leader, president of the Federation, then made a further demand for a closed shop agreement. When this was refused Leader declared a "sit down strike." Immediately, acts of violence against petitioner's plant and the employees in charge of it were committed by the assembled mob. It forcibly seized the plant, whereupon, under union leadership, its members were organized to maintain themselves as sit-down strikers in possession of the plant, and it remained in possession until June 23, 1937, when the strikers were forcibly ejected pursuant to an injunction ordered by the Court of Appeals for the Third Circuit in *Apex Hosiery Co.* v. *Leader,* 90 F. 2d 155, 159; reversed and dismissal ordered as moot in *Leader* v. *Apex Hosiery Co.,* 302 U. S. 656.

The locks on all gates and entrances of petitioner's plant were changed; only strikers were given keys. No others were allowed to leave or enter the plant without permission of the strikers. During the period of their occupancy, the union supplied them with food, blankets, cots, medical care, and paid them strike benefits. While occupying the factory, the strikers wilfully wrecked machinery of great value, and did extensive damage to other property and equipment of the company. All manufacturing operations by petitioner ceased on May 6th. As the result of the destruction of the company's machinery and plant, it did not resume even partial manufacturing operations until August 19, 1937. The record discloses a lawless invasion of petitioner's plant and destruction of its property by force and violence of the most brutal and wanton character, under leadership and direction of respondents, and without interference by the local authorities.

For more than three months, by reason of respondents' acts, manufacture was suspended at petitioner's plant

and the flow of petitioner's product into interstate commerce was stopped. When the plant was seized, there were on hand 130,000 dozen pairs of finished hosiery, of a value of about $800,000, ready for shipment on unfilled orders, 80 per cent. of which were to be shipped to points outside the state. Shipment was prevented by the occupation of the factory by the strikers. Three times in the course of the strike respondents refused requests made by petitioner to be allowed to remove the merchandise for the purpose of shipment in filling the orders.

Section 1 of the Sherman Act provides: "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." Only a single question is presented by the record for our decision, whether the evidence which we have detailed, whose verity must be taken to be established by the jury's verdict, establishes a restraint of trade or commerce which the Sherman Act condemns.

It is not denied, and we assume for present purposes, that respondents by substituting the primitive method of trial by combat,[1] for the ordinary processes of justice and more civilized means of deciding an industrial dispute, violated the civil and penal laws of Pennsylvania which authorize the recovery of full compensation and impose criminal penalties for the wrongs done. But in this suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws. Their only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act and violence,

[1] This Court has recently characterized the encouraging, aiding and abetting the strikers in similar unlawful acts as a "high-handed proceeding without shadow of legal right," see *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 252.

as will appear hereafter, however reprehensible, does not give the federal courts jurisdiction.

At the outset, and before considering the more substantial issues which we regard as decisive of this cause, it is desirable to remove from the field of controversy certain questions which have been much argued here and below, but which we think, in the circumstances of the present case, are irrelevant to decision. We find abundant support for petitioner's contention that the effect of the sit-down strike was to restrict substantially the interstate transportation of its manufactured product, so as to bring the acts of respondents by which the restriction was effected within the reach of the commerce power if Congress has seen fit to exercise it. Cessation of petitioner's manufacturing operations, which respondents compelled, indubitably meant the cessation of shipment interstate. The effect upon the commerce resulted naturally and inevitably from the cause. The occupancy of petitioner's factory by the strikers prevented the shipment of the substantial amount of merchandise on hand when the strike was called. In point of the immediacy of the effect of the strikers' acts upon the interstate transportation involved and of its volume, the case does not differ from many others in which we have sustained the Congressional exercise of the commerce power. The national power to regulate commerce is not restricted to that which is nationwide in its scope. Here the strikers' activities were as closely related to interstate commerce and affected it as substantially as numerous other activities not in themselves interstate commerce which have nevertheless been held to be subject to federal statutes enacted in the exercise of the commerce power.[2] More recently,

[2] *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U. S. 612, 619; *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342; *Chicago Board of Trade* v. *Olsen*, 262

where the statute was by its terms applicable and the question was of Congressional power, we have sustained the application of the Wagner Act, 49 Stat. 449, 29 U. S. C. §§ 151–166, regulating labor relations "affecting" interstate commerce to situations no more closely related to the commerce than these, and where the interstate commerce affected was no greater in volume.[3] And in the application of the Sherman Act, as we have recently had occasion to point out, it is the nature of the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation. See *United States* v. *Socony-Vacuum Oil Co., ante,* p. 224, note 59. Cf. *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606.

We think also, as petitioner contends, that the jury's verdict must be taken as a finding supported by evidence that respondents intended to prevent petitioner's shipments in interstate commerce in the sense that respondents must be taken to have intended the natural and probable consequences of their acts. The trial court left it to the jury to say whether the respondents intended to restrain petitioner's interstate shipments, and charged that in a suit to recover damages for violation of the Sherman Act it was necessary for it to find an intent on the part of respondents to cause the prohibited restraint of commerce,[4] but that such intent might be inferred

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U. S. 1; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38.

[3] *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 38–40; *Labor Board* v. *Fruehauf Trailer Co.,* 301 U. S. 49; *Labor Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58; *Santa Cruz Packing Co.* v. *Labor Board,* 303 U. S. 453, 463 *et seq.; Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197; *Labor Board* v. *Fainblatt,* 306 U. S. 601, 604 *et seq.* See *Labor Board* v. *Crowe Coal Co.,* 104 F. 2d 633; *Labor Board* v. *Good Coal Co.,* 110 F. 2d 501.

[4] *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 342; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 243;

from their acts in stopping petitioner's manufacture of a product largely and regularly shipped in interstate commerce. Concededly the purpose of the strikers and their principal objective were to compel petitioner to yield to their demands for a union shop, but it is a matter of common knowledge and experience that the stoppage of a large manufacturing plant, which the strikers did intend, whose product is distributed generally to consumers throughout the country, would prevent its shipments in interstate commerce. We must take it from the jury's verdict that this was known to the strikers as well as to others. In addition there was specific testimony that the strikers refused to permit the withdrawal of the finished merchandise from petitioner's factory for shipment.

But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344 (*First Coronado* case); *United Leather Workers* v. *Herkert Co.* 265 U. S. 457 (*Leather Workers* case). In *In re Debs*, 158 U. S. 564, 600, this Court declined to consider whether the stoppage of trains on an interstate railroad resulting from a strike, was a violation of the Sherman Act—a question which it has not since been called on to decide.[5] It is not seriously

United States v. *Patten*, 226 U. S. 525, 543; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 468; *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, 77; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.*, 274 U. S. 37; cf. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 40.

[5] The public interest in protecting interstate transportation from interference by strikes, recognized in the *Debs* case, 158 U. S. 564, independently of the Sherman law, has since been protected by legislation specially directed to that end. See, e. g., Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103 (1913); Title III, Transportation Act of 1920, 41 Stat. 456, 469; Railway Labor Act of 1926, 44 Stat. 577; Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. §§ 151–163. See *Virginian Ry.* v. *Federation*, 300 U. S. 515,

contended here that a conspiracy to derail and rob an interstate train, even though it were laden with 100,000 dozen pairs of stockings, necessarily would involve a violation of the Sherman Act. This Court has never applied the Act to laborers or to others as a means of policing interstate transportation, and so the question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer's factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probable consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer.

A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe* v. *Lawlor,* 208 U. S. 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, "Every contract, combination . . . or conspiracy in restraint of trade or commerce" do embrace to some extent and in some circumstances labor unions and their activities; [6] and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions

545, 553; *United States* v. *Lowden,* 308 U. S. 225, 236. I Sharfman, The Interstate Commerce Commission, 100–102, notes 39, 40.

[6] *Loewe* v. *Lawlor,* 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418; *Lawlor* v. *Loewe,* 235 U. S. 522; *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *United States* v. *Brims,* 272 U. S. 549; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37; *Local 167* v. *United States,* 291 U. S. 293.

wholly from the operation of the Act.[7] On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it.[8]

Whether labor organizations and their activities are wholly excluded from the Sherman Act is a question of statutory construction, not constitutional power.[9] The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute

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[7] Eleven bills introduced in Congress shortly after passage of the Sherman Act providing, among other things, for the exemption of labor from provisions of the Act, failed of enactment. They are H. R. 6640, in the 52nd Congress; H. R. 10539 in the 56th Congress; H. R. 11667 in the 56th Congress; S. 649 and H. R. 14947 in the 57th Congress; S. 1728, H. R. 89, H. R. 166, and H. R. 2636 in the 52nd Congress; H. R. 7938 in the 55th Congress and H. R. 11988 in the 57th Congress. The sole purpose of another bill, S. 1546, 55th Congress, was to amend the act so as to exempt all labor organizations from its prohibitions. Copies of these bills are printed in Bills and Debates Relating to Trusts, Sen. Doc. 147, 57th Cong., 2d Sess. 1902–1903, pp. 465 and 411, 469 and 449, 473 and 431, 477 and 417, 481, 581, 949, 953, 987 and 999.

[8] See e. g. § 6 of the Clayton Act, 38 Stat. 731, (1914); restrictions on appropriations, 38 Stat. 53 (1913); 44 Stat. 1194 (1927).

For detailed account of the Congressional history see Frankfurter and Greene, The Labor Injunction (1930), pp. 139–144.

[9] Cf. comment on the labor anti-trust cases in *A. L. A. Schechter Poultry Co.* v. *United States*, 295 U. S. 495, 548: ". . . these decisions related to the *applicability of the federal statute and not to its constitutional validity*, . . ." and in *Labor Board* v. *Jones & Laughlin Co.*, 301 U. S. 1, 40, in discussing the *First Coronado* case it was said "that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, . . ." (Italics supplied.)

to labor unions has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

While we must regard the question whether labor unions are to some extent and in some circumstances subject to the Act as settled in the affirmative, it is equally plain that this Court has never thought the Act to apply to all labor union activities affecting interstate commerce. The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated,[10] the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed. Cf. *Standard Oil Co.* v. *United States,* 221 U. S. 1; *Nash* v. *United States,* 229 U. S. 373; *Appalachian Coals* v. *United States,* 288 U. S. 344, 359, 360.

[10] See Debates, 21 Cong. Rec. 2460, 3148; 2 Hoar, Autobiography of Seventy Years 364; Senator Edmunds, *The Interstate Trust and Commerce Act of 1890,* 194 No. Am. Rev. 801, 813, "after most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words 'trade' and 'commerce' or 'trust,' or the words 'restraint' or 'monopolize,' by precise and all-inclusive definitions; and that these were truly matters for judicial consideration."

See also Senator Hoar who with Senator Edmunds probably drafted the bill (see A. H. Walker, History of the Sherman Law (1910), p. 27–28) in 36 Cong. Rec. 522, Jan. 6, 1903: "We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase, 'in restraint of trade,' had a technical and well-understood meaning in the law."

The critical words which circumscribe the judicial performance of this function so far as the present case is concerned are "Every . . . combination . . . or conspiracy in restraint of trade or commerce." Since in the present case, as we have seen, the natural and predictable consequence of the strike was the restraint of interstate transportation the precise question which we are called upon to decide is whether that restraint resulting from the strike maintained to enforce union demands by compelling a shutdown of petitioner's factory is the kind of "restraint of trade or commerce" which the Act condemns.

In considering whether union activities like the present may fairly be deemed to be embraced within this phrase, three circumstances relating to the history and application of the Act which are of striking significance must first be taken into account. The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property. The legislative history and the voluminous literature which was generated in the course of the enactment and during fifty years of litigation of the Sherman Act give no hint that such was its purpose.[11] They do not suggest

[11] See the Bibliography on Trusts (1913) prepared by the Library of Congress. Cf. Homan, "Industrial Combination as Surveyed in Recent Literature," 44 Quart. J. Econ., 345 (1930). With few exceptions the articles, scientific and popular, reflected the popular idea that the Act was aimed at the prevention of monopolistic practices and restraints upon trade injurious to purchasers and consumers of goods and services by preservation of business competition. See e. g. Seager and Gulick, Trusts and Corporation Problems (1929), 367 *et seq.*, 42 Ann. Am. Acad., Industrial Competition and Combination (July, 1912); P. L. Anderson, Combination *v.* Competition, 4 Edit. Rev. 500 (1911); Gilbert Holland Montague, Trust Regulation Today, 105 Atl. Monthly, 1 (1910); Federal Regulation of Industry, 32 Ann. Am. Acad. of Pol. Sci., No. 108 (1908) *passim;* Clark, Federal Trust Policy (1931), Ch. II, V; Homan, Trusts, 15 Ency. Soc. Sciences 111, 113, "clearly the law was inspired by the predatory competitive tactics of the great trusts and its primary purpose was

that, in general, state laws or law enforcement machinery were inadequate to prevent local obstructions or interferences with interstate transportation, or presented any problem requiring the interposition of federal authority.[12] In 1890 when the Sherman Act was adopted there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation.[13] With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes declaring conspiracies to interfere or actual interference with interstate commerce by violence or threats of violence to be felonies.[14] It was another and quite a different evil at

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the maintenance of the competitive system in industry." See also, Shulman, Labor and the Anti-Trust Laws, 34 Ill. L. Rev. 769; Boudin, The Sherman Law and Labor Disputes, 39 Col. L. Rev. 1283; 40 Col. L. Rev. 14.

[12] There was no lack of existing law to protect against evils ascribed to organized labor. Legislative and judicial action of both a criminal and civil nature already restrained concerted action by labor. See e. g. the kinds of strikes which were declared illegal in Pennsylvania, including a strike accompanied by force or threat of harm to persons or property, Brightly's Purdon's Digest of 1885, pp. 426, 1172.

For collection of state statutes on labor activities, see Report of the Commissioner of Labor, *Labor Laws of the Various States* (1892); Bull. 370, *Labor Laws of the United States with Decisions Relating Thereto,* United States Bureau of Labor Statistics (1925); Witte, The Government in Labor Disputes (1932), 12–45, 61–81.

[13] Three statutes covered in 1890 the Congressional action in relation to obstructions to interstate commerce. A penalty was imposed for the refusal to transmit a telegraph message (R. S. § 5269, 17 Stat. 366 (1872)), for transporting nitroglycerine and other explosives without proper safeguards (R. S. § 5353, 14 Stat. 81 (1866)) and for combining to prevent the continuous carriage of freight, 24 Stat. 382, 49 U. S. C. § 7.

[14] See e. g. regulation of: interstate carriage of lottery tickets, 28 Stat. 963 (1895), 18 U. S. C. § 387; transportation of obscene books, 29 Stat. 512 (1897), 18 U. S. C. § 396; transportation of illegally killed game, 31 Stat. 188 (1900), 18 U. S. C. §§ 392–395; interstate

which the Sherman Act was aimed. It was enacted in the era of "trusts" and of "combinations" of businesses

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shipment of intoxicating liquors, 35 Stat. 1136 (1909), 18 U. S. C. §§ 388–390; white slave traffic, 36 Stat. 825 (1910), 18 U. S. C. §§ 397–404; transportation of prize-fight films, 37 Stat. 240 (1912), 18 U. S. C. §§ 405–407; larceny of goods moving in interstate commerce, 37 Stat. 670 (1913), 18 U. S. C. § 409; violent interference with foreign commerce, 40 Stat. 221 (1917), 18 U. S. C. § 381; transportation of stolen motor vehicles, 41 Stat. 324 (1919), 18 U. S. C. § 408; transportation of kidnapped persons, 47 Stat. 326 (1932), 18 U. S. C. § 408a–408c; threatening communication in interstate commerce, 48 Stat. 781 (1934), 18 U. S. C. § 408d; transportation of stolen or feloniously taken goods, securities or money, 48 Stat. 794 (1934), 18 U. S. C. § 415; transporting strikebreakers, 49 Stat. 1899 (1936), 18 U. S. C. § 407a; destruction or dumping of farm products received in interstate commerce, 44 Stat. 1355 (1927), 7 U. S. C. § 491. Cf. National Labor Relations Act, 49 Stat. 449 (1935), 29 U. S. C., Ch. 7, § 151, "Findings and Declaration of Policy. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest, which have the intent or necessary effect of burdening or obstructing commerce. . . ."

The Anti-Racketeering Act, 48 Stat. 979, 18 U. S. C. § 420a–e (1934), is designed to protect trade and commerce against interference by violence and threats. Sec. 420a provides that "any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations . . . not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right, or

"(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsection (a) or (b);

"(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts, shall, upon conviction

and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.[15]

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thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by fine of $10,000 or both."

But the application of the provisions of § 420a to labor unions is restricted by § 420d, which provides: "Jurisdiction of offenses. Any person charged with violating section 420a of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided,* That no court of the United States shall construe or apply any of the provisions of sections 420a to 420e of this title in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States."

It is significant that Chapter 9 of the Criminal Code, dealing with "Offenses against Foreign and Interstate Commerce," and relating specifically to acts of interstate transportation or its obstruction, makes no mention of the Sherman Act, which is made a part of the Code which deals with social, economic and commercial results of interstate activity, notwithstanding its criminal penalty.

[15] The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that "business competition" was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition.

On July 10, 1888, the Senate adopted without discussion a resolution offered by Senator Sherman which directed the Committee on Finance to inquire into and report in connection with revenue bills, "such measures as it may deem expedient to set aside, control, restrain, or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view, or

For that reason the phrase "restraint of trade" which, as will presently appear, had a well-understood meaning at

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which tend to prevent *free and full competition* . . . with such penalties and provisions . . . as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition . . ." (19 Cong. Rec. 6041.)

This resolution explicitly presented the economic theory of the proponents of such legislation. The various bills introduced between 1888 and 1890 follow the theory of this resolution. Many bills sought to make void all arrangements "made with a view, or which tend, to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production," S. 3445; S. 3510; H. R. 11339, all of the 50th Cong., 1st Sess. (1888) were bills of this type. In the 51st Cong. (1889) the bills were in a similar vein. See S. 1, § 1 (this bill as redrafted by the Judiciary Committee ultimately became the Sherman Law); H. R. 202, § 3; H. R. 270; H. R. 286; H. R. 402; H. R. 509; H. R. 826; H. R. 3819. See Bills and Debates in Congress relating to Trusts (1909), Vol. 1, pp. 1025–1031.

Only one, which was never enacted, S. 1268 in the 52d Cong., 1st Sess. (1892), introduced by Senator Peffer, sought to prohibit "every wilful act . . . which shall have the effect to in anyway interfere with the freedom of transit of articles in interstate commerce, . . ."

When the antitrust bill (S. 1, 51st Cong., 1st Sess.), came before Congress for debate, the debates point to a similar purpose. Senator Sherman asserted the bill prevented only "business combinations" "made with a view to prevent competition," 21 Cong. Rec. 2457, 2562; see also *ibid.* at 2459, 2461.

Senator Allison spoke of combinations which "control prices," *ibid.* 2471; Senator Pugh of combinations "to limit production" for "the purpose of destroying competition," *ibid.* 2558; Senator Morgan of combinations "that affect the price of commodities," *ibid.* 2609; Senator Platt, a critic of the bill, said this bill proceeds on the assumption that "competition is beneficent to the country," *ibid.* 2729; Senator George denounced trusts which crush out competition "and that is the great evil at which all this legislation ought to be directed," *ibid.* 3147.

In the House, Representative Culberson, who was in charge of the bill, interpreted the bill to prohibit various arrangements which tend to drive out competition, *ibid.* 4089; Representative Wilson spoke in favor of the bill against combinations among "competing producers to control the supply of their product, in order that they may dictate

common law, was made the means of defining the activities prohibited. The addition of the words "or commerce among the several states" was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. It was in this sense of preventing restraints on commercial competition that Congress exercised "all the power it possessed." *Atlantic Cleaners & Dyers* v. *United States, supra,* 435.

A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services [16] and finally this Court has refused

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the terms on which they shall sell in the market, and may secure release from the stress of competition among themselves," *ibid.* 4090.

The unanimity with which foes and supporters of the bill spoke of its aims as the protection of free competition, permit use of the debates in interpreting the purpose of the act. See White, C. J., in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 50; *United States* v. *San Francisco, ante,* p. 16.

See also Report of Committee on Interstate Commerce on Control of Corporations Engaged in Interstate Commerce, S. Rept. 1326, 62d Cong., 3d Sess. (1913), pp. 2, 4; Report of Federal Trade Commission, S. Doc. 226, 70th Cong., 2d Sess. (1929), pp. 343–345.

[16] While it is impossible to consider all the anti-trust cases in this Court with reference to the question whether the acts condemned

to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a

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or condoned had a substantial effect on competition in the industry, nevertheless in most of them, particularly in the cases arising since the development of the "rule of reason" in 1912, emphasis was placed on the "competitive conditions in the industry."

In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, arising before the "rule of reason," Justice Peckham adopted Judge Taft's statement of the case in his opinion in the Circuit Court of Appeals, pointing out that within substantial parts of the United States, price competition had been practically eliminated (see page 236). *Standard Oil Co.* v. *United States*, 221 U. S. 1, which heralded the "rule of reason" stressed intent to eliminate competition and the predatory practices by which competition had actually been eliminated. *United States* v. *American Tobacco Co.*, 221 U. S. 106, decided the same day, involved a trust which dominated the whole industry and exercised its power in securing price control. In both the *Oil* case and the *Tobacco* case, decisions were specifically rested on the ground that the condemned combinations "unduly restricted competition."

A combination of two great railroads resulting in "destroying or greatly abridging the free operation of competition theretofore existing" was enjoined in *United States* v. *Union Pacific Co.*, 226 U. S. 61. But where the majority of the Court was of opinion that the evidence did not show that the combination "ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry," the Sherman Act was held not to apply to the combination, *United States* v. *United States Steel Corp.*, 251 U. S. 417. On finding such a power to control the output, supply of the market and the transportation facilities of potential competitors, in the anthracite coal market, the arrangement was held void in *United States* v. *Reading Co.*, 253 U. S. 26, 47–48.

The belief that "competitive conditions in the trade in harvesting machines have been established," compelled the court to find compliance with an earlier consent decree in *United States* v. *International Harvester Co.*, 274 U. S. 693, 704.

"It has been repeatedly held by this Court that the purpose of the statute is to maintain free competition in interstate commerce . . ." *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 400; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 87; *United States* v. *Reading Co.*, 226 U. S. 324, 369; *Eastern States*

production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. *First Coronado* case, *supra; Leather Workers* case, *supra. Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law.[17] They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. Such contracts were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong. Certain classes of restraints were not outlawed when deemed reasonable, usually because they served to preserve or protect legitimate interests, previously existing, of one or more parties to the contract.[18]

In seeking more effective protection of the public from the growing evils of restraints on the competitive system

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Lumber Dealers' Assn. v. *United States,* 234 U. S. 600, 609; *United States* v. *Trenton Potteries,* 273 U. S. 392, 397; *Appalachian Coals* v. *United States,* 288 U. S. 344, 360.

For a complete collection of cases, see Handler, Industrial Mergers and the Anti-Trust Laws, 32 Columbia Law Rev. 179; Handler, The Sugar Institute Case, 36 Columbia Law Rev. 1; The Rule of Reason in Loose-Knit Combinations, 32 Columbia Law Rev. 291.

[17] In his explanation of the bill Senator Sherman referred to several common law cases on restraint of trade. 21 Cong. Rec. 2457–2460.

[18] *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271. See cases collected in Handler, Cases on Trade Regulations (1937), cc. III, IV; Handler, Restraint of Trade, 13 Ency. Soc. Sciences, 339.

effected by the concentrated commercial power of "trusts" and "combinations" at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U. S. 211, written by Judge, later Chief Justice, Taft, and concurred in by Justice Harlan and Judge, later Justice, Lurton, of this Court. This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.[19]

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[19] See cases discussed in note 15, *supra*. See also, *United States* v. *Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 361; *Nash* v. *United States*, 229 U. S. 373, 376; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, 583, 584.

In *Standard Oil Co.* v. *United States,* 221 U. S. 1, 54, 55, 58, decided in 1911, this Court, speaking through Chief Justice White, pointed out that the restraint of trade contemplated by § 1 of the Act took its origin from the common law, and that the Sherman Act was adapted to the prevention, in modern conditions, of conduct or dealing effecting the wrong, at which the common law doctrine was aimed. This, it was said, is "the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, . . ." [20] The Court declared, page 59, that "the statute was drawn in the light of the existing practical conception of the law of restraint of trade," and drew the conclusion that the restraints which were condemned by the statute are those which, following the common law analogy, are "unreasonable or undue." This view was followed and more explicitly stated in *United States* v. *American Tobacco Co.,* 221 U. S. 106,

[20] "Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." *Standard Oil Co.* v. *United States,* 221 U. S. 1, at 58.

179, where it was said: ". . . it was held in the *Standard Oil* case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance." In thus grounding the "rule of reason" upon the analogy of the common law doctrines applicable to illegal restraints of trade the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose. Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price.[21] It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate com-

[21] See e. g. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Socony-Vacuum Oil Co.*, *ante*, p. 150, especially note 59 and cases cited.

merce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *United States Steel Co.,* 251 U. S. 417; *Cement Manufacturers Assn.* v. *United States,* 268 U. S. 588; *United States* v. *International Harvester Co.,* 274 U. S. 693; *Appalachian Coals* v. *United States,* 288 U. S. 344, 375, *et seq.*[22]

The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims,* 272 U. S. 549; *Local 167* v. *United States,* 291 U. S. 293. Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals* v. *United States, supra,* because notwithstanding its effect upon the marketing of the coal

[22] ". . . 'only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.'" *Appalachian Coals* v. *United States,* 288 U. S. 344, 360.

it nevertheless was not intended to and did not affect market price.

A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." [23] Since the enactment of the

[23] Combinations of capital and labor have seldom been treated as phases of a general movement to suppress competition. See Taft, Anti-Trust Act and the Supreme Court (1914), p. 21; Seager, The Attitude of the State Towards Trade Unions and Trusts, 22 Pol. Sci. Q. 385 (1907); Commons and Andrews, Principles of Labor Legislation (1927), pp. 125–129.

In England prior to 1824 the two types of combinations were treated as substantially the same, the Combinations Acts (39 Geo. III, c. 81; 39 & 40 Geo. III, c. 106), preventing combinations of wage earners even for the more obvious purpose of securing higher wages or shorter hours. These restrictions have been removed by various Acts (e. g. 5 Geo. IV, c. 95, s. 2; 22 Vict., c. 34; 34 & 35 Vict., c. 31, s. c.; 38 & 39 Vict. 36) until the Trade Disputes Act of 1906 (6 Edw. VII, c. 47) which clearly encourages the combinations of workmen. See Henderson, Trade Unions and the Law (1927). Compare the English treatment of capital combirations, see, The Anti-Trust Laws of the British Commonwealth of Nations, 32 Col. L. Rev. 324.

The experience in the United States has paralleled that in England. In a few early cases all labor combinations were regarded as unlawful, Groat, Attitude of American Courts in Labor Cases, 42 Col. Univ. Studies (1911), pp. 36–38, but since *Commonwealth* v. *Hunt*, 4 Metcalf 111 (Mass. 1842), the legitimate scope of labor combinations has steadily expanded, see Frankfurter and Greene, The Labor Injunction (1930), c. I; Landis, Cases on Labor Law (1934), pp. 32–34. In addition to this difference in treatment reflected in judicial decisions, many states have by legislation accorded favorable treatment to unions on other matters. See collection of legislation favorable to unionism found in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 386, note 1; Bull. No. 370, Labor Laws of

declaration in § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. *Appalachian Coals* v. *United States, supra,* 360. Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been

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the United States, Bureau of Labor Statistics, United States Department of Labor (1925); Witte, The Government and Labor Disputes (1932), 17 *et seq.*

considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & Garrigues Co.* v. *Morrin, supra;* cf. *American Foundries* case, *supra,* 209; *National Association of Window Glass Mfrs.* v. *United States,* 263 U. S. 403.[24] And in any case, the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended effect on price or price competition.

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[24] Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act.

The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, limiting the use of injunctions in labor disputes, is predicated on the policy that "under prevailing economic conditions," it is necessary that the worker "have full freedom of association . . . to negotiate the terms and conditions of his employment." The Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. §§ 151–164, provided for independence of railroad employees in the matter of self-organization. The National Labor Relations Act, 49 Stat. 449, 29 U. S. C. §§ 151–166, was passed to protect the workers in the "exercise of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment . . ." and expressly protects the right of self-organization, recognizes the strike as a proper union weapon and permits closed-shop contracts.

The Public Contracts Act, 49 Stat. 2036, 41 U. S. C. §§ 35–48, was aimed at preventing price competition in government bidding based on wage cutting and authorizes the establishment of minimum wage standards. The Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. §§ 201–219, likewise seeks to eliminate competition which thrived upon low wages and substandard working conditions.

This series of acts clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy.

This Court first applied the Sherman Act to a labor organization in *Loewe* v. *Lawlor,* 208 U. S. 274, in 1908, holding that the trial court had erroneously sustained a demurrer to the declaration in a suit for damages for violation of the Sherman Act on the ground that the combination alleged was not within the Act. The combination or conspiracy charged was that of a nation-wide labor organization to force all manufacturers of fur hats in the United States to organize their workers by maintaining a boycott against the purchase of the product of non-union manufacturers shipped in interstate commerce. The restraint alleged was not a strike or refusal to work in the complainants' plant, but a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants, and to purchase the competing products of other unionized manufacturers. This Court pointed out that the restraint was precisely like that in *Eastern States Retail Lumber Dealers Co.* v. *United States,* 234 U. S. 600, 610, 614, in which a conspiracy to circulate a "black list," intended to persuade retailers not to deal with specified wholesalers, was held to violate the Act because of its restraint upon competition with unlisted wholesalers. The Court in the *Loewe* case held that the boycott operated as a restraint of trade or commerce within the meaning of the Sherman Act, and that the language of the Act, "every combination, etc." was broad enough to include a labor union imposing such a restraint. Like problems found a like solution in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, and in *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.,* 274 U. S. 37; where, in the one case, a secondary boycott, and in the other, the refusal of the union to work on a product in the hands of the purchaser, were carried on on a country-wide scale by a national labor organization, in order to

induce the purchasers of a manufactured product shipped in interstate commerce to withdraw their patronage from the producer. In both, as in the *Loewe* case, the effort of the union was to compel unionization of an employer's factory, not by a strike in his factory but by restraining, by the boycott or refusal to work on the manufactured product, purchases of his product in interstate commerce in competition with the like product of union shops.

In the *Bedford Stone* case it was pointed out that, as in the *Duplex Printing Press Co.* case, the strike was directed against the use of the manufactured product by consumers "with the immediate purpose and effect of restraining future sales and shipments in interstate commerce" and "with the plain design of suppressing or narrowing the interstate market," and that in this respect the case differed from those in which a factory strike, directed at the prevention of production with consequent cessation of interstate shipments, had been held not to be a violation of the Sherman law. See *First Coronado* case, *supra; Leather Workers* case, *supra; cf. Second Coronado* case, *supra,* 310.

It will be observed that in each of these cases where the Act was held applicable to labor unions, the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases. See *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45, 46; *Retail Lumber Dealers Co.* v. *United States, supra; Paramount Famous Lasky Co.* v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures,* 282 U. S. 44. That the objective of the restraint in the boycott cases was the strengthening of the bargaining position of the union and not the elimination of business competition—which was the end in the non-labor cases—was

thought to be immaterial because the Court viewed the restraint itself, in contrast to the interference with shipments caused by a local factory strike, to be of a kind regarded as offensive at common law because of its effect in curtailing a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition with union made goods in the interstate market.

Both the *Duplex Printing Co.* and *Bedford Stone* cases followed the enactment of the Clayton Act and the recognition of the "rule of reason" in the *Standard Oil* case, *supra.* The applicability of that rule to restraints upon commerce affected by a labor union in order to promote and consolidate the interests of its union was not considered.[25] But an important point considered and decided by the Court in both cases was that nothing in the Clayton Act precluded the relief granted. We are not now concerned with the merits of either point.[26] The only

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[25] Whether the interest of the labor unions in these cases in maintaining and extending their respective organizations, rendered the restraint reasonable as a means of attaining that end within the common law rule, or brought the restraints within the rule of reason developed and announced in the Standard Oil case, was not discussed and we need not consider it here. Restraints upon the competitive marketing of a manufacturer's product brought about by an agreement between the employer and his employees in order to secure continuous employment of the employees was held to be within the rule of reason and therefore not an unreasonable restraint of trade in *National Association of Window Glass Mfrs.* v. *United States,* 263 U. S. 403.

[26] Section 6 of the Clayton Act declared that "nothing contained in the anti-trust laws shall be construed . . . to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." And § 20 of the Clayton Act provided, "No restraining order or injunction shall be granted by any court of the United States, or a judge or

significance of the two cases for present purposes is that in each the Court considered it necessary, in order to support its decision, to find that the restraint operated to suppress competition in the market.

This Court was first called on to consider a case like the present in the *First Coronado* case, *supra*. There a local branch of a national labor union sought to unionize a coal mine which was shipping its product interstate to the extent of more than 5,000 tons a week. Members of the union compelled the mine to shut down, by force and violence, including murder and arson. By reason of their forcible action all work at the mine was prevented, it filled with water, shipments of coal which were regularly moving in interstate commerce as mined, ceased, and

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the judges thereof, in any case between an employer and employees, or between employers and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right. . . .

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; . . . or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

In both the *Duplex Printing Press Co.* and the *Bedford Stone Cutters* cases, it was held that the prohibition of § 6 of the Clayton Act did not extend to illegal combinations or conspiracies in restraint of trade, which the concerted action taken by the labor unions in these cases was held to be, and that the restrictions of § 20 of the Clayton Act upon the injunction applied only to actual disputes between an employer and his employees, with respect to the terms or conditions of their own employment, and did not extend to acts of labor unions, boycotting the product of an employer by whom they were not employed. Cf. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552.

the strikers burned more than ten cars, three of them loaded with coal and some billed for movement interstate. This Court, notwithstanding the admittedly substantial effect of the strike on the interstate movement of the coal, and the admittedly illegal and outrageous acts of the strikers, held that it was not a restraint of trade or commerce prohibited by the Sherman Act. It rested its decision specifically on two grounds: that "obstruction to coal mining is not a direct obstruction to interstate commerce in coal," [27] and that the intent to obstruct the mining of coal and to burn the loaded cars, did not necessarily imply an intent to restrain the commerce, although concededly interstate shipments and the filling of interstate orders for coal were necessarily ended by the stoppage of mining operations and the destruction of the loaded cars. It perhaps suffices for present purposes to say that if the strike in the *Coronado* case was not within the Sherman Act because its effect upon the commerce was "indirect" and because the "intention" to shut down the mine and destroy the cars of coal destined for an interstate shipment, did not imply an "intention to obstruct interstate commerce," then the like tests require the like decision here.

But we are not relegated to so mechanical an application of these cryptic phrases in the application of the Sherman Anti-Trust Act, for the Court has since so in-

[27] The assertion that the decision in the *First Coronado* case rests on the ground that "production, as such—in that case, coal mining—was not interstate commerce" is neither supported by the opinion in that case nor by its subsequent interpretation by this Court. See *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 548; *Labor Board* v. *Jones & Laughlin Co.,* 301 U. S. 1, 40. See note 9, *supra.* Cf. *Sunshine Anthracite Coal Co.* v. *Adkins, ante,* p. 381. The opinion recognized that the cessation of production of the coal prevented interstate commerce in the coal but held that it did not violate the Sherman Act because the effect on the commerce was "indirect," to which it was thought the Sherman Act did not apply.

terpreted them as to give to the phrase "restraint of trade or commerce" a meaning and content consonant with the legislative and judicial history of the Act to which we have referred. In the *Leather Workers* case, *supra,* the Court was again called on to determine whether a local strike in a factory which prevented shipment of its product in filling interstate orders of substantial volume violated the Sherman Act. As in the *First Coronado* case the Court held that the restraint was not one prohibited by the Sherman Act. It pointed out, page 469, that there has been no attempt, as in *Loewe* v. *Lawlor,* to boycott the sale of complainant's products in other states, and that if the interruption of interstate shipments resulting from a local factory strike aimed at compelling the employer to yield to union demands were deemed within the sweep of the Sherman Act, "The natural, logical and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to federal jurisdiction provided any appreciable amount of its product enters into interstate commerce," page 471. After discussing the cases which had given currency to the notion that the Sherman Act, where the combination or conspiracy is not formed with the "intent to restrain trade or commerce," is to be applied only to those restraints characterized as "direct," the Court said, page 471:

"This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference

with its manufacture can be said directly to burden interstate commerce."

And the Court added,

"The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers were thus directing their scheme against interstate commerce."

It was thus made apparent that in saying that "indirect obstructions" to commerce were not condemned by the Sherman Act where the conspiracy is not directed at that commerce, the Court was not seeking to apply a purely mechanical test of liability, but was using a shorthand expression to signify that the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market, so as "to monopolize the supply, control its price or discriminate between its would-be purchasers." And in speaking of intent as a prerequisite to liability under the Act where the restraint to interstate commerce is "indirect" it meant no more than that the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy.

This was again pointed out in the *Second Coronado* case, *supra,* 310, where upon a retrial of the case on amended pleadings it appeared that "the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, . . ." The Court declared such a restraint to be a "direct violation of the Sherman Act." The like distinction was taken and explanation made in the *Bedford Stone*

case, *supra,* pp. 46, 49, where the restraint consisted in the refusal of the unions to work on stone shipped interstate from an open shop quarry after its interstate journey to the purchaser had ended, and where it appeared that the purpose of the strike was to prevent the interstate sale of the stone in competition with the product of unionized producers. Cf. *Levering & Garrigues Co.* v. *Morrin, supra.*

These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers." These elements of restraint of trade, found to be present in the *Second Coronado* case and alone to distinguish it from the *First Coronado* case and the *Leather Workers* case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the *Second Coronado* case. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect

on the competitive conditions in the industry than the combination of producers upheld in the *Appalachian Coals* case and in others on which it relied.[28]

If, without such effects on the market, we were to hold that a local factory strike, stopping production and shipment of its product interstate, violates the Sherman law, practically every strike in modern industry would be brought within the jurisdiction of the federal courts, under the Sherman Act, to remedy local law violations. The Act was plainly not intended to reach such a result, its language does not require it, and the course of our decisions precludes it. The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence.

Affirmed.

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[28] It is said to be anomalous to hold employers subject to the Labor Act because their unfair practices would prevent the shipment of their goods in interstate commerce, and at the same time to hold the activities of employees which amount to a "direct and intentional obstruction" to interstate movement of goods, not to be within the meaning of "restraint of trade or commerce," under the Sherman Act. If any other answer than a comparison of the legislative history and objectives of the two acts, and our decisions under them, were needed, it seems obvious that the Sherman Act cannot be said to subject employees to a liability which it does not impose on employers or others. [Over.]

MR. CHIEF JUSTICE HUGHES, dissenting:

The undisputed facts will bear a brief repetition, for upon an appreciation of their true import hinges the application of the Sherman Act.

As the Circuit Court of Appeals said, the evidence disclosed a "sit-down strike in its most aggravated and illegal form." When the Union demanded a closed shop agreement and, on its refusal, declared the strike, only eight of the Company's twenty-five hundred employees were members of the Union. The Company's plant was seized and held for several weeks. Its machinery and equipment were "wantonly demolished or damaged to the extent of many thousands of dollars."

There was not merely a stoppage of production, but there was also a deliberate prevention of the shipment of finished goods to customers outside the State. This was not simply the result of the occupation of the plant but was due to the repeated and explicit refusals of the Union to permit the shipment. These goods amounted to 134,000 dozens of finished hosiery, of the value of about $800,000, of which 80 per cent, as respondents well know, were ready for shipment in interstate commerce. The evidence is that the Company's representative thus besought the Union's president: "We have orders on hand from customers all over the country which we can fill with merchandise which we have on hand at the plant. Will you permit us to go into the plant for the sole purpose of removing that finished merchandise so that we can ship it against orders?" The Union's president emphatically answered: "No, not until this strike is settled."

There was thus a direct and intentional prevention of interstate commerce in the furtherance of an illegal conspiracy. This, I take it, the opinion of the Court concedes. Whatever vistas of new uncertainties in the application of the Sherman Act the present decision may open,

it seems to be definitely determined that a conspiracy of workers, or for that matter of others, to obstruct or prevent the shipment or delivery of goods in interstate commerce to fill orders of the customers of a manufacturer or dealer is not a violation of the Sherman Act. With that conclusion I cannot agree.

The argument has been pressed in this case, and in other recent cases, that the Sherman Act does not apply to labor unions. The Court finds that argument untenable, referring to our decisions to the contrary and to the failure of repeated attempts to persuade Congress to exclude labor organizations from the operation of the Act. Respondents' argument for immunity under the terms of §§ 6 and 20 of the Clayton Act[1] has also been found unavailing. Section 6 declares that "the labor of a human being is not a commodity or article of commerce" and that nothing in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations instituted for the purpose of mutual help, "or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." The reference in the last clause to "*such* organizations" has manifest reference to what precedes, and the immunity conferred is only with respect to the "lawfully carrying out" of their "legitimate objects." Section 20 forbids the granting of injunctions prohibiting persons "singly or in concert" from "terminating any relation of employment," or from engaging in described activities of persuasion, etc., when these are "peaceful and lawful"; or "from peaceably assembling in a lawful manner, and

[1] 15 U. S. C. 17; 29 U. S. C. 52.

for lawful purposes." The inapplicability of these provisions is apparent.

But while the Clayton Act does not give the immunity desired by respondents, and labor unions are found by the Court to be within the purview of the Sherman Act "to some extent and in some circumstances," the Act is construed as not embracing the direct and deliberate interference with interstate commerce that is here disclosed. I think that this construction of the statute is too narrow.

Section one of the Sherman Act [2] condemns as illegal every "combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." "Conspiracy" is a familiar term of art and means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. There was plainly a conspiracy here. To "restrain" is to hold back, repress, obstruct,—to hinder from liberty of action. Manifestly there was restraint in this case. What then is the significance of the term "commerce" as used in the Act? Adopting the language of the Constitution, Congress evidently used the term in its constitutional sense. "Commerce" is intercourse; in its most limited meaning it embraces traffic. *Gibbons* v. *Ogden,* 9 Wheat. 1, 189. "Commerce" manifestly covers the shipment and transportation of commodities across state lines to execute contracts of sale. The term "commerce," we said in *Second Employers' Liability Cases,* 223 U. S. 1, 46, "embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers whether carried on by water or by land."

[2] 15 U. S. C. 1.

As the instant case falls directly within the language of the Sherman Act in its natural import, the question is whether that language has been, or should be, so narrowed by judicial construction as to exclude from its application the conspiracy and restraint here found. The scope of this question is not only limited by the conclusion of the Court that labor unions are not excepted from the Act but also by the Court's rejection of the bases of the decision of the court below. Thus the immediacy of the effect of respondents' action upon interstate commerce is admitted, and the argument that the interdicted shipments constituted but a small part of the "total national output in the industry" is dismissed as irrelevant. This ruling necessarily follows from the reasoning of our decisions under the National Labor Relations Act. In *Labor Board* v. *Fainblatt,* 306 U. S. 601, 606, we said that "The exercise of Congressional power under the Sherman Act . . . has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small." Here, the volume affected was very substantial although it was but a small proportion of the entire traffic in similar commodities. Again, the Court rejects the conclusion of the court below that the evidence did not sustain a finding that respondents intended to prevent the shipment of the goods. The contrary, as we have seen, was clearly shown.

Nor does the "rule of reason" aid respondents.[3] The test of reasonableness under that rule is the effect of the agreement or combination, not the motives which inspire it. Leaders of industry have been taught in striking fashion that when the Court finds that they have combined to impose a direct restraint upon interstate com-

[3] *Standard Oil Co.* v. *United States,* 221 U S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

merce, their benevolent purposes to promote the interest of the industry, or to rescue it from a distressful condition, will not save them even from criminal prosecution for violation of the Sherman Act. See *United States* v. *Socony-Vacuum Oil Co., ante,* p. 150. If labor unions are not excepted from the Act, and they have acted outside the legitimate field contemplated by the Clayton Act, the impartial enforcement of the law would seem to require that the same doctrine be applied to them. In that view, the purpose of respondents to promote the interests of labor organization cannot be deemed to justify the direct and intentional restraint they imposed upon interstate commerce. The opinion of the Court does not appear to hold otherwise. From no point of view, as it seems to me, can the restraint be regarded as reasonable.

Why then should the Sherman Act be construed to be inapplicable? It is said that the Act was not aimed at "policing" interstate transportation. But this would seem to be a statement of result rather than a justification for reaching it. If "policing" means the protection of interstate transportation from unlawful conspiracies to restrain it, it would seem that the Sherman Act provides that protection. The fact that various statutes have been passed by Congress to prevent the transportation of articles deemed to be injurious does not indicate the contrary, for these are statutes restricting the right of transportation in order to protect the public, while the Sherman Act is aimed at securing the freedom of transportation in lawful commerce.

The question whether a conspiracy to prevent transportation in interstate commerce was within the Sherman Act came before the circuit courts not long after the Act was passed. In *United States* v. *Workingmen's Amalgamated Council,* 54 F. 994, it appeared that in consequence of a difference between the warehousemen in New Orleans and their employees and the principal draymen and

their subordinates, a strike was called by labor associations which enforced "a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the City of New Orleans, from state to state, and to and from foreign countries." By the intended effect of the defendants' actions, "not a bale of goods constituting the commerce of the country could be moved." District Judge Billings, sitting in the Circuit Court, concluded that there was no question "but that the combination of the defendants was in restraint of commerce" and hence a violation of the Sherman Act. *Id.*, pp. 999, 1000. An injunction was granted and the order was affirmed by the Circuit Court of Appeals. 57 F. 85.

A similar view was apparently entertained by Circuit Judge Taft and Circuit Judge Lurton. See *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 F. 803, 821. It was noted in that case that a conspiracy to prevent transportation might result in the paralysis of interstate commerce. *Id.*, p. 822.

In the case of *United States* v. *Debs*, 64 F. 724, the United States brought suit to enjoin those engaged in a conspiracy to interfere with transportation upon several railroads, and an injunction having been issued and disobeyed, contempt proceedings were instituted. The question was whether the federal court had jurisdiction to issue the injunction. Circuit Judge Woods found that it had and based his decision upon the Sherman Act. After stating that the original design of the Act to suppress trusts and monopolies created by contract or combination in the form of trust, which would be of a contractual character, was adhered to, the court thought it equally clear that "a further and more comprehensive purpose" came to be entertained and was embodied in the final form of the enactment. The Act extended to conspiracies in the sense of the law and, citing the decisions showing the

constitutional scope of the term "commerce" and its application to transportation, the court found no reason for thinking that the term as used in the Sherman Act was "less comprehensive." *Id.*, pp. 747–751.

It is true that when the *Debs* case came to this Court on a petition for *habeas corpus,* the decision sustaining the jurisdiction of the federal court to entertain the suit by the United States was placed upon the ground that the United States, having the full attributes of sovereignty within the limits of its granted powers, had among those the power over interstate commerce and over the transmission of the mails and was entitled to remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce or the carrying of the mails. 158 U. S. 564. But while the Court chose that broad ground for sustaining jurisdiction, it was careful not to intimate disagreement with the basis of the decision in the Circuit Court as to the application of the Sherman Act. Referring to that decision, and to the Sherman Act, the Court said: "We enter into no examination of the act of July 2, 1890, c. 647, 26 Stat. 209, upon which the Circuit Court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed." *Id.*, p. 600.

In *Loewe* v. *Lawlor,* 208 U. S. 274, in holding that the Sherman Act applied to labor unions, the Court cited in support of its reasoning the case of *United States* v. *Workingmen's Amalgamated Council, supra,* quoting the statement of District Judge Billings in describing the New Orleans conspiracy: "One of the intended results of their combined action was the forced stagnation of

all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well." That "forced stagnation" was the obstruction of interstate transportation. The Court in the *Loewe* case also quoted in full the observation in the *Debs* case that the Court should not be understood as dissenting from the conclusions of the circuit court as to the scope of the Sherman Act. And this Court, still considering the application of that Act to labor unions, then quoted what had been said by Mr. Justice Brewer in the *Debs* case (*supra*, p. 581) with respect to obstructions to interstate commerce, as follows: "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" *Loewe* v. *Lawlor, supra,* pp. 303, 304.

In the light of these decisions of the circuit courts and of the significant and unanimous expressions by this Court, the argument seems to be untenable that the Sherman Act has been regarded as not extending to conspiracies to obstruct or prevent transportation in interstate or foreign commerce. On the contrary, I think that hitherto it has not been supposed that such conspiracies lay outside the Act.

With this background we come to the question whether the application of the Sherman Act in the instant case,

which would otherwise appear to be required by its comprehensive terms, has been precluded by our decisions in labor cases. The view is announced that the Sherman Act was not directed at those restraints which fall short of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers. That is, in short, that it does not apply to the direct and intentional obstruction or prevention of the shipment or transportation of goods to fill the orders of customers in interstate commerce such as we have here. I do not read our decisions as either requiring or justifying such a judicial limitation of the provisions of the Act. Rather, I believe, they point to a contrary conclusion.

While *Loewe* v. *Lawlor, supra,* was the case of a boycott, the principle applied was not limited to that sort of restraint but was as broad as the terms of the Act. The Court not only did not exclude obstruction of interstate shipments from being regarded as a violation of the statute but drew upon the decisions which had involved such obstruction to support its general conclusion. The Court considered the means employed in the *Loewe* case as constituting a direct restraint, but plainly those means were not deemed to be exclusive of other means including those which had been employed in the cases which the Court cited. The same may be said of other boycott cases. See *Duplex Printing Co.* v. *Deering,* 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.,* 274 U. S. 37.

In *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 438, the Court, referring to *Loewe* v. *Lawlor,* emphasized the comprehensiveness of the Sherman Act, saying:

"In *Loewe* v. *Lawlor,* 208 U. S. 274, the statute was held to apply to any unlawful combination resulting in restraint of interstate commerce. In that case the damages sued for were occasioned by acts which, among other

things, did include the circulation of advertisements. But the principle announced by the court was general. It covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter."

Moreover, of what avail is it to interdict boycotts or to assure a free market, that is, to secure freedom in obtaining customers, and yet to leave unprotected the right to ship goods to the customers who are thus obtained? Of what advantage is it to solicit orders freely in interstate commerce if they cannot be filled? The freedom of interstate movement—immunity from conspiracies directly to restrain shipment and delivery—lies at the very base of a free market and the untrammeled making of sales.

The *First Coronado Company* case (259 U. S. 344), chiefly relied upon, does not seem to afford an adequate basis for the broader ruling now made. That decision was centered upon the point that production, as such,—in that case, coal mining,—was not interstate commerce, and that obstruction to coal mining through a strike was not in itself a direct obstruction to interstate commerce. *Id.*, pp. 407, 408. And it was deemed to be necessary to go further and find an "intent to injure, obstruct or restrain interstate commerce" in order to bring the case within the Sherman Act. The evidence was found insufficient to show such an intent. Thus, the Court did not decide that a direct and intentional obstruction of interstate commerce was not a violation of the Act. In the *Second Coronado Company* case (268 U. S. 295), evidence of that intent was supplied and the Court ac-

cordingly set aside a judgment in favor of the local union. It is true that the Court, in dealing with the purpose of the local union, found that it was to stop the production of non-union coal and prevent its shipment to markets of other States, where by competition it would tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines. But the interstate commerce that was thus found to be directly and intentionally obstructed was the shipment of the coal, and whether the purpose was to maintain unionization in other States, or within the same State, would not seem to be material, so long as the interstate commerce in either case is directly and intentionally prevented.

The Court in the *Second Coronado Company* case not only decided the particular case but laid down the general principle as follows: "But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." *Id.*, p. 310. The use of the disjunctive is significant.

The ruling of the *First Coronado Company* case as to a mere stoppage of production, in the absence of proof of a direct and intentional obstruction of interstate commerce, was repeated in the case of *United Leather Workers* v. *Herkert Co.*, 265 U. S. 457. But the dictum from the opinion in that case, which the Court quotes in its present opinion, must be read in connection with what immediately follows where the Court pointed out that there was no direct interference by the defendants in the *Herkert* case "with the interstate transportation" of the goods of the plaintiff company. Any doubt as to the true import of the *Coronado* and *Herkert* cases is set at rest by this Court's construction of these decisions in the

case of *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn., supra.* There the Court emphasized the point as to the absence of direct interference with interstate transportation in the earlier cases, saying (274 U. S. pp. 47, 48):

"The case, therefore, is controlled, not by *United Mine Workers* v. *Coronado Co., supra,* [259 U. S. 344] and *United Leather Workers* v. *Herkert,* 265 U. S. 457, as respondents contend, but by others presently to be discussed. In the *United Leather Workers* case, it appeared that the strikes were leveled only against production, and that the strikers (p. 471) 'did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product'; and the decision rests upon the ground that there was an entire absence of evidence or circumstances to show that the defendants, in this conspiracy to coerce complainants, were directing their scheme against interstate commerce. *United Mine Workers* v. *Coronado Co., supra,* pp. 408–409, is to the same effect."

And the general principle set forth in the *Second Coronado Company* case, as above quoted, was reiterated.

In *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 107, there was no showing of a direct or intentional restraint of interstate commerce. But in *Local 167* v. *United States,* 291 U. S. 293, the evidence showed a conspiracy "to burden the free movement of live poultry into the metropolitan area" in New York. The Court said: "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce." *Id.,* p. 297. Thus it was "the untrammeled shipment and movement" which, when found to be di-

rectly and intentionally restrained, was held to constitute violation of the Sherman Act.

Suppose, for example, there should be a conspiracy among the teamsters and truck drivers in New York City to prevent the hauling of goods and their transportation in interstate commerce, can it be doubted that the Sherman Act would apply? Would it not be essentially the same sort of obstruction of interstate commerce as was found to have been effected in *United States* v. *Workingmen's Amalgamated Council, supra,* where the transportation of goods in New Orleans in interstate commerce was tied up? There the defendants paralyzed local business and their object was to benefit themselves in their dealings with their employers, but to attain that end they directly and intentionally obstructed the movement of goods in interstate commerce and thus came within the interdiction of the Act. The fact that the defendants in the instant case are not teamsters can make no difference as it is the direct and intentional prevention of interstate commerce that turns the scales.

Our decisions have said much of the "free flow" of interstate commerce. What is this metaphor of an interstate stream protected in its flow by the Sherman Act but a striking way of describing the movement of goods by untrammeled shipments in pursuance of freely negotiated sales?

It was to protect this free movement from being obstructed by industrial strife through the denial of collective bargaining that Congress passed the National Labor Relations Act. In sustaining the validity of that Act we referred to our decisions with respect to the conduct of employees engaged in production, summing up the matter in this way: "And in the second *Coronado* case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production

is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the 'intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the [Sherman] Anti-Trust Act.' " *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40. It is true that in that case we were considering the power of Congress over interstate commerce, but we were pointing to the exercise of that power in the Sherman Act, with respect to which we had previously said "that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435. That power, and its exercise, should not be deemed to fall short of the protection of the interstate shipment of goods from conspiracies to impose a direct restraint upon it.

The attempt in the court below to distinguish between the use of the word "affect" in the National Labor Relations Act and the word "restraint" in the Sherman Act is ineffectual as it fails to take note of the fact that the word "affect" was construed as purporting "to reach only what may be deemed to burden or obstruct" interstate or foreign commerce, and hence under the familiar principle "that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power," the statute was upheld. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *supra*, pp. 31, 32.

The evil sought to be remedied by the National Labor Relations Act was the interruption of interstate commerce primarily by the prevention of the free shipment and delivery of goods in that commerce, and hence it has

been applied to those cases where industries are of such a character that the prohibited unfair labor practices would naturally have the effect of interrupting the movement of commodities between the States. See, *e. g., National Labor Relations Board* v. *Fruehauf,* 301 U. S. 49, 53, 54; *National Labor Relations Board* v. *Friedman-Harry Marks Co.,* 301 U. S. 58, 72, 73; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 468; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 221. In *National Labor Relations Board* v. *Fainblatt, supra,* pp. 605, 606, we found that "interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of respondents and in the transportation of the finished product to points outside the state for distribution to purchasers and ultimate consumers," and that "transportation alone across state lines is commerce within the constitutional control of the National Government"; and, having said that, we pointed to the protective exercise of congressional power under the Sherman Act as not in any way restricted because the volume of the commerce involved in such transportation was small. *Id.*

It would indeed be anomalous if, while employers are bound by the Labor Act because their unfair labor practices may lead to conduct which would prevent the shipment of their goods in interstate commerce, at the same time the direct and intentional obstruction or prevention of such shipments by the employees were not deemed to be a restraint of interstate commerce under the broad terms of the Sherman Act.

This Court has never heretofore decided that a direct and intentional obstruction or prevention of the shipment of goods in interstate commerce was not a violation of the Sherman Act. In my opinion it should not so

decide now. It finds no warrant for such a decision in the terms of the statute. I am unable to find any compulsion of judicial decision requiring the Court so to limit those terms. Restraints may be of various sorts. Some may be imposed by employers, others by employees. But when they are found to be unreasonable and directly imposed upon interstate commerce, both employers and employees are subject to the sanctions of the Act.

It is said that such a view would bring practically every strike in modern industry within the application of the statute. I do not agree. The right to quit work, the right peaceably to persuade others to quit work, the right to proceed by lawful measures within the contemplation of the Clayton Act to attain the legitimate objects of labor organization, is to my mind quite a different matter from a conspiracy directly and intentionally to prevent the shipment of goods in interstate commerce either by their illegal seizure for that purpose, or by the direct and intentional obstruction of their transportation or by blocking the highways of interstate intercourse.

Once it is decided, as this Court does decide, that the Sherman Act does not except labor unions from its purview,—once it is decided, as this Court does decide, that the conduct here shown is not within the immunity conferred by the Clayton Act,—the Court, as it seems to me, has no option but to apply the Sherman Act in accordance with its express provisions.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS join in this opinion.

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WHITE *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 87. Argued May 20, 1940.—Decided May 27, 1940.

1. Use in a state court of a coerced confession in procuring a conviction of a capital crime violates the due process clause of the Fourteenth Amendment. P. 531.
2. The evidence shows that the confession used in the trial of this case was coerced. P. 532.

Petition denied.

On a petition by the State of Texas for the rehearing of a case adjudged March 25, 1940, 309 U. S. 631, reversing a death sentence upon a conviction of rape.

Mr. F. S. K. Whittaker, with whom *Mr. Carter Wesley* was on the brief, for petitioner.

Messrs. Lloyd Davidson and *William J. Fanning,* Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, *George W. Barcus,* Assistant Attorney General, and *W. C. McClain* were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was convicted of rape and sentenced to death in the District Court of Montgomery County, Texas. The State's appellate criminal court of last resort affirmed and denied rehearing.[1] We declined to grant certiorari to review the state court's action, 308 U. S. 608. February 29, 1940, petitioner sought rehearing of his petition for certiorari, alleging that his conviction and sentence resulted from proceedings in which the State had utilized an alleged confession in violation of the Due Process Clause of the Fourteenth Amendment. March 25, 1940, we granted certiorari, and reversed the judgment of the state court,

[1] 139 Tex. Crim. Rep. —; 128 S. W. 2d 51. A prior conviction was reversed. 135 Tex. Crim. Rep. 210; 117 S. W. 2d 450.

309 U. S. 631, upon authority of *Chambers* v. *Florida,* 309 U. S. 227, and *Canty* v. *Alabama,* 309 U. S. 629. The case is before us now on the State's petition for rehearing.[2]

From the first offer of the alleged confession in evidence at the trial, petitioner has challenged the State's right to utilize it, consistently with rights guaranteed him by the Federal Constitution.[3] In affirming the conviction and sentence of death, the court below necessarily determined that use of the confession did not constitute a denial of that due process which the Fourteenth Amendment guarantees.

The State suggests that there is evidence that petitioner denied ever having made or signed the confession which purported to be signed by his mark. Therefore, it insists

[2] Petitioner's original petition for certiorari was denied November 13, 1939, 308 U. S. 608. On February 29, 1940, after our decision in the *Chambers* case, petitioner filed a petition for rehearing of his original petition, assigning the additional ground that his conviction was attributable to the use by the State of a confession obtained by coercion and intimidation. March 2, 1940, the Attorney General of Texas was notified of the pendency of the petition for rehearing and he has informed the Clerk of this Court that he notified the State's Appellate Criminal Attorney. Information of pendency of the petition for rehearing of the petition for certiorari was also communicated to the Montgomery County District Court Clerk, the District Attorney, the Governor and the State Board of Pardons and Paroles. The State's petition for rehearing of our judgment of March 25, 1940, reversing the state court's judgment, alleged that the State had not received adequate notice and sought further opportunity to present the State's views. We therefore heard oral arguments upon the State's petition for rehearing.

[3] In addition to alleging that the confession relied on by the State was coerced and involuntary, both petitioner's amended motion for a new trial and his bill of exceptions to the court below set out that he "was not permitted to talk to an attorney to advise him but was kept incommunicado, was not permitted to use a telephone, was kept in the woods by Rangers a great portion of the time and was denied every right that even this defendant is entitled to under the Constitution of Texas and the Constitution of the United States."

that petitioner is barred from urging that the prosecution's use of the confession could have deprived him of due process at his trial. But regardless of petitioner's testimony on this question, the State insisted and offered testimony to establish that the confession was signed by him, and upon this evidence the confession was submitted to the jury for the purpose of obtaining his conviction. Since, therefore, the confession was presented by the State to the jury as that of petitioner, we must determine whether the record shows that, if signed at all, the confession was obtained and used in such manner that petitioner's trial fell short of that procedural due process guaranteed by the Constitution.

Petitioner is an illiterate farmhand who was engaged, at the time of his arrest, upon a plantation about ten miles from Livingston, Texas. On the day following the crime with which he has been charged, he was called from the field in which he was picking cotton and was taken to the house of the brother-in-law of the prosecutrix, the victim of the crime, where fifteen or sixteen negroes of the vicinity were at the time in custody without warrants or the filing of charges. Taken to the county court house, and thence to the Polk County jail, petitioner was kept there six or seven days. According to his testimony, armed Texas Rangers on several successive nights took him handcuffed from the jail "up in the woods somewhere," whipped him, asked him each time about a confession and warned him not to speak to any one about the nightly trips to the woods. During the period of his arrest up to and including the signing of the alleged confession, petitioner had no lawyer, no charges were filed against him and he was out of touch with friends or relatives.

There were denials that petitioner was ever physically mistreated or abused. But the Rangers and a local peace officer, identified by petitioner as the officers who took

him on the night trips to the woods and there whipped him, did not specifically deny that he was taken out of jail, at night, and interrogated in the woods. This local peace officer wasn't sure "how many times" the prisoner was removed from jail, and one Ranger re-stated his testimony given at the first trial that he "took him out so many times" the exact number could not be recalled. The prisoner was taken out of jail, driven "out on the road" and then "out off of the road," as this Ranger testified, in order that the officers could talk to him and because the jail was crowded. In jail, the Sheriff put petitioner by himself and "kept watching him and talking to him."

Before carrying petitioner to Beaumont, where the alleged confession was taken, the Sheriff talked about an hour and a half with him. The Rangers who had been taking petitioner to the woods at night knew the county attorney was going to Beaumont to get a statement; they, too, went there and were in and out of the eighth floor room of the jail in Beaumont, with the elevator locked, where petitioner was interrogated from approximately 11: 00 P. M. to 3: 00 or 3: 30 A. M. The alleged confession was reduced to writing after 2 A. M. Immediately before it was taken down, the prisoner was repeatedly asked by the private prosecutor whether he was ready to confess. Petitioner then began to cry, and the typing of the confession, upon which the State's case substantially rested, was completed by the county attorney about daylight. Two citizens of Beaumont signed it as witnesses.

"Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." [4]

The State's petition for rehearing is

Denied.

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[4] *Chambers* v. *Florida*, 309 U. S. 227, 241; *Canty* v. *Alabama*, 309 U. S. 629.

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

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

No. 713. Argued April 26, 1940.—Decided May 27, 1940.

1. The power of the Interstate Commerce Commission under the Motor Carrier Act, 1935, § 204 (a), to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, is confined to those employees whose duties affect safety of operation. Pp. 546, 553.
2. When acceptance of the literal meaning of words in a statute leads to results which are absurd or futile or plainly at variance with the policy of the legislation, the legislative purpose will be followed. P. 543.
3. Even though, superficially, the meaning of statutory words appears plain, aids to their interpretation may be resorted to in pursuit of the purpose. P. 543.
4. To accept literally the word "employee" in § 204 (a) of the Motor Carrier Act, would place upon the Interstate Commerce Commission the function of regulating the qualifications of large numbers of employees whose duties do not affect safety of operation, contrary to the settled practice of Congress, evinced in other Acts, with respect to regulation of hours and qualifications of transportation employees, and contrary to the policy of most of the States, as shown by Acts in force when the federal Act was passed. P. 544.
5. Indication of any intention of Congress, by § 204 (a), to grant the Interstate Commerce Commission other than the customary power to secure safety, is absent from the legislative history of the Motor Carrier Act. P. 546.
6. The construction of § 204 (a) by the Interstate Commerce Commission and by the Wage and Hour Division of the Department of Labor, as relating solely to safety of operation, is of great weight. P. 549.

31 F. Supp. 35, reversed.

APPEAL from a decree of the District Court of three judges commanding the Interstate Commerce Commission to set aside an order by which it declined, for want of juris-

diction, to determine qualifications and maximum hours of service for all employees of contract and motor carriers subject to the Motor Carrier Act, and commanding it to take jurisdiction and proceed with such determination. The suit was brought against the United States and the Commission, under § 205 (h) of the Act, by the above-named Trucking Associations and five common carriers by motor. The Administrator of the Wage and Hour Division of the Department of Labor intervened on the side of the defense.

Mr. Thomas E. Harris, with whom *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Daniel W. Knowlton, Nelson Thomas, George A. McNulty, David A. Pine, Elmer B. Collins,* and *Frank Coleman* were on the brief, for appellants.

One of the primary purposes of the Act was the promotion and enhancement of safety of operation of all motor vehicles operated by motor carriers engaged in interstate and foreign commerce. It was solely to this end that Congress empowered the Interstate Commerce Commission to prescribe qualifications and maximum hours of service for employees of motor carriers.

The intent is shown by the legislative history of § 204 (a) (1) and (2), and is further revealed by analysis of other provisions of the Act. These point to "safety of operation" as the sole Congressional purpose. Federal statutes regulating hours of service in other fields of transportation, and state motor carrier statutes, in the light of which the meaning of the Act must be sought, indicate a legislative policy directed toward the end of "safety of operation." Finally, the fact that the regulatory power was conferred by the Act upon an agency expert in transportation matters alone, unattended by the legislative standards traditionally guiding the regulation of hours of

work, supports the view that Congress intended to limit the Commission's power to those employees whose activities affect safety of operation.

The purposes and the legislative history of the Fair Labor Standards Act afford additional support for the view that § 204 (a) (1) and (2) of the Act is restricted to those employees engaged in activities affecting safety of operation. The exemption provided by § 13 (b) (1) of the Fair Labor Standards Act with respect to those employees as to whom the Interstate Commerce Commission has power to prescribe qualifications and maximum hours of service was enacted upon the assumption that the Commission's power was limited to "safety" employees. Employees of motor carriers whose duties do not affect safety of operation are engaged in pursuits similar to those followed by millions of other employees within the scope of the Fair Labor Standards Act, and, consequently, more properly fall within the scope of that statute than of the Motor Carrier Act.

Mr. J. Ninian Beall, with whom *Mr. Albert F. Beasley* was on the brief, for appellees.

The Act contains a broad declaration of policy, and a comprehensive plan for the regulation of common and contract carriers by motor vehicle in interstate commerce. Section 202 declares the Congressional policy and confers jurisdiction upon the Commission. It declares a policy to include the fostering of sound economic conditions, the promotion of economical and efficient service, and the prevention of unfair or destructive competitive practices; and it vests in the Interstate Commerce Commission jurisdiction to regulate transportation by motor vehicle, the procurement thereof and the provision of facilities therefor.

The Commission is authorized, § 204, to "establish reasonable requirements" for (1) continuous and adequate service, (2) transportation of baggage and express, (3)

uniform systems of accounts, records and reports, (4) preservation of records, (5) qualifications and maximum hours of service of employees, and (6) safety of operations and equipment.

It is significant that the term "employees" is not limited, and that the only limitation upon the authorized requirements is that they be "reasonable." Thus the terms of § 204 (a) (1) and (2) apply with respect to all employees of common and contract carriers by motor vehicle; and, as no "reasonable requirement" could ever cause a harsh, oppressive or absurd result, there is no reason to construe the section to mean anything else.

The legislative history of the Act and related acts discloses a clear Congressional intention that the Commission shall regulate hours of service and qualifications for all purposes within the declaration of policy and legislative standards set forth in § 204, and that the Commission's jurisdiction shall be exclusive.

The nature of interstate transportation business makes it necessary that one administrative agency have power to regulate qualification and maximum hours of service for all business purposes, and the Commission is the only agency charged by Congress with the duty of executing its transportation policy.

There can be no divided jurisdiction with respect to the qualifications and hours of service of employees in their relations to any phase of interstate transportation by motor vehicle. But if the Fair Labor Standards Act applies, then state statutes or municipal ordinances more restrictive in terms are made effective. This would lead to an unconstitutional result, because authority would be delegated to States without any standards or policy declared.

Where the language is plain, there is no room for construction. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269.

No limitations are either expressed or implied.

MR. JUSTICE REED delivered the opinion of the Court.

This appeal requires determination of the power of the Interstate Commerce Commission under the Motor Carrier Act, 1935, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, other than employees whose duties affect safety of operation.

After detailed consideration, the Motor Carrier Act, 1935, was passed.[1] It followed generally the suggestion of form made by the Federal Coordinator of Transportation.[2] The difficulty and wide scope of the problems raised by the growth of the motor carrier industry were obvious. Congress sought to set out its purpose and the range of its action in a declaration of policy which covered the preservation and fostering of motor transportation in the public interest, tariffs, the coördination of motor carriage with other forms of transportation and coöperation with the several states in their efforts to systematize the industry.[3]

While efficient and economical movement in interstate commerce is obviously a major objective of the Act,[4] there are numerous provisions which make it clear that Congress intended to exercise its powers in the non-transpor-

[1] 49 Stat. 543.

[2] S. Doc. No. 152, 73rd Cong., 2d Sess., Regulation of Transportation Agencies, p. 350. See p. 25, for discussion of the preliminary steps of motor carrier regulation. Hearings on Regulation of Interstate Motor Carriers, H. R. 5262 and H. R. 6016, before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess.; Hearings on S. 1629, Senate Committee on Interstate Commerce, 74th Cong., 1st Sess.

[3] § 202; *Maurer* v. *Hamilton*, 309 U. S. 598.

[4] §§ 202, 216, 217, 218.

tation phases of motor carrier activity.[5] Safety of operation was constantly before the committees and Congress in their study of the situation.[6]

The pertinent portions of the section of the Act immediately under discussion read as follows:

"SEC. 204 (a). It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment . . ." Shortly after the approval of the Act, the Commission on its own motion undertook to and did fix maximum hours

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[5] Services, § 203 (a) (19); brokers, § 203 (a) (18), § 204 (a) (4); security issues, § 214; insurance, § 215; accounts, records and reports, § 220.

[6] *Maurer* v. *Hamilton, supra;* Regulation of Transportation Agencies, *supra,* Highway and Safety Regulations, p. 32; Hearings on S. 1629, *supra,* pp. 122–123, 184.

of service for "employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." [7] A few months after this determination, the Fair Labor Standards Act was enacted.[8] Section 7 of this act limits the work-week at the normal rate of pay of all employees subject to its terms and § 18 makes the maximum hours of the Fair Labor Standards Act subject to further reduction by applicable federal or state law or municipal ordinances. There were certain employees excepted, however, from these regulations by § 13 (b). It reads as follows:

"SEC. 13 (b). The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ."

This exemption brought sharply into focus the coverage of employees by Motor Carrier Act, § 204 (a). Clerical, storage and other non-transportation workers are under this or the Fair Labor Standards Act, dependent upon the sweep of the word employee in this act. The Commission again examined the question of its jurisdiction and in Ex parte No. MC–28 [9] again reached the conclusion that its power under "section 204 (a) (1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees . . . whose activities affect the safety of operation." It added: "The provisions of section 202 evince a clear intent of Congress to limit our jurisdiction to regulating the motor-carrier industry as a part of the transportation system of the nation. To extend that regulation to features which are not char-

[7] Ex parte No. MC–2, 3 M. C. C. 665, 667.

[8] 52 Stat. 1060.

[9] 13 M. C. C. 481, 488.

acteristic of transportation or inherent in that industry strikes us as an enlargement of our jurisdiction unwarranted by any express or implied provision in the act, which vests in us all the powers we have." [10] The Wage and Hour Division of the Department of Labor arrived at the same result in an interpretation.[11]

Shortly thereafter appellees, an association of truckmen and various common carriers by motor, filed a petition with the Commission in the present case seeking an exercise of the Commission's jurisdiction under § 204 (a) to fix reasonable requirements "with respect to qualifications and maximum hours of service of all employees of common and contract carriers, except employees whose duties are related to safety of operations; (3) to disregard its report and order in Ex parte MC–28." [12] The Commission reaffirmed its position and denied the petition. The appellees petitioned a three-judge district court to compel the Commission to take jurisdiction and consider the establishment of qualifications and hours of service of all employees of common and contract carriers by motor vehicle.[13] The Administrator of the Wage and Hour Division was permitted to intervene.[14] The district court reversed the Commission, set aside its order and directed it to take jurisdiction of the appellees' petition. 31 F. Supp. 35. A direct appeal to this Court was granted.[15]

In the broad domain of social legislation few problems are enmeshed with the difficulties that surround a de-

[10] 13 M. C. C. 481, 489.

[11] Interpretative Bulletin No. 9, Wage & Hour Manual (1940) 168.

[12] § 204 (a) (1), (6) and (7) (e); Rules of Practice I. C. C., April 1, 1936, Rule XV.

[13] § 205 (h), Motor Carrier Act; Urgent Deficiencies Act, 38 Stat. 220, 28 U. S. C. §§ 47, 47a.

[14] Cf. *Securities & Exchange Comm'n* v. *U. S. Realty & Improvement Co., ante,* p. 434.

[15] Judicial Code § 238; 38 Stat. 208, 219–20; 49 Stat. 543, § 205 (h).

termination of what qualifications an employee shall have and how long his hours of work may be. Upon the proper adjustment of these factors within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected as well as the employment and efficiency of the workers. The Motor Carrier Act lays little emphasis upon the clause we are called upon now to construe, "qualifications and maximum hours of service of employees." None of the words are defined by the section, 203, devoted to the explanation of the meaning of the words used in the Act. They are a part of an elaborate enactment drawn and passed in an attempt to adjust a new and growing transportation service to the needs of the public. To find their content, they must be viewed in their setting.

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.[16] There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in

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[16] Story, J., in *Minor* v. *Mechanics' Bank*, 1 Peters 46, 64: "But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment." *Pennington* v. *Coxe*, 2 Cranch 33, 59; *James* v. *Milwaukee*, 16 Wall. 159, 161; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272, 301; *White* v. *United States*, 191 U. S. 545, 551; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 239; *Gulf States Steel Co.* v. *United States*, 287 U. S. 32, 45; *Royal Indemnity Co.* v. *American Bond & M. Co.*, 289 U. S. 165, 169; *Lincoln* v. *Ricketts*, 297 U. S. 373, 376; *Foster* v. *United States*, 303 U. S. 118, 120.

a law drawn to meet many needs of a major occupation.[17]

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.[18] When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.[19] Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" [20] this Court has followed that purpose, rather than the literal words.[21] When aid to construction of

[17] Cf. Davies, The Interpretation of Statutes in the Light of their Policy by the English Courts, 35 Columbia Law Review 519; Radin, Statutory Interpretation, 43 Harvard Law Review 863; Landis, A Note on "Statutory Interpretation," 43 Harvard Law Review 886; R. Powell, Construction of Written Instruments, 14 Indiana Law Journal 199, 309, 324; Jones, The Plain Meaning Rule, 25 Washington University Law Quarterly 2.

[18] *Taft* v. *Commissioner,* 304 U. S. 351, 359; *Helvering* v. *City Bank Co.,* 296 U. S. 85, 89; *Wilbur* v. *United States,* 284 U. S. 231, 237; *Crooks* v. *Harrelson,* 282 U. S. 55, 60; *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 278; *Van Camp & Sons* v. *American Can Co.,* 278 U. S. 245, 253; *Caminetti* v. *United States,* 242 U. S. 470, 490; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, 199.

[19] *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U. S. 315, 332; *Sorrells* v. *United States,* 287 U. S. 435, 446; *United States* v. *Ryan,* 284 U. S. 167, 176.

[20] *Ozawa* v. *United States,* 260 U. S. 178, 194.

[21] *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 126; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 14; *Popovici* v. *Agler,* 280 U. S. 379; *Smiley* v. *Holm,* 285 U. S. 355; *Williams* v. *United States,* 289 U. S. 553; *Maurer* v. *Hamilton, supra,* pp. 612, 615.

the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use,[22] however clear the words may appear on "superficial examination." [23] The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.[24] Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown." [25]

The language here under consideration, if construed as appellees contend, gives to the Commission a power of regulation as to qualifications and hours of employees quite distinct from the settled practice of Congress. That policy has been consistent in legislating for such regulation of transportation employees in matters of movement

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[22] *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48.

[23] *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 465.

[24] Cf. Committee on Ministers' Powers Report (Cmd. 4060, 1932), p. 135.

[25] *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 396; *United States* v. *Arizona,* 295 U. S. 174, 188, 191; *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 394; *Ozawa* v. *United States, supra.*

and safety only. The Hours of Service Act [26] imposes restrictions on the hours of labor of employees "actually engaged in or connected with the movement of any train." The Seamen's Act [27] limits employee regulations under it to members of ships' crews. The Civil Aeronautics Authority has authority over hours of service of employees "in the interest of safety." [28] It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act "forty states had regulatory measures relating to the hours of service of employees" and every one "applied exclusively to drivers or helpers on the vehicles." In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division, it cannot be said that the word "employee" as used in § 204 (a) is so clear as to the workmen it embraces that we would accept its broadest meaning. The word, of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.[29]

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[26] 34 Stat. 1415.

[27] 38 Stat. 1164, 1169, 1170–84.

[28] 52 Stat. 1007, § 601 (a) (5). This authority has apparently been exercised only as to pilots and copilots. Dept. of Commerce, Bureau of Air Commerce, Civil Air Regulations, No. 61, Scheduled Airline Rules (Interstate), as amended to May 31, 1938, §§ 61.518–61.5185.

[29] That the word "employees" is not treated by Congress as a word of art having a definite meaning is apparent from an examination of recent legislation. Thus the Social Security Act specifically provides that "The term 'employee' includes an officer of a corporation," (42 U. S. C. § 1301 (a) (6)) while the Fair Labor Standards Act specifically exempts "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity. . . ."

We are especially hesitant to conclude that Congress intended to grant the Commission other than the customary power to secure safety in view of the absence in the

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(29 U. S. C. § 213 (a) (1)). In the Railroad Unemployment Insurance Act, Congress expressly recognized the variable meaning of employee even when defined at length and used only in a single act: ". . . 'employee' (except when used in phrases establishing a different meaning) means . . ." (45 U. S. C. § 351 (d)). In a statute permitting heads of departments to settle claims up to $1,000 arising from the negligence of "employees of the Government," Congress gives recognition to the fact that the term is not on its face all-inclusive by providing: " 'Employee' shall include enlisted men in the Army, Navy and Marine Corps." (31 U. S. C. §§ 215, 216.) See also the varying definitions of "employees" in the following statutes: Railroad Retirement Act, 45 U. S. C. § 228a (b) (c); Interstate Commerce Act, 49 U. S. C. § 1 (7); Emergency Railroad Transportation Act, 49 U. S. C. § 251 (f); Communications Act, 47 U. S. C. § 210; National Labor Relations Act, 29 U. S. C. § 152 (3); Maritime Labor Relations Act, 46 U. S. C. § 1253 (c); Classification Act of 1923 (Civil Service), 5 U. S. C. § 662; U. S. Employees' Compensation Act, 5 U. S. C. § 790; Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902; Boiler Inspection Act, 45 U. S. C. § 22; Railway Labor Act, 45 U. S. C. § 151 (5).

Where the term "employee" has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520 (consulting engineers performing services for states, municipalities, and water districts held not to be "employees" under statute exempting "officers and employees under . . . any State, . . . or any local subdivision thereof" from the income tax); *Waskey* v. *Hammer*, 223 U. S. 85 (mineral surveyor, appointed by the surveyor but paid by private persons, is within prohibition of statute prohibiting "employés in the General Land Office" from purchasing public land); *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept.*, 93 F. 2d 340 (furloughed railroad workers entitled to priority in rehiring held "employees" within meaning of Railway Labor Act), discussed in 51 Harv. L. Rev. 1299; *Latta* v. *Lonsdale*, 107 F. 585 (attorney not "employee" within meaning of statute giving "employees" preference against assets of insolvent corporations); *Vane* v. *Newcombe*, 132 U. S. 220 (contractor who built lines for telegraph company not "em-

legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers over all employees. The clause in question was not contained in the bill as introduced.[30] Nor was it in the Coordinator's draft.[31] It was presented on the Senate floor as a committee amendment following a suggestion of the Chairman of the Legislative Committee of the Commission, Mr. McManamy.[32] The committee reports

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ployee" within statute giving employees liens against corporate property); *Malcomson* v. *Wappoo Mills,* 86 F. 192 (same); cf. *United States* v. *Griffith,* 55 App. D. C. 123; 2 F. 2d 925 (War Department clerk receiving disability compensation held employee of government within common law rule of the District of Columbia that employee of a litigant cannot be a member of jury); see also, *Hull* v. *Philadelphia & Reading Ry. Co.,* 252 U. S. 475; *Louisville, E. & St. L. R. Co.* v. *Wilson,* 138 U. S. 501; *Campbell* v. *Commissioner,* 87 F. 2d 128; *Burnet* v. *Jones,* 50 F. 2d 14; *Burnet* v. *McDonough,* 46 F. 2d 944.

[30] S. 1629, 74th Cong., 1st Sess.

[31] S. Doc. 152, 73rd Cong., 2nd Sess., p. 352, § 304 (a) (1).

[32] See the testimony of Mr. McManamy in Hearings on S. 1629 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess., pp. 122, 123:

"The regulation of the hours of service of bus and truck operators is far more important from a safety standpoint than the regulation of the hours of service of railroad employees because the danger is greater. . . . This could be accomplished by inserting in section 304 (a) (1) and (2), lines 9 and 15, page 8, following the word 'records' in both lines, the words which appear in S. 394, as follows: 'qualifications and maximum hours of service of employees.'"

The clause in question came from § 2 (a) (1) of S. 394, 74th Cong., 1st Sess., a subsection otherwise substantially like the corresponding subsection in S. 1629.

Senator Wheeler, Chairman of the Committee on Interstate Commerce and sponsor of the bill, explained the provision on the floor of the Senate: ". . . the committee amended paragraphs (1) and (2) [of § 204] to confer power on the Commission to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of common and contract carriers, . . .

and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact the evidence points the other way. The Senate Committee's report explained the provisions of § 204 (a) (1), (2) as giving the commission authority over common and contract carriers similar to that given over private carriers by § 204 (a) (3).[33] The Chairman of the Senate Committee expressed the same thought while explaining the provisions on the floor of the Senate.[34] When suggesting the addition of the clause, the Chairman of the Commission's Legislative Committee said: ". . . it relates to safety." [35] In the House the member in charge of the bill characterized the provisions as tending "greatly to promote careful operation for safety on the highways," and spoke with assurance of the Commission's ability to "formulate a set of reasonable rules . . . including therein maximum labor-

This suggestion came to us, I think, from the chairman of the legislative committee of the Interstate Commerce Commission. . . .

"In order to make the highways more safe, and so that common and contract carriers may not be unduly prejudiced in their competition with peddler trucks and other private operators of motor trucks, a provision was added in subparagraph 3 giving the Commission authority to establish similar requirements with respect to the qualifications and hours of service of the employees of such operators. . . ." 79 Cong. Rec. 5652.

[33] S. Rep. 482, 74th Cong., 1st Sess. The report stated: "No regulation is proposed for private carriers except that an amendment adopted in committee authorizes the Commission to regulate the 'qualifications and maximum hours of service of employees and safety of operation and equipment' of private carriers of property by motor vehicle in the event that the Commission determines there is need for such regulation. Other amendments adopted by the committee confer like authority upon the Commission with respect to common and contract carriers." Safety of operation and equipment was in the original bill.

[34] See last paragraph of remarks of Senator Wheeler, note 32 *supra*.

[35] Hearings, note 32 *supra*.

hours service on the highway." [36] And in the report of the House Committee a member set out separate views criticizing the delegation of discretion to the Commission and proposing an amendment providing for an eight-hour day for "any employee engaged in the operation of such motor vehicle." [37]

The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous contruction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." [38] Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.[39]

It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation. The first interpretation was made on December 29, 1937, when the Commission stated: " . . . until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." [40] This expression was half a year old when Congress enacted the Fair Labor Standards Act with the exemption of § 13 (b) (1). Seemingly the

[36] 79 Cong. Rec. 12206.

[37] H. R. Rep. No. 1645, 74th Cong., 1st Sess.

[38] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

[39] *Hassett* v. *Welch*, 303 U. S. 303, 310.

[40] Ex parte No. MC–2, 3 M. C. C. 665, 667.

Senate at least was aware of the Commission's investigation of its powers even before its interpretation was announced.[41] Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act.

It is contended by appellees that the difference in language between subsections (1) and (2) and subsection (3) is indicative of a congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while inserting broader authority in (1) and (2) for employees of common and contract carriers. Appellants answer that the difference in language is explained by the difference in the powers. As (1) and (2) give powers beyond safety for service, goods, accounts and records, language limiting those subsections to safety would be inapt.

Appellees call our attention to certain pending legislation as sustaining their view of the congressional purpose in enacting the Motor Carrier Act. We do not think it can be said that the action of the Senate and House of Representatives on this pending transportation legislation throws much light on the policy of Congress or the meaning attributed by that body to § 204 (a). Aside from the very pertinent fact that the legislation is still unadopted, the legislative history up to now points only to a hesitation to determine a controversy as to the meaning of the present Motor Carrier Act, pending a judicial determination.[42]

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[41] 81 Cong. Rec. 7875.

[42] The pending legislation is S. 2009, 76th Cong., 1st Sess., 84 Cong. Rec. 3509. As to the point here under discussion, the report of the Senate Committee said: "Paragraph (1) of section 34 of the bill is based on the provisions of subparagraphs (1), (2), and (3) of section 204 (a) of the Motor Carrier Act. In the original draft, there was inserted at the beginning of the paragraph the clause 'in order to promote safety of operations,' thus making clear that the Commis-

One amendment made to the then pending Motor Carrier Act has relevance to our inquiry. Section 203 (b) reads as set out in the note below.[43] The words, "except

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sion's power to regulate qualifications and maximum hours of service of employees is confined to those who have anything to do with safety of operation. This is a question with respect to which considerable doubt seems to have arisen under the wording of the present law. Upon the strenuous objection of the truckers claiming conflict between this law and the Fair Labor Standards Act, the bill [i. e., the committee amendment] restores the law to the present provisions of the Motor Carrier Act." S. Rep. No. 433, 76th Cong., 1st Sess., p. 24. The bill passed the Senate. The House bill left § 204 (a) (1), (2) and (3) of the present act unchanged. 84 Cong. Rec. 9459; H. R. Rep. No. 1217, 76th Cong., 1st Sess., 84 Cong. Rec. 10125. While the bills were in conference the Chairman of the Legislative Committee of the Interstate Commerce Commission sent to the chairmen of the House and Senate Committees a letter on the House and Senate bills which suggested that both bills explicitly limit the Commission's jurisdiction over qualifications and hours of service of employees to considerations of safety. The letter stated: "While the subsection [in the Senate bill] follows the existing language of section 204 . . ., a controversy has arisen in regard to the meaning of that language. . . . This controversy has now reached the Supreme Court. We think it may well be determined in this new legislation. In our judgment, if restrictions on hours of labor for social and economic reasons are to be imposed, this should be done by Congress, and no duty in that respect should be delegated to the Commission, which has no experience which particularly fits it for the performance of such a duty. Our authority over qualifications and hours of service of employees should, therefore, be confined to the needs of safety in operation. . . ." On April 26, 1940, the House conferees reported to the House a compromise bill agreed on by the conference committee which left § 204 (a) (1), (2), and (3) of the Motor Carrier Act unamended. 86 Cong. Rec. 7847; H. R. Rep. No. 2016, 76th Cong., 3d Sess. On May 9, 1940, the House because of disagreement with sections of this bill not here relevant voted to recommit the bill to the conference committee. 86 Cong. Rec. 8986.

[43] "(b) Nothing in this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* shall be construed to include (1) motor vehicles employed solely in transporting

the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of

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school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each

operation or standards of equipment," italicized in the note, were added by amendment in the House after the passage of S. 1629 in the Senate with the addition of the disputed clause to § 204 (a) (1) and (2).[44] It is evident that the exempted vehicles and operators include common, contract and private carriers. It seems equally evident that where these vehicles or operators were common or contract carriers, it was not intended by Congress to give the Commission power to regulate the qualifications and hours of service of employees, other than those concerned with the safety of operations.

Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in § 204 (a) (1) and (2) is limited to those employees whose activities affect the safety of operation. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others. The decree of the district court is accordingly reversed and it is directed to dismiss the complaint of the appellees.

Reversed.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE, and MR. JUSTICE ROBERTS are of opinion that the decree should be affirmed for the reasons stated in the opinion of the district court, 31 F. Supp. 35.

State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

[44] H. R. Rep. No. 1645, 74th Cong., 1st Sess.

UNITED STATES *v.* DICKERSON.

CERTIORARI TO THE COURT OF CLAIMS.

No. 705. Argued April 26, 1940.—Decided May 27, 1940.

1. A proviso appended to an appropriation in § 402 of Public Resolution 122, June 21, 1938, declared "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "re-enlistments made during the fiscal year ending June 30, 1939, notwithstanding applicable portions of sections 9 and 10" of the basic military pay act of June 10, 1922. *Held,* in view of its legislative history, that the effect of the proviso was not merely to restrict the funds available, but to suspend the right to re-enlistment allowances during the fiscal year specified. P. 555.
2. There should be a considered weighing of every relevant aid to construction, in determining the meaning of an Act of Congress. P. 562.

89 Ct. Cls. 520, reversed.

CERTIORARI, 309 U. S. 647, to review a judgment sustaining the claim of a soldier for a re-enlistment allowance.

Assistant Attorney General Shea, with whom *Solicitor General Biddle* and *Messrs. Melvin H. Siegel* and *Paul A. Sweeney* were on the brief, for the United States.

Mr. Herman J. Galloway, with whom *Messrs. George R. Shields, John W. Gaskins,* and *Fred W. Shields* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The question is whether respondent, Dickerson, may recover a judgment against the United States upon a cause of action founded upon § 9 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 629–630.

Section 9 provides that after the 1st of July, 1922, an enlistment allowance shall be paid "to every honorably

discharged enlisted man . . . who re-enlists within a period of three months from the date of his discharge." Respondent, who was honorably discharged upon the termination of an enlisted period ending on the 21st of July, 1938, re-enlisted on the following day, the 22nd, for a period of three years, but was not paid an enlistment allowance. He thereupon brought this action in the Court of Claims. It is conceded that § 9, if not repealed or suspended at the date of his re-enlistment, would entitle him to the sum of seventy-five dollars.

The Government opposed the action before the Court of Claims on the ground that § 402 of Public Resolution No. 122, June 21, 1938, c. 554, 52 Stat. 809, 818–819, suspended the allowance for re-enlistment during the fiscal year ending June 30, 1939. Section 402 contains a proviso, appended to an appropriation for the Rural Electrification Administration, that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "re-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10" of the Act of June 10, 1922.

The Court of Claims entered judgment for respondent on the ground that § 402, while it restricted the funds available for payment of the allowance, did not suspend or repeal § 9. 89 Ct. Cls. 520. Because of the importance of the issue in the administration of the revenues, we granted certiorari. 309 U. S. 647.

There can be no doubt that Congress could suspend or repeal the authorization contained in § 9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise. *United States* v. *Mitchell,* 109 U. S. 146, 150; *Mathews* v. *United States,* 123 U. S. 182; *Dunwoody* v. *United States,* 143 U. S. 578; *Belknap*

v. *United States,* 150 U. S. 588, 593; *United States* v. *Vulte,* 233 U. S. 509, 515. See *United States v. Langston,* 118 U. S. 389. The question remains whether it did so during the fiscal year ending on the 30th of June, 1939.

Section 9 remained in full force and effect during the eleven fiscal years ending on the 30th of June, 1923 to 1933, after which date it was suspended during the ensuing four fiscal years by a provision inserted in various appropriation acts. Section 18 of the Economy Act of March 3, 1933, c. 212, 47 Stat. 1489, 1519, provided that "So much of sections 9 and 10 of the Act . . . approved June 10, 1922 . . . as provides for the payment of enlistment allowances to enlisted men for re-enlistment within a period of three months from date of discharge is hereby suspended as to re-enlistments made during the fiscal year ending June 30, 1934." This provision, which concededly suspended the authorization for the enlistment allowance, was continued in full force and effect for the fiscal years ending on the 30th of June, 1935, 1936 and 1937, by its insertion in the Economy Provisions of the Independent Offices Appropriation Act for the fiscal year 1935 and in the Treasury-Post Office Appropriation Acts for the fiscal years 1936 and 1937.[1]

The Second Deficiency Appropriation Bill of May 28, 1937, c. 277, 50 Stat. 213, 232, also contained a provision affecting the enlistment allowance, but the form of words used was changed. That Act as passed by Congress provided that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of enlistment allowance to enlisted men for re-enlistment within a period of three months from date of discharge as to re-enlistments

[1] c. 102, 48 Stat. 509, 523; c. 110, 49 Stat. 218, 226–227; c. 725, 49 Stat. 1827, 1837.

made during the fiscal year ending June 30, 1938, notwithstanding the applicable provisions of sections 9 and 10 of the Act" approved June 10, 1922. The identical provision, with the exception of the dates, was appended as a proviso to § 402 of Public Resolution 122, copied above, and was made applicable during the fiscal year ending on the 30th of June, 1939.

The provision inserted in the Second Deficiency Appropriation Bill for 1937 was introduced on the floor of the Senate as an amendment by Senator Byrnes. In response to questions concerning the amendment, the Senator stated (81 Cong. Rec. 4426):

". . . the language of the amendment has been carried ordinarily in the Treasury and Post Office Appropriation Bill, but was not carried in that appropriation bill this year, and is therefore proposed to be included in the bill now before us.

. . . . . .

The effect of it is simply to carry the same limitation that has been carried for years in the appropriation bills.

. . . . . .

Its purpose is to continue the appropriation situation that has existed for years, so that no bounty shall be paid for re-enlistment in the military and other uniformed services."

The amendment was thereupon adopted in the Senate without recorded opposition, and was sent to conference. The House managers, in reporting the amendment to the House, described it as "Continuing during the fiscal year 1938 the suspension of the re-enlistment gratuity for enlisted personnel of the Army, Navy, Marine Corps, and Coast Guard." 81 Cong. Rec. 5084. The course of the debate amply discloses that the House regarded the amendment as continuing during the fiscal year 1938 the same restriction on the enlistment allowance as the pro-

vision inserted in earlier appropriation bills.[2] It was then adopted by the House. 81 Cong. Rec. 5091.

The identical provision (except as to the dates), eventually appended to § 402 of Public Resolution 122, was

[2] Mr. Scott, one of the chief speakers against the amendment, stated (81 Cong. Rec. 5089): "In 1933 an amendment went into the Treasury-Post Office appropriation bill taking away or suspending this re-enlistment bonus. . . . The provision was continued by inserting it in the Treasury-Post Office appropriation bill each year from 1933 until this year. It was in the Treasury-Post Office appropriation bill that was brought into the House for consideration this year. I raised a point of order against the provision on the ground it was legislation on an appropriation bill, and that it did not come under the Holman rule. The Chairman of the Committee sustained the point of order.

"The bill went to the Senate and the suspension was not placed in the bill. The second deficiency appropriation bill passed the House and went over to the Senate. This amendment was placed in there. It was clearly subject to a point of order in the Senate, but the point was not made against it.

"It now comes back to the House for a separate vote as an amendment. If we vote for this amendment it means the further suspension of the re-enlistment bonus to the enlisted personnel of the Army, Navy, Marine Corps, Coast and Geodetic Survey, and Coast Guard."

Mr. Woodrum, who took charge of explaining the Conference Report to the House, stated (81 Cong. Rec. 5090): "In the first place, I wish to emphasize the fact that the language in the amendment only asks to continue this legislation for the fiscal year 1938. . . . We ask in this amendment that during the next fiscal year this re-enlistment bonus be not allowed; and I may say, Mr. Speaker, this is not taking one solitary thing away from any enlisted man in the Army, Navy, or Marine Corps. He is getting exactly the pay that was promised him, and every member of the Army, the Navy, and the Marine Corps who enlisted during the last 3 years enlisted with the knowledge there was no re-enlistment bonus going to be paid to him if he did re-enlist.

. . . . . .

". . . they know now what they knew when they re-enlisted, that the time has not yet come when the Congress can offer a bonus to people working for the Government."

introduced as an amendment to the Second Deficiency Appropriation Bill for the fiscal year 1938 (H. R. 10851, 75th Cong., 3d Sess.), then pending in the House. 83 Cong. Rec. 8522–8569. A point of order was made against the amendment on the ground that it was legislation in an appropriation bill; Representative Woodrum, who had charge of the amendment, admitted that the point of order was good, and the Chair sustained it. 83 Cong. Rec. 8567. The amendment was then offered in the Senate, where the Presiding Officer also sustained a point of order that it was legislation in an appropriation bill.[3] 83 Cong. Rec. 9189.

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[3] Senator Byrnes, who had offered the amendment on behalf of the Appropriations Committee, then engaged in the following colloquy with Senator Walsh (83 Cong. Rec. 9189–9190):

Mr. BYRNES. . . . I will say to the Senator from Massachusetts, in the light of the ruling of the Chair, that before the Congress adjourns I shall certainly make an effort to do something to bring about a change, so that there will not be dissatisfaction among the various services. If the bounties were all restored, millions of dollars would be involved.

Mr. WALSH. Is not the situation that under existing law there is now an authorization of funds to be paid to those who re-enlist in the Army, Navy, Marine Corps, and Public Health Service? Is not that the situation?

Mr. BYRNES. There is authority to pay the bounty. It has not been paid for 6 years.

Mr. WALSH. No funds are available.

Mr. BYRNES. No funds are available.

Mr. WALSH. The House Bill did seek to provide funds for re-enlistment bounties in the Army. Of course, it would be highly discriminatory to have re-enlistment bounties paid to those who re-enlist in the Army, and none paid to those who re-enlist in the other branches of the military service.

Mr. BYRNES. It would certainly be discriminatory, and cause great dissatisfaction among the services.

Mr. WALSH. Is the bill now in such shape that no funds are provided for re-enlistment bounties for any branch of the military service?

The provision was thereafter included by the conference committee as a proviso to § 402 of H. J. Res. 679 (which later became Pub. Res. No. 122). See 83 Cong. Rec. 9512, 9677. It was passed by the Senate without much debate.[4] In the House, the debate disclosed that the amendment had the same purpose and effect as the provision inserted in the various appropriation bills for the preceding years. Representative Woodrum, in presenting the amendment to the House, described it as follows (83 Cong. Rec. 9677):

". . . we are providing a further inhibition for 1 year against payment of the re-enlistment allowances in the military and naval services.

Mr. BYRNES. That is correct.

Mr. WALSH. What the Senator sought to do was to have Congress declare as its policy that it did not intend in the future to pay such re-enlistment bounties, so as to prevent possible claims; is not that true?

Mr. BYRNES. Mr. President, the sole position of the Committee is that no funds being provided, we should not leave open the opportunity for numbers of persons to file claims in the Court of Claims in behalf of men who re-enlist, with the result that a year from now, or 2 years from now, some men would receive the re-enlistment bounty or some part of it, after the attorneys received their fees.

Mr. WALSH. I think I understand.

[4] The debate in the Senate was as follows (83 Cong. Rec. 9512):

Mr. WALSH. Mr. President, I understand that the bill as it passed the House contained a provision for the use of funds from this appropriation for re-enlistments in the Army, and no provisions were made for the use of any of the appropriation for the payment of re-enlistments in the Navy, the Marine Corps, or the Coast Guard.

Mr. ADAMS. That is correct.

Mr. WALSH. The purpose of the amendment is to eliminate the provision for payment in case of re-enlistments in the Army because it is discriminatory against the other services and civil forces, which formerly received re-enlistment pay and allowances.

Mr. ADAMS. That is correct, and it is to open the way for statutory clearing of the whole situation.

"No re-enlistment allowances have been paid for the past 5 fiscal years in any of the services, and in the absence of permanent law stopping it, the inhibition has been shuttled about in economy bills and appropriation bills at one time or another. We have not paid them for 5 years, and the latter part of this amendment now before the House is a Senate amendment which discontinues for another year the payment of the re-enlistment allowances."

The opponents of the amendment, while questioning its wisdom, were in general agreement with its sponsors concerning its purpose and effect. 83 Cong. Rec. 9678–9679. The amendment was then adopted by the House. 83 Cong. Rec. 9679.

We are of opinion that Congress intended in § 402 to suspend the enlistment allowance authorized by § 9 during the fiscal year ending on the 30th of June, 1939. The legislative history, summarized above, discloses that Congress intended the legislation concerning the allowance during the fiscal years 1938 and 1939 as a continuation of the suspension enacted in each of the four preceding years. The adoption in the act of May 28, 1937, of different terminology might in other circumstances indicate an intent to change the object of the legislation. Compare *Brewster* v. *Gage,* 280 U. S. 327, 337; *Crawford* v. *Burke,* 195 U. S. 176, 190; *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 448. But the drawing of such an inference is a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence where, as here, it exists. Compare *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48.

The respondent contends that the words of § 402 are plain and unambiguous and that other aids to construction may not be utilized. It is sufficient answer to deny that such words when used in an appropriation bill are

words of art or have a settled meaning. See *United States* v. *Perry,* 50 F. 743, 748 (C. C. A. 8th).[5] The very legislative materials which respondent would exclude refute his assumption. It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co.* v. *United States, supra,* at 48. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.[6] These lead to the conclusion that the judgment of the court below must be

Reversed.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS are of opinion that the judgment should be affirmed on the views expressed by the Court of Claims.

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[5] Compare Luce, *Legislative Problems* (1935), pp. 421 *et seq.,* 432.

[6] "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . ." *United States* v. *Fisher,* 2 Cranch 358, 386.

Counsel for Parties.

ARKANSAS *v.* TENNESSEE.

No. 9, Original. Argued April 23, 1940.—Decided June 3, 1940.

1. Land on the Arkansas side of the Mississippi River was cut off by a sudden change of the river's course, in 1821, and became attached to the Tennessee side. *Held:*
   (1) That it subsequently became a part of Tennessee as the result of long and continuous exercise by that State of dominion and jurisdiction over it with the acquiescence of Arkansas. P. 566.
   (2) That an addition to this area, caused by gradual accretion from the river, was also subject to the Tennessee jurisdiction. P. 572.
2. The principle of prescription and acquiescence is applicable in the determination of boundaries between States. P. 569.
3. The rule of the *thalweg* rests upon equitable considerations and is intended to safeguard to each State equality of access and right of navigation in the stream. The rule yields to the doctrine that a boundary is unaltered by an avulsion; and in such case, in the absence of prescription, the boundary no longer follows the *thalweg* but remains at the original line. P. 571.
4. The doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over the area affected. P. 571.
5. The question whether a State has acquired political jurisdiction by prescription is not affected by the circumstance that the title to the area is in the United States, such title not being disputed. P. 571.

Exceptions overruled; report confirmed; and decree ordered.

Upon exceptions to the report of a Special Master, appointed in an original boundary suit (301 U. S. 666) between the States of Arkansas and Tennessee.

Mr. D. Fred Taylor, Jr., with whom *Messrs. Jack Holt,* Attorney General of Arkansas, *A. F. Barham, Harvey G. Combs,* and *D. F. Taylor* were on the brief, for plaintiff.

Messrs. Nat Tipton and *C. M. Buck,* with whom *Messrs. Roy H. Beeler,* Attorney General of Tennessee, and *Edwin F. Hunt* were on the brief, for defendant.

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

The State of Arkansas brought this suit against the State of Tennessee seeking a decree determining the true boundary between the States at certain points and confirming the jurisdiction and sovereignty of the State of Arkansas over the described territory.

The bill of complaint set forth two counts. The first count presented the contentions of Arkansas as to the boundary in relation to an area known as "Needham's Island," later as "Cutoff Island" or "Moss Island," and to a contiguous formation known as "Blue Grass Towhead." This is the only area which remains in controversy, as the parties have agreed by stipulation upon the boundary line to be fixed in relation to the land described in the second count.

Tennessee answered, contesting the claims of Arkansas and asserting by cross-bill its jurisdiction and sovereignty over the territory in question.

The issues were referred to Monte M. Lemann as Special Master. 301 U. S. 666. The Master has filed a careful and comprehensive report recommending a decree in favor of Tennessee as to the area described in count one, and in accordance with the stipulation as to that described in count two. The case has been heard upon that report and the exceptions filed by Arkansas.

The Master set forth the following facts as agreed upon by the parties:

"Prior to 1821, the land in controversy in this suit was on the west bank of the Mississippi River and the main channel of the river flowed to the east thereof. At the location involved in this suit, the river at that time flowed around a twelve mile bend caused by the extension of a peninsula into the river from the western shore. In 1821 an avulsion took place in the course of the river

occasioned by the waters cutting across the neck of this peninsula at a point where it had become only half a mile wide due to caving of the river banks. At the present time the main channel of the Mississippi River flows to the west of the lands in controversy and has so flowed for many years prior to the present. The original channel of the river is now, and has for many years been, filled up so that the island originally created by the avulsion is now, and has for many years been, physically connected to, and a part of, the eastern shore of the river."

After a review of the evidence upon points in dispute, the Master made a summary of his findings and conclusions as follows:

"(1) The Territory of Arkansas was organized by Act of March 2, 1819, 3 Stat. 493, being carved out of the Territory of Missouri, which was a part of the Louisiana Purchase, and the eastern boundary of the Territory was the middle of the main channel of the Mississippi River.

"(2) In 1819 the lands in controversy were on the west side of the main channel of the river and were part of the Territory of Arkansas.

"(3) The avulsion at Needham's Cutoff occurred in 1821.

"(4) The main channel of the river flowed through the cutoff prior to 1836.

"(5) Arkansas was admitted into the Union on June 15, 1836, 5 Stat. 50, and its eastern boundary was fixed at the middle of the main channel of the Mississippi River.

"(6) On June 15, 1836, when Arkansas was admitted into the Union, the lands in controversy were on the east side of the main channel of the Mississippi River.

"(7) The avulsion did not change the boundary line theretofore existing between Tennessee and the Territory of Arkansas.

"(8) The Act of Congress of June 15, 1836, admitting Arkansas into the Union, did not have the effect of excluding from the boundaries of the State of Arkansas lands which immediately prior to the adoption of the Act were within the Territory of Arkansas.

"(9) Tennessee was admitted into the Union on June 1, 1796, 1 Stat. 491, c. 47. Its western boundary was the middle of the main channel of the Mississippi River. The lands in controversy were in 1796 on the west of the main channel of the river.

"(10) The Act of June 15, 1836, 5 Stat. 50, admitting Arkansas into the Union, did not have the effect of enlarging the boundaries of Tennessee.

"(11) From 1826 to the date of the filing of this suit, Tennessee has continuously exercised dominion and jurisdiction over the lands in controversy.

"(12) Arkansas has acquiesced in Tennessee's exercise of dominion and jurisdiction.

"(13) The lands described in Count One of the complaint are now within the boundaries of Tennessee as a result of prescription. Blue Grass Towhead, which has been formed by gradual processes and is attached to Moss Island, is likewise now within the boundaries of Tennessee."

The exceptions of Arkansas to the Master's report present for the most part questions of law. Arkansas contends that its true eastern boundary at the place in controversy was determined by the rule of the *thalweg,* being the middle of the main channel of navigation of the Mississippi River as it existed when the Treaty of Peace between the United States and Great Britain was concluded in 1783, subject to such subsequent changes as occurred through natural and gradual processes. *Arkansas* v. *Tennessee,* 246 U. S. 158; *Arkansas* v. *Mississippi,* 250 U. S. 39; *Arkansas* v. *Mississippi,* 252 U. S. 344. The Master supports that contention with respect to the

original boundary of the Territory of Arkansas, and also the contention that the avulsion of 1821 did not change the boundary line theretofore existing between Tennessee and the Territory of Arkansas; and, further, the Master holds that the Act of 1836 admitting Arkansas into the Union did not operate to exclude from its boundaries the lands which immediately before were within the Territory of Arkansas or to enlarge the boundaries of Tennessee.

Despite these conclusions, the Master is of the opinion that the area in question should now be deemed to be within the boundaries of Tennessee by virtue of prescription and the acquiescence on the part of Arkansas in the exercise by Tennessee of dominion and jurisdiction over that area. Upon that question of fact, the Master found that Tennessee had continuously exercised that dominion and jurisdiction from the year 1826 to the time of the bringing of the present suit. In support of this finding, the Master thus summarized the evidence:

"The contemporary evidence shows that as early as 1823 entries of the land were being made under the authority of Tennessee and surveys were made under authority of Tennessee as early as 1824. Witnesses sixty-five, seventy-eight and eighty-four years old testified before me that the inhabitants of the island always voted in Tennessee elections; were taxed by Tennessee, married by Tennessee Justices of the Peace, required to do road work under Tennessee authority, educated upon the island in a school operated by Tennessee. The records of Dyer County, Tennessee, showed that assessments on the lands in controversy for local taxes were made by Tennessee authorities and land taxes paid to Tennessee as far back as 1870, prior to which records are missing. Tennessee Exhibit 42 shows a tax sale by a Tennessee sheriff in 1848 covering lands on the island. The bill of exceptions in the case of *Moss* v. *Gibbs,* shows testimony

in that case that as far back as 1826 Tennessee assessed the lands on the cutoff island, collected the taxes on them and served process there. The opinion of the Supreme Court of Tennessee in *Moss* v. *Gibbs* [1872] 57 Tenn. 283 recites these facts as proven therein."

The Master added that if he was mistaken in thinking it proper to consider the depositions and opinion in *Moss* v. *Gibbs* as affording evidence in this case, "the testimony taken before me and the other documentary evidence, consisting of certified copies of entries, surveys and patents, is, in my judgment, sufficient to prove Tennessee's long and uninterrupted exercise of dominion and jurisdiction over the lands in controversy."

The Master was equally explicit in finding that the record showed the acquiescence of Arkansas in this assertion of dominion by Tennessee. On this point his report states:

"There is no showing that Arkansas ever asserted any claim to the land in controversy prior to the institution of this suit. The lands were never surveyed or granted by Arkansas. In 1848 the United States Surveyor of Public Lands in Arkansas wrote to the General Land Office in Washington that he had been called upon to survey the lands on the cutoff island. He received a reply authorizing him to proceed with the survey of the island 'more especially if it is not claimed by the State of Tennessee.' But no survey was ever made. On October 10th, 1935, application was filed with the Commissioner of State Lands of Arkansas for the purchase of Blue Grass Towhead, but no action was taken thereon. The opinion of the Supreme Court of Tennessee in *Moss* v. *Gibbs,* 57 Tenn. 283, was published in the year 1872 and made the claims of Tennessee a matter of public notoriety."

There was slight, if any, controversy as to the facts upon the hearing at this bar. The findings of the Master

with respect to the exercise of dominion and jurisdiction by Tennessee and as to the acquiescence therein of Arkansas are fully supported by the record, and we must determine the cause upon that basis.

The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained. That principle has had repeated recognition by this Court. In *Rhode Island* v. *Massachusetts,* 4 How. 591, 639, the Court said: "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." Applying this principle in *Indiana* v. *Kentucky,* 136 U. S. 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." Again, in *Louisiana* v. *Mississippi,* 202 U. S. 1, 53, the Court observed: "The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both." See, also, *Virginia* v. *Tennessee,* 148 U. S. 503,

523; *Maryland* v. *West Virginia,* 217 U. S. 1, 41–44; *Vermont* v. *New Hampshire,* 289 U. S. 593, 613.

In *Michigan* v. *Wisconsin,* 270 U. S. 295, 308, the Court thus referred to the recognition of this principle in international law, saying: "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.,* [1877] L. R. 2 A. C. 394, 421; Wheaton, International Law, 5th Eng. Ed., 268–269; 1 Moore, International Law Digest, 294 *et seq.,* and, *a fortiori,* to the quasi-sovereign States of the Union." Prescription in international law, says Oppenheim, may be defined as "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order." And thus he finds that prescription in international law "has the same rational basis as prescription in municipal law—namely, the creation of stability of order." Oppenheim, International Law, 5th Ed., pp. 455, 456. See, also, Hall, International Law, 8th Ed., pp. 143, 144; Hyde, International Law, § 116.

This principle of prescription and acquiescence, when there is a sufficient basis of fact for its application, so essential to the "stability of order" as between the States of the Union, is in no way disregarded or impaired by our decisions in *Arkansas* v. *Tennessee, supra,* and *Arkansas* v. *Mississippi, supra,* upon which counsel for Arkansas rely. In those cases the evidence fell short of the proof of long acquiescence which was necessary to warrant the application of the principle and there was no such show-

ing of acts of dominion and jurisdiction as are shown on the part of Tennessee in the instant case.

On behalf of Arkansas it is argued that the rule of the *thalweg* is of such dominating character that it meets and overthrows the defense of prescription and acquiescence. That position is untenable. The rule of the *thalweg* rests upon equitable considerations and is intended to safeguard to each State equality of access and right of navigation in the stream. *Iowa* v. *Illinois,* 147 U. S. 1, 7, 8; *Minnesota* v. *Wisconsin,* 252 U. S. 273, 281, 282; *Wisconsin* v. *Michigan,* 295 U. S. 455, 461; *New Jersey* v. *Delaware,* 291 U. S. 361, 380. The rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the *thalweg* but remains at the original line although now on dry land because the old channel has filled up. *Nebraska* v. *Iowa,* 143 U. S. 359, 367; *Missouri* v. *Nebraska,* 196 U. S. 23, 36; *Arkansas* v. *Tennessee, supra,* pp. 173, 174. And, in turn, the doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. Here that fact has been established and the original rule of the *thalweg* no longer applies.

The contention is also pressed that the defense of prescription is unavailable upon the ground that the title to the land in controversy is in the United States; that the land is still unsurveyed land of the United States; and, hence, that the defense of adverse possession could not be good against Arkansas as she did not have title. But the question in this suit is not one of title to particular land but of boundaries and of political jurisdiction as between Arkansas and Tennessee. Tennessee is making no claim against the United States. No title of the

United States to lands within the boundaries of either State is here in question or is here determined. The ruling of the Master in overruling this contention is sustained.

A special point is urged as to the area known as "Blue Grass Towhead." As to this area, the Master found:

"Blue Grass Towhead is a formation adjoining Moss Island (the cutoff island) on the west thereof, which has been formed since the year 1916 by the gradual processes of the river and is now attached physically to the eastern shore of the river. Insofar as this formation is in controversy in the present litigation, I am of the opinion that it also is subject to the jurisdiction of Tennessee, as it was formed by gradual processes and is attached to Moss Island; see *Arkansas* v. *Tennessee*, 246 U. S. 158, 173."

It seems clear that as Moss Island by prescription and acquiescence must be deemed to be part of the territory subject to the jurisdiction of Tennessee, this addition by gradual processes should be treated as part of Moss Island and as subject to the same jurisdiction.

The exceptions of Arkansas to the Master's report are overruled and the report is in all respects confirmed. Decree will be entered accordingly, providing:

(1) That the claims of Arkansas to the lands described in count one be rejected and the claims of Tennessee thereto be maintained, and that the boundary line between the States at the point to which count one refers be fixed at the middle of the main channel of navigation in the Mississippi River as it existed at the date of the filing of the bill of complaint herein.

(2) That the boundary between Arkansas and Tennessee at the point described in count two of the bill of complaint be fixed in accordance with the stipulation entered into by the parties, and that a commissioner be appointed to mark the boundary line as set out in the stipulation by placing three suitable markers along the

line and a fourth one on sufficiently high ground to be used in locating the other three in the event that they should be covered by water, moved or destroyed.

(3) That costs be equally divided between the States.

Decree may be settled on notice.

It is so ordered.

RAILROAD COMMISSION OF TEXAS ET AL. *v.* ROWAN & NICHOLS OIL CO.

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

No. 681. Argued April 24, 25, 1940.—Decided June 3, 1940.

An order of a state commission for limiting and prorating the production of an oil field, fixed the maximum allowable to any well at 2.32% of its "hourly potential," but gave to "marginal" wells—those which, if their low capacity were curtailed, would have to be prematurely abandoned—a special status, allowing each of them production up to twenty barrels per day. Because of the large number of such low-capacity wells, approximately 385,000 barrels, out of a total daily "allowable" of 522,000 barrels for the entire field, were exempt from the "hourly potential" formula. A company whose wells were favorably situated and capable of large production, but were allowed by the formula a daily production of but twenty-two barrels each, claimed that the regulation disregarded its right to the oil in place within its ground; that it permitted others undue opportunity to capture oil draining from its ground; that the "potential" method failed to give sufficient weight to relevant factors in the measurement of oil in place, especially to the depth of the company's reserves; that only an allocation based upon acre-feet of the oil sand, or its equivalent, would be reasonable; that the order was, in effect, an allocation on a flat per-well basis, regardless of great variation in the capacity of wells and the density of well drilling on different tracts; that excessive drillings allowed by the commission as exceptions to its general spacing rule, enabled densely drilled tracts, by virtue of the "marginal" allowances, to drain away the company's reserves; and that, for these reasons, the company's property was taken without due process of law. *Held:*

1. That, in view of the difficulties of the problem of fair allocation, the speculation involved in an approach to its solution, and the special function of the commission, a federal court should not undertake to determine it upon the conflicting testimony of experts. P. 580.

2. In a controversy such as this, courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted. Pp. 580–581.

3. Whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment. P. 581.

In a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the administrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment.

4. In making exceptions to its general spacing rule and general restrictive production formula, in favor of small, irregularly shaped tracts that, otherwise, might lose their oil by failure to drill or inability to operate at a profit, the commission was entitled to take into account not only the individual interests of these small owners, but also effects on the State's economy. P. 582.

5. It is not for the federal courts to supplant the commission's judgment even in the face of convincing proof that a different result would have been better. P. 583.

107 F. 2d 70, reversed.

CERTIORARI, 309 U. S. 646, to review the affirmance of a decree (28 F. Supp. 131) enjoining the enforcement of an oil proration order.

Mr. James P. Hart, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *W. F. Moore,* First Assistant Attorney General, were on the brief, for petitioners.

Under the decisions of the Supreme Court of Texas, a landowner under proration is entitled to an opportunity

to recover substantially the equivalent of the oil and gas originally in place beneath his land.

The respondent failed to establish that it is being irreparably injured by the enforcement of the proration orders of the Railroad Commission, because the undisputed evidence shows that the respondent has suffered no physical depletion of its lease, and has benefited from the operation of the proration orders up to the present time.

Respondent failed to establish that it will be deprived, by the enforcement of the proration orders, of the opportunity of ultimately recovering from its lease an amount of oil substantially equivalent to the amount of oil originally in place beneath its lease.

Respondent is without standing to attack the constitutionality of the proration orders, because it has benefited from and acquiesced in the enforcement of the same method of proration for over five years before bringing a suit to set aside such orders, during which time property rights have vested which would be destroyed by the invalidation of such orders.

Respondent failed to establish that the marginal or minimum allowable assigned to each well in the East Texas field is not reasonably necessary in order to prevent waste and the confiscation of property.

The well-potential method is the best practical means of allocating the allowable production according to the productive capacities of the wells and, together with the spacing rules, gives fair consideration to the recoverable oil under each tract.

Prorating the allowable production in proportion to the reserves of oil beneath each lease would be discriminatory and confiscatory of the property of many operators in the East Texas field and would permit operators in the Fairway to recover much more than the equivalent of the oil originally in place beneath their leases.

Mr. Dan Moody, with whom *Mr. Rice M. Tilley* was on the brief, for respondent.

The Texas rule of property is that the owner of land owns the oil and gas beneath it; that the owner of an oil and gas lease owns the oil and gas in place beneath the land affected by the lease.

The Texas law is that under proration the owner of the oil and gas estate in land is entitled to "an equal opportunity with adjoining leaseholders of developing and realizing for his leasehold"; that he is entitled to "a fair chance to recover the oil and gas in or under his land, or their equivalent in kind"; that is, he is entitled to an opportunity "to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

The reasonableness of the potential method of proration is not material because that is not the method here involved. Approximately 99 per cent of the field "allowable" was divided among wells on a basis of 20 barrels per well. Such a per well basis of proration does not result in a distribution of the field allowable on a reasonable basis as is required by law, and is arbitrary and confiscatory.

The method of proration here enforced was not necessary to prevent waste; it resulted in unnecessary and unreasonable drainage of respondent's oil by other operators and prevented respondent's currently or ultimately recovering its fair share or proportionate share of the recoverable oil.

Respondent repeatedly protested the inequities and unreasonableness of the method of proration here involved, and this suit to protect its property from confiscation was timely.

By leave of Court, briefs were filed by *Messrs. J. N. Saye* and *W. T. Saye,* and by *Mr. Norman L. Meyers,* on behalf of a number of owners and operators, as *amici curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question before us is the validity, when challenged by appeal to the Fourteenth Amendment, of an oil proration order promulgated by the Railroad Commission of Texas, insofar as it applies to the respondent's wells.

To safeguard its oil resources Texas has devised a regulatory scheme for their production, and has placed its administration in the Railroad Commission's hands. Revised Civil Statutes, Arts. 6014 *et seq.* In conformity with this statute, which has familiar procedural provisions, the Commission in the fall of 1938 issued the assailed proration order covering the East Texas oil field, where respondent's wells are located. By this order each well was allowed to produce 2.32% of its "hourly potential"—that is, 2.32% of its hourly productive capacity under unrestricted flow. But the practical operation of this order was largely cut across by allowances made to "marginal wells." These are wells which, if their low productive capacity were legally curtailed, would have to be prematurely abandoned. Therefore the Texas statute gives them a special status. In accord with its policy toward these marginal wells, the Commission freed them from the burden of its hourly potential formula by allowing them production up to twenty barrels a day. Because of the large number of these low capacity units in the East Texas field, approximately 385,000 barrels out of a total daily "allowable" of 522,000 barrels were exempt from the restricting formula, leaving only about 136,000 for the class within which respondent's wells fell. Application to them of the hourly potential formula resulted in an allotment of only about twenty-two barrels a day to each well. Claiming that such a mode of regulation disregarded its right to the oil in place beneath its leases, respondent sought and obtained a decree from the District

Court for the Western District of Texas enjoining the Commission from carrying its proration plan into effect. 28 F. Supp. 131. With modification not here relevant the Circuit Court of Appeals affirmed the decree. 107 F. 2d 70. We brought the case here by certiorari, 309 U. S. 646, because of the importance of the matter in the administration of the Texas law and kindred conservation statutes.

As sustained by the findings of the District Court and accepted by the Circuit Court of Appeals, respondent's claims may be summarized by what follows. The Commission's proration formula as applied permits other leaseholders, more leniently treated, to capture oil at a more rapid rate than is possible for the respondent, thereby draining away oil which underlies respondent's leased lands. This is due both to the allocating formula itself, and more especially to the permission granted marginal wells to produce without limit up to twenty barrels a day. The "potential" method of allocation fails to give sufficient weight to relevant factors in the measurement of oil in place, especially to the depth of respondent's reserves situated in the "Fairway," a deep and rich portion of the East Texas field. Only an allocation based upon acre-feet of sand or its equivalent would be a reasonable means of measuring the oil in place beneath respondent's leases; and any formula failing to do this takes respondent's property without due process of law. Moreover, the allowance made to marginal wells absorbs so much of the total "allowable" as to make the Commission's order in effect an allocation on a flat per well basis, regardless of great variation in the capacity of the wells and the density with which different leases have been drilled. An important factor in producing this result is the permission frequently granted by the Commission, under power conferred upon it by statute, for departure from its spacing and drilling rules whereby the field has

been drilled with an irregular density. As a consequence, the more densely drilled tracts adjoining respondent's leases may, by virtue of their marginal allowances, produce oil in such quantities as to drain away respondent's reserves. Such is the basis for respondent's resistance to the order.

Underlying these claims is as thorny a problem as has challenged the ingenuity and wisdom of legislatures. In major part it was created by the discovery of vast oil resources and by their development under rules of law fashioned in the first instance by courts on the basis of analogies drawn from other fields of the common law. In Texas, according to conventional doctrine, the holder of an oil lease "owns" the oil in place beneath the surface. *Lemar* v. *Garner,* 121 Tex. 502; 50 S. W. 2d 769; *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 113 Tex. 160; 254 S. W. 290; 1 Summers, Oil and Gas (2nd ed.), p. 16. But equally recognized is the "rule of capture" which subjects the lessee's interest to his neighbors' power to drain his oil away. Therefore, to speak of ownership in its relation to oil, is to imply a contingency of control not applicable to ordinary interests in realty. See Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1218–22. Each leaseholder, that is to say, is at the mercy of all those who adjoin him, since oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts. This gap between the geological nature of the oil pool and the formal surface rights of the lessees is frequently bridged by the drilling of "offset wells" at the boundary of each surface tract, so that owners may protect themselves against the exercise of one another's capture rights. Partly to mitigate the undesirable consequences of this unsystematized development, the oil-producing states, Texas among them, have enacted conservation laws with appropriate administrative mechanisms to control drilling and production. The

general scheme of the Texas statute is not challenged. Its constitutionality is here settled. *Champlin Refining Co.* v. *Commission,* 286 U. S. 210.

But merely writing laws is only the beginning of the matter. The administration of these laws is full of perplexities. State agencies have encountered innumerable difficulties in trying to adjust the many conflicting interests which grow out of the rule of capture and its implications. The experience of Texas illustrates that a brood of litigation almost inevitably follows the inherent empiricism of these attempted solutions. See Ely, *op. cit. supra,* at pp. 1225–29; Marshall and Meyers, The Legal Planning of Petroleum Production: Two Years of Proration, 42 Yale L. J. 701. For some years the Texas Commission has been engaged in experimental endeavor to devise appropriate formulas for a fair allotment of the allowable production. The commitment of such a delicate task to the administrative process has not escaped challenge in the courts, and at times the challenge has been successful. Compare *MacMillan* v. *Railroad Commission,* 51 F. 2d 400; *Constantin* v. *Smith,* 57 F. 2d 227; *Peoples' Petroleum Producers* v. *Smith,* 1 F. Supp. 361; *Amazon Petroleum Corp.* v. *Railroad Commission,* 5 F. Supp. 633. But such cases are only episodes in the evolution of adjustment among private interests and in the reconciliation of all these private interests with the underlying public interest in such a vital source of energy for our day as oil. Certainly so far as the federal courts are concerned the evolution of these formulas belongs to the Commission and not to the judiciary. Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls

for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted.

General as these considerations may be, they are decisive of the present case. Both the District Court and the Circuit Court of Appeals appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order. For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment. According to the Commission's experts, theories of allocation urged by the respondent and accepted by the courts below would in fact give to respondent more than its fair share of the oil in the field. Respondent, the Commission's witnesses contend, would gain undue benefit from the constant eastward migrations of oil caused by the gradual influence of subsurface pressure gradients—and this at the expense of other lessees in geologically less fortunate portions of the field. The Commission's experts further insisted that, though much technical progress has been made, estimates of recoverable reserves beneath the surface of a particular tract remain largely an indeterminate venture; and that hourly potential actually takes into account, at least in some measure, all relevant factors for ascertaining recoverable reserves. Certainly in a domain of knowledge still shifting and growing, and in a field where judgment is therefore necessarily beset by the necessity of inferences bordering on conjecture even for those learned in the art, it would be presumptuous for courts, on the basis of conflicting expert testimony, to deem the view of the ad-

ministrative tribunal, acting under legislative authority, offensive to the Fourteenth Amendment. Compare *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191, *et seq.*

Equally enmeshed in a conflict of *expertise* is the claim most vigorously urged by respondent that, taken in connection with exceptions made by the Commission to its spacing rules and with the unrestricted twenty barrel allowance to marginal wells, the proration order substantially places production on a flat per well basis. Such a result, according to respondent's claim as accepted by the lower courts, gives a constitutionally inadmissible advantage to smaller and more densely drilled tracts as against those owned by respondent. But this claim really presents a more specialized aspect of the general problem. In regulating flow of production the treatment to be accorded to small and irregularly shaped tracts which do not fit neatly into the Commission's general scheme for spacing, has presented a difficulty almost as great as the framing of proration formulas. Compare Walker, The Problem of the Small Tract under Spacing Regulations, 17 Tex. L. Rev. 157 (Supp. Bar Association Proceedings). To deny the holders of these tracts permission to drill might subject them to the risk of losing their oil in place or of being put at the mercy of adjoining holders. In many instances, therefore, the Commission has granted exceptions to its general spacing rule on the basis of which investments have been made and wells drilled. If these wells, most of them small, were restricted to production on the basis of an hourly potential formula, it might be unprofitable to operate them at all. Not only are the individual interests of these small operators involved, but their effect on the state's economy is an appropriate factor to be taken into account when plans are devised to keep the wells open.

A flat per well allowance to these producers was not an unnatural answer to the problem. Whether, as contended by the respondent, the maximum figure set by the Commission is too high in that it leads to the capture of oil from beneath its leases by neighboring operators, and whether a lower limit might suffice to assure profitable production—these questions take us into that debatable territory which it is not the province of federal courts to enter. The record is redolent with familiar dogmatic assertions by experts equally confident of contradictory contentions. These touch matters of geography and geology and physics and engineering. No less is there conflict in the evidence as to the solidity of respondent's apprehension that there will be drainage of the oil beneath its surface by neighboring wells. The Commission's experts insist that the threat, if existent at all, is speculative, and that the Commission's power of continuous oversight is readily available for relief if real danger should arise in the future.

Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field.[1] It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the compli-

[1] We are here not concerned with a statute, or orders under it, not thought to enforce state policy "for the prevention of waste, and the protection of correlative rights of owners in the common pool," but directed solely "to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product." *Thompson* v. *Consolidated Gas Corp.*, 300 U. S. 55, 69, 77.

cated and subtle factors that must enter into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better.

The challenged decree must therefore be

Reversed.

MR. JUSTICE ROBERTS, dissenting:

The petitioners' proration order is challenged not merely as unfair or unreasonable but as confiscatory of the respondent's property. Upon the allegations of the bill, the District Court had jurisdiction. Although the problem of proration presented technical and difficult questions, and although the Commission was vested with a broad discretion in dealing with them, these facts could not justify the court's abdicating its jurisdiction to test the Commission's order. The case was tried *de novo* and neither the full record made before the Commission nor its findings appear in the evidence, except for what is contained in the Commission's orders. After a painstaking trial, and upon detailed and well supported findings of fact, the court reached the conclusion that the order worked a confiscation of respondent's property.[1] The court said: "The respondents' [petitioners'] engineers frankly admitted that the present scheme of proration is nothing more or less than one on a per well basis." Referring to such a basis, the court added: "It is sufficient to say that it takes no account of the difference in the wells, of the richness or thickness of the sand, of the

[1] 28 F. Supp. 131.

location upon the structure, of the porosity or permeability of the sand, of the estimated oil reserves, or of the acreage upon which the respective wells are situated. The worst property is raised to the level of the best and the best is lowered to the level of the worst." The court concluded that the order operated to appropriate, for the benefit of others, the respondent's oil without compensation.

The Circuit Court of Appeals approved and adopted the findings and conclusions of the District Court.[2]

The opinion of this court, in my judgment, announces principles with respect to the review of administrative action challenged under the due process clause directly contrary to those which have been established. A recent exposition of the applicable principles is found in the opinion of Mr. Justice Brandeis, written for a unanimous court, in *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, dealing with a proration order affecting gas, entered by the same commission which entered the order here in issue. I think that adherence to the principles there stated requires the affirmance of the decree.

The CHIEF JUSTICE and MR. JUSTICE MCREYNOLDS join in this opinion.

Reporter's Note.—The opinion of the Court in this case was amended by an order of October 21, 1940, which will be reported in Vol. 311 U. S.

[2] 107 F. 2d 70.

MINERSVILLE SCHOOL DISTRICT, BOARD OF EDUCATION OF MINERSVILLE SCHOOL DISTRICT, ET AL. *v.* GOBITIS ET AL.

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

No. 690. Argued April 25, 1940.—Decided June 3, 1940.

1. A state regulation requiring that pupils in the public schools, on pain of expulsion, participate in a daily ceremony of saluting the national flag, whilst reciting in unison a pledge of allegiance to it "and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all"—*held* within the scope of legislative power, and consistent with the Fourteenth Amendment, as applied to children brought up in, and entertaining, a conscientious religious belief that such obeisance to the flag is forbidden by the Bible and that the Bible, as the Word of God, is the supreme authority. P. 591.
2. Religious convictions do not relieve the individual from obedience to an otherwise valid general law not aimed at the promotion or restriction of religious beliefs. P. 594.
3. So far as the Federal Constitution is concerned, it is within the province of the legislatures and school authorities of the several States to adopt appropriate means to evoke and foster a sentiment of national unity among the children in the public schools. P. 597.
4. This Court can not exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country, nor overrule the local judgment against granting exemptions from observance of such a program. P. 598.

108 F. 2d 683, reversed.

CERTIORARI, 309 U. S. 645, to review the affirmance of a decree (24 F. Supp. 271; opinion, 21 F. Supp. 581) which perpetually enjoined the above-named School District, the members of its board of education, and its superintendent of public schools, from continuing to enforce an order expelling from the public schools certain minors (suing in this case by their father as next friend) and from

requiring them to salute the national flag as a condition to their right to attend.

Mr. Joseph W. Henderson, with whom *Messrs. John B. McGurl, Thomas F. Mount,* and *George M. Brodhead, Jr.* were on the brief, for petitioners.

The resolution of the School Board requiring pupils to salute the flag was lawfully adopted, and the expulsion of the children was within its power and authority.

The expulsion of the children did not violate any right under the Constitution of the United States. *Leoles* v. *Landers,* 302 U. S. 656; *Hering* v. *State Board of Education,* 303 U. S. 624; *Gabrielli* v. *Knickerbocker,* 306 U. S. 621; *Johnson* v. *Deerfield,* 306 U. S. 621; *Johnson* v. *Deerfield,* 307 U. S. 650; *Leoles* v. *Landers,* 184 Ga. 580; *Hering* v. *State Board of Education,* 118 N. J. L. 566; *Gabrielli* v. *Knickerbocker,* 12 Cal. 2d 85; *Johnson* v. *Deerfield,* 25 F. Supp. 918; *People* v. *Sandstrom,* 279 N. Y. 523; *Nicholls* v. *Mayor,* 7 N. E. 2d 577; *Hamilton* v. *Regents,* 293 U. S. 245; *Coale* v. *Pearson,* 290 U. S. 597; *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Selective Draft Law Cases,* 245 U. S. 366; *Shapiro* v. *Lyle,* 30 F. 2d 971; *United States* v. *MacIntosh,* 283 U. S. 605, 625.

The expulsion of the children did not violate any right under the Constitution of Pennsylvania. *Commonwealth* v. *Lesher,* 17 S. & R. (Pa.) 155, 160; *Wilkes-Barre* v. *Garabed,* 11 Pa. Super. 355, 366; *Commonwealth* v. *Herr,* 229 Pa. 132, 141; *Stevenson* v. *Hanyon,* 7 Pa. Dist. Rep. 585; *Pittsburgh* v. *Ruffner,* 134 Pa. Super. 192, 198; *Oaths of Allegiance in Public Schools,* 25 Pa. Dist. & County Rep. 8.

The refusal of the children to salute the national flag at school exercises because they believed that to do so would violate the written law of Almighty God as contained in the Bible was not founded on a religious belief. *Davis* v. *Beason,* 133 U. S. 333, 342.

The act of saluting the flag has no bearing on what a pupil may think of his Creator or what are his relations to his Creator. Nor is a pupil required to exhibit his religious sentiments in a particular "form of worship" when saluting the flag, because the ceremony is not, by any stretch of the imagination, a "form of worship." Like the study of history or civics or the doing of any other act which might make a pupil more patriotic as well as teach him or her "loyalty to the State and National Government," the salute has no religious implications. *Nicholls* v. *Mayor,* 7 N. E. 2d 577, 580; *Leoles* v. *Landers,* 184 Ga. 580, 587; *Peoples* v. *Sandstrom,* 279 N. Y. 523, 529.

The commandments of Jehovah, as set forth in the Bible, do not prohibit the saluting of a national flag but on the contrary approve of that practice.

The act of saluting the flag is only one of many ways in which a citizen may evidence his respect for the Government. Every citizen stands at attention, and the men remove their hats, when the national anthem is played; yet such action can not be called a religious ceremony. The same respect is shown the American flag when it passes in a parade; yet that is not a religious rite.

Though members of Jehovah's Witnesses endeavor to extend religious implications to a ceremony purely patriotic in design, they do not accord to others the religious freedom which they demand for themselves, claiming that there is no limit to which they may go when they think they are worshipping God. *Cantwell* v. *Connecticut,* 126 Conn. 1; 310 U. S. 296.

The act of saluting the flag does not prevent a pupil, no matter what his religious belief may be, from acknowledging the spiritual sovereignty of Almighty God by rendering to God the things which are God's. *Hardwick* v. *Board of School Trustees,* 54 Cal. App. 696, 712.

Messrs. Joseph F. Rutherford and *George K. Gardner* argued the cause, and with the former *Mr. Hayden Covington* was on the brief, for respondents.

The rule compelling respondents to participate in the ceremony of saluting the flag and the act of its School Board in expelling them because they refrained, violate their rights guaranteed by Art. I, § 3, of the Constitution of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States.

The vital question is: Shall the creature man be free to exercise his conscientious belief in God and his obedience to the law of Almighty God, the Creator, or shall the creature man be compelled to obey the law or rule of the State, which law of the State, as the creature conscientiously believes, is in direct conflict with the law of Almighty God?

This Court has repeatedly held that the individual alone is privileged to determine what he shall or shall not believe. The law, therefore, does not attempt to settle differences of creeds and confessions, or to say that any point or doctrine is too absurd to be believed. That rule was laid down more than one hundred years ago by the Pennsylvania courts in *Schriber* v. *Rapp,* 5 Watts 351, 363.

As early as 1784 a like question was before the House of Delegates of the State of Virginia. Mr. Jefferson prepared a Bill: "For establishing religious freedom." After defining religious freedom and reciting "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." See *Reynolds* v. *United States,* 98 U. S. 145, 162.

Will any court attempt to say that respondents mistakenly believe what is set forth in the twentieth chapter of Exodus in the Bible? The belief of respondents is not based upon conjecture or a myth. Respondents' belief is based strictly upon the Bible. The minor respondents

from their infancy have been taught by their father to rely upon the Bible.

The saluting of the flag of any earthly government by a person who has covenanted to do the will of God is a form of religion and constitutes idolatry.

The modern-day compulsory flag saluting as a daily exercise or ceremony in the public schools is clearly an experiment. The nation has existed for more than a century without any such enforced rule. To expel children from school and deny them the opportunity of an education because they refuse to violate their conscience, is wrong and is cruel and unusual punishment. "No cruel experiment on any living creature shall be permitted in any public school of this Commonwealth." 24 Purdon's Pa. Stat. Ann. § 1554.

"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding." Mr. Justice Brandeis, in *Olmstead* v. *United States,* 277 U. S. 479. See *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, 141.

The rule certainly abridges the privileges of the respondents and deprives them of liberty and property without due process of law. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535

Petitioners claim that the purpose of saluting the flag is to "Instill in the children patriotism and love of country." But why limit that compulsory rule to teachers and pupils of the public schools? Why not require that same ceremony in all the schools? Why not apply the same rule to all officials of the Nation and State, from the President and the members of Congress down to the very least and humblest citizen? The general answer would be that the enforcement of such a rule is ridiculous and nonsensical. Chap. 14, "Patriotism of the Flag," Moss, *The Flag of the United States, Its History and Symbolism,* pp. 85–86.

By leave of Court, briefs of *amici curiae* were filed on behalf of the Committee on the Bill of Rights, of the American Bar Association, consisting of *Messrs. Douglas Arant, Zechariah Chafee, Jr., Grenville Clark, Osmer C. Fitts, Lloyd K. Garrison, George I. Haight, Monte M. Lemann, Ross L. Malone, Jr., Burton W. Musser, Joseph A. Padway,* and *Charles P. Taft;* and by *Messrs. George K. Gardner, Arthur Garfield Hays, Osmond K. Fraenkel, William G. Fennell, Jerome M. Britchey,* and *Alexander H. Frey,* on behalf of the American Civil Liberties Union,— urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy.

Lillian Gobitis, aged twelve, and her brother William, aged ten, were expelled from the public schools of Minersville, Pennsylvania, for refusing to salute the national flag as part of a daily school exercise. The local Board of Education required both teachers and pupils to participate in this ceremony. The ceremony is a familiar one. The right hand is placed on the breast and the following pledge recited in unison: "I pledge allegiance to my flag, and to the Republic for which it stands; one nation indivisible, with liberty and justice for all." While the words are spoken, teachers and pupils extend their right hands in salute to the flag. The Gobitis family are affiliated with "Jehovah's Witnesses," for whom the Bible as the Word of God is the supreme authority. The chil-

dren had been brought up conscientiously to believe that such a gesture of respect for the flag was forbidden by command of Scripture.[1]

The Gobitis children were of an age for which Pennsylvania makes school attendance compulsory. Thus they were denied a free education, and their parents had to put them into private schools. To be relieved of the financial burden thereby entailed, their father, on behalf of the children and in his own behalf, brought this suit. He sought to enjoin the authorities from continuing to exact participation in the flag-salute ceremony as a condition of his children's attendance at the Minersville school. After trial of the issues, Judge Maris gave relief in the District Court, 24 F. Supp. 271, on the basis of a thoughtful opinion at a preliminary stage of the litigation, 21 F. Supp. 581; his decree was affirmed by the Circuit Court of Appeals, 108 F. 2d 683. Since this decision ran counter to several *per curiam* dispositions of this Court,[2] we granted *certiorari* to give the matter full reconsideration. 309 U. S. 645. By their able submissions, the Committee on the Bill of Rights of the American Bar Association and the American Civil Liberties Union, as friends of the Court, have helped us to our conclusion.

We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses

[1] Reliance is especially placed on the following verses from Chapter 20 of Exodus:

"3. Thou shalt have no other gods before me.

"4. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:

"5. Thou shalt not bow down thyself to them, nor serve them: . . ."

[2] *Leoles* v. *Landers,* 302 U. S. 656; *Hering* v. *State Board of Education,* 303 U. S. 624; *Gabrielli* v. *Knickerbocker,* 306 U. S. 621; *Johnson* v. *Deerfield,* 306 U. S. 621; 307 U. S. 650. Compare *New York* v. *Sandstrom,* 279 N. Y. 523; 18 N. E. 2d 840; *Nicholls* v. *Mayor and School Committee of Lynn,* 7 N. E. 2d 577 (Mass.).

upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment.

Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights. The First Amendment, and the Fourteenth through its absorption of the First, sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith. So pervasive is the acceptance of this precious right that its scope is brought into question, as here, only when the conscience of individuals collides with the felt necessities of society.

Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law. Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief—in the supernatural is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting-house. Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in government. *Cantwell* v. *Connecticut, ante,* p. 296.

But the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow-men. When does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good? To state the

problem is to recall the truth that no single principle can answer all of life's complexities. The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others—even of a majority—is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. Compare Mr. Justice Holmes in *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355. Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other. But, because in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith.

In the judicial enforcement of religious freedom we are concerned with a historic concept. See Mr. Justice Cardozo in *Hamilton* v. *Regents,* 293 U. S. at 265. The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.[3] The mere possession of religious convictions

[3] Compare II Writings of Thomas Jefferson (Ford ed.) p. 102; 3 Letters and Other Writings of James Madison, pp. 274, 307–308; 1 Rhode Island Colonial Records, pp. 378–80; 2 *Id.* pp. 5–6; Wiener, Roger Williams' Contribution to Modern Thought, 28 Rhode Island Historical Society Collections, No. 1; Ernst, The Political Thought of Roger Williams, chap. VII; W. K. Jordan, The Development of Religious Toleration in England, *passim.* See *Commonwealth* v. *Herr,* 229 Pa. 132; 78 A. 68.

which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Selective Draft Law Cases,* 245 U. S. 366; *Hamilton* v. *Regents,* 293 U. S. 245. In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom. Even if it were assumed that freedom of speech goes beyond the historic concept of full opportunity to utter and to disseminate views, however heretical or offensive to dominant opinion, and includes freedom from conveying what may be deemed an implied but rejected affirmation, the question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. Compare *Schneider* v. *State,* 308 U. S. 147.

Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.

Unlike the instances we have cited, the case before us is not concerned with an exertion of legislative power for the promotion of some specific need or interest of secular society—the protection of the family, the promotion of health, the common defense, the raising of public revenues to defray the cost of government. But all these specific activities of government presuppose the existence of an organized political society. The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. "We live by symbols." The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that ". . . the flag is the symbol of the Nation's power, the emblem of freedom in its truest, best sense. . . . it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." *Halter* v. *Nebraska,* 205 U. S. 34, 43. And see

United States v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668.[4]

The case before us must be viewed as though the legislature of Pennsylvania had itself formally directed the flag-salute for the children of Minersville; had made no exemption for children whose parents were possessed of conscientious scruples like those of the Gobitis family; and had indicated its belief in the desirable ends to be secured by having its public school children share a common experience at those periods of development when their minds are supposedly receptive to its assimilation, by an exercise appropriate in time and place and setting, and one designed to evoke in them appreciation of the nation's hopes and dreams, its sufferings and sacrifices. The precise issue, then, for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious.[5] To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no

[4] For the origin and history of the American flag, see 8 Journals of the Continental Congress, p. 464; 22 *Id.*, pp. 338–40; Annals of Congress, 15th Cong., 1st Sess., Vol. 1, pp. 566 *et seq.*; *Id.*, Vol. 2, pp. 1458 *et seq.*

[5] Compare Balfour, Introduction to Bagehot's English Constitution, p. XXII; Santayana, Character and Opinion in the United States, pp. 110–11.

controlling competence. The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate. And the effective means for its attainment are still so uncertain and so unauthenticated by science as to preclude us from putting the widely prevalent belief in flag-saluting beyond the pale of legislative power. It mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader.

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs. Perhaps it is best, even from the standpoint of those interests which ordinances like the one under review seek to promote, to give to the least popular sect leave from conformities like those here in issue. But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

We are dealing here with the formative period in the development of citizenship. Great diversity of psychological and ethical opinion exists among us concerning the best way to train children for their place in society. Be-

cause of these differences and because of reluctance to permit a single, iron-cast system of education to be imposed upon a nation compounded of so many strains, we have held that, even though public education is one of our most cherished democratic institutions, the Bill of Rights bars a state from compelling all children to attend the public schools. *Pierce* v. *Society of Sisters,* 268 U. S. 510. But it is a very different thing for this Court to exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country.

What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed [6]—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law. That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be

[6] In cases like *Fiske* v. *Kansas,* 274 U. S. 380; *De Jonge* v. *Oregon,* 299 U. S. 353; *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496, and *Schneider* v. *State,* 308 U. S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function.

given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.

Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. See *Missouri, K. & T. Ry. Co.* v. *May,* 194 U. S. 267, 270. Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.[7]

Reversed.

[7] It is to be noted that the Congress has not entered the field of legislation here under consideration.

MR. JUSTICE MCREYNOLDS concurs in the result.

MR. JUSTICE STONE, dissenting:

I think the judgment below should be affirmed.

Two youths, now fifteen and sixteen years of age, are by the judgment of this Court held liable to expulsion from the public schools and to denial of all publicly supported educational privileges because of their refusal to yield to the compulsion of a law which commands their participation in a school ceremony contrary to their religious convictions. They and their father are citizens and have not exhibited by any action or statement of opinion, any disloyalty to the Government of the United States. They are ready and willing to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. It is not doubted that these convictions are religious, that they are genuine, or that the refusal to yield to the compulsion of the law is in good faith and with all sincerity. It would be a denial of their faith as well as the teachings of most religions to say that children of their age could not have religious convictions.

The law which is thus sustained is unique in the history of Anglo-American legislation. It does more than suppress freedom of speech and more than prohibit the free exercise of religion, which concededly are forbidden by the First Amendment and are violations of the liberty guaranteed by the Fourteenth. For by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions. It is not denied that such compulsion is a prohibited infringement of personal liberty, freedom of speech and religion, guaranteed by the Bill of Rights, except in so far as it may be justified and supported as a proper exercise of the state's power over public education. Since the state,

in competition with parents, may through teaching in the public schools indoctrinate the minds of the young, it is said that in aid of its undertaking to inspire loyalty and devotion to constituted authority and the flag which symbolizes it, it may coerce the pupil to make affirmation contrary to his belief and in violation of his religious faith. And, finally, it is said that since the Minersville School Board and others are of the opinion that the country will be better served by conformity than by the observance of religious liberty which the Constitution prescribes, the courts are not free to pass judgment on the Board's choice.

Concededly the constitutional guaranties of personal liberty are not always absolutes. Government has a right to survive and powers conferred upon it are not necessarily set at naught by the express prohibitions of the Bill of Rights. It may make war and raise armies. To that end it may compel citizens to give military service, *Selective Draft Law Cases,* 245 U. S. 366, and subject them to military training despite their religious objections. *Hamilton* v. *Regents,* 293 U. S. 245. It may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. *Davis* v. *Beason,* 133 U. S. 333. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience.

The very fact that we have constitutional guaranties of civil liberties and the specificity of their command where freedom of speech and of religion are concerned require some accommodation of the powers which government normally exercises, when no question of civil liberty is involved, to the constitutional demand that those liberties be protected against the action of govern-

ment itself. The state concededly has power to require and control the education of its citizens, but it cannot by a general law compelling attendance at public schools preclude attendance at a private school adequate in its instruction, where the parent seeks to secure for the child the benefits of religious instruction not provided by the public school. *Pierce* v. *Society of Sisters,* 268 U. S. 510. And only recently we have held that the state's authority to control its public streets by generally applicable regulations is not an absolute to which free speech must yield, and cannot be made the medium of its suppression, *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 514, *et seq.,* any more than can its authority to penalize littering of the streets by a general law be used to suppress the distribution of handbills as a means of communicating ideas to their recipients. *Schneider* v. *State,* 308 U. S. 147.

In these cases it was pointed out that where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that it is the function of courts to determine whether such accommodation is reasonably possible. In the cases just mentioned the Court was of opinion that there were ways enough to secure the legitimate state end without infringing the asserted immunity, or that the inconvenience caused by the inability to secure that end satisfactorily through other means, did not outweigh freedom of speech or religion. So here, even if we believe that such compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by

commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country. I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties by requiring it to resort to the alternatives which do not coerce an affirmation of belief.

The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities. The framers were not unaware that under the system which they created most governmental cur-

tailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection. I cannot conceive that in prescribing, as limitations upon the powers of government, the freedom of the mind and spirit secured by the explicit guaranties of freedom of speech and religion, they intended or rightly could have left any latitude for a legislative judgment that the compulsory expression of belief which violates religious convictions would better serve the public interest than their protection. The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion. And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion. The very terms of the Bill of Rights preclude, it seems to me, any reconciliation of such compulsions with the constitutional guaranties by a legislative declaration that they are more important to the public welfare than the Bill of Rights.

But even if this view be rejected and it is considered that there is some scope for the determination by legislatures whether the citizen shall be compelled to give public expression of such sentiments contrary to his religion, I am not persuaded that we should refrain from passing upon the legislative judgment "as long as the remedial

channels of the democratic process remain open and unobstructed." This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, note 4. And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters, supra; Farrington* v. *Tokushige*, 273 U. S. 284. Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools.

The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free govern-

ment can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have recently held to infringe the constitutional liberty of religious and racial minorities.

With such scrutiny I cannot say that the inconveniences which may attend some sensible adjustment of school discipline in order that the religious convictions of these children may be spared, presents a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.

DECISIONS PER CURIAM, ETC., FROM APRIL 23, 1940, THROUGH JUNE 3, 1940.*

No. 879. LOVING ET AL., A COPARTNERSHIP, *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of Oklahoma. April 29, 1940. *Per Curiam:* The judgment is affirmed. *McDonald* v. *Thompson*, 305 U. S. 263, 266; *United States* v. *Maher*, 307 U. S. 148, 153–154; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–548; *Los Angeles Switching Case*, 234 U. S. 294, 311–312. *Messrs. Robert H. Ledbetter* and *E. P. Ledbetter* for appellants. Reported below: 32 F. Supp. 464.

No. 881. OHIO EX REL. JONAK *v.* WHITE ET AL., MEMBERS OF THE INDUSTRIAL COMMISSION OF OHIO. Appeal from the Supreme Court of Ohio. April 29, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Holmes* v. *Conway*, 241 U. S. 624, 631–632; *Hardware Dealers Insurance Co.* v. *Glidden*, 284 U. S. 151, 158; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; *Radium Dial Co.* v. *Ryan*, 308 U. S. 504. *Mr. Lody Huml* for appellant. *Mr. Thomas J. Herbert* for appellees. Reported below: 136 Ohio St. 213; 24 N. E. 2d 826.

No. —, original. EX PARTE JOHN A. CURTIS. April 29, 1940. Motion for leave to file a petition for writ of habeas corpus denied.

* For decisions on applications for certiorari, see *post*, pp. 616, 624; for rehearing, *post*, pp. 654, 656. For cases disposed of without consideration by the Court, *post*, p. 654.

No. —, original. EX PARTE RAILROAD COMMISSION OF TEXAS ET AL. April 29, 1940. Motion for leave to file a petition for a writ of mandamus denied.

No. 552. MURRAY, RECEIVER, ET AL. *v.* CITY OF NEW YORK ET AL.; and

No. 558. ROBERTS, RECEIVER, *v.* MURRAY, RECEIVER, ET AL. April 29, 1940. The motion further to defer consideration of the petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit is granted and consideration is deferred until October 7 next. The CHIEF JUSTICE took no part in the consideration and decision of this application. Reported below: 103 F. 2d 889.

No. 915. SOUTHERN SERVICE CO., LTD., *v.* COUNTY OF LOS ANGELES ET AL. Appeal from the Supreme Court of California. May 6, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. (1) *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 429–430; *Eitel* v. *Toman,* 308 U. S. 505; *Sears, Roebuck & Co.* v. *Toman,* 308 U. S. 505. (2) *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; *Railroad Co.* v. *Commissioners,* 98 U. S. 541, 543–544; *Chesebrough* v. *United States,* 192 U. S. 253, 259–260. *Messrs. W. Sumner Holbrook, Jr., Karl D. Loos,* and *Preston B. Kavanagh* for appellant. *Mr. W. B. McKesson* for the County of Los Angeles; and *Messrs. Ray L. Chesebro* and *Leon Thomas David* for the City of Los Angeles, appellees. Reported below: 15 Cal. 2d 1; 97 P. 2d 963.

No. 921. WYNNE ET AL. *v.* TEXAS. Appeal from the Supreme Court of Texas. May 6, 1940. *Per Curiam:* The appeal is dismissed for the want of a substantial

federal question. *Hodge* v. *Muscatine County,* 196 U. S. 276. *Mr. Sproesser Wynn* for appellants. Reported below: 134 Texas 455; 113 S. W. 2d 325; 133 S. W. 2d 951.

No. 930. RAILROAD COMMISSION OF TEXAS ET AL. *v.* HUMBLE OIL & REFINING CO. Appeal from the District Court of the United States for the Western District of Texas. May 6, 1940. Motion for stay. The enforcement of the injunction is stayed until action upon the statement as to jurisdiction. See p. 616.

No. —, original. EX PARTE W. J. MEREDITH ET AL. May 6, 1940. The motion for a temporary restraining order pending the motion for leave to file a petition for a writ of mandamus, presented to MR. JUSTICE FRANKFURTER and referred by him to the Court, is denied.

No. —, original. EX PARTE R. L. SCOTT. May 6, 1940. Motion for leave to file a petition for writ of mandamus denied.

No. 943. EAVEY COMPANY ET AL. *v.* DEPARTMENT OF TREASURY OF INDIANA ET AL. Appeal from the Supreme Court of Indiana. May 20, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Hendrick* v. *Maryland,* 235 U. S. 610; *Hicklin* v. *Coney,* 290 U. S. 169, 173; *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 72–73; *Arthur* v. *Indiana,* 309 U. S. 630. *Messrs. Lloyd D. Claycombe* and *Albert Stump* for appellants. *Messrs. Joseph W. Hutchinson* and *Rexell A. Boyd* for appellees. Reported below: 24 N. E. 2d 268.

No. —, original. Ex parte Joseph Murphy. May 20, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte W. J. Meredith. May 20, 1940. Motion for leave to file petition for writ of mandamus denied.

No. 813. Montgomery Ward & Co. *v.* Duncan. May 20, 1940. Motion of the respondent to dismiss the writ of certiorari denied.

No. 1003. Shelley *v.* United States. May 20, 1940. Application denied. *Rebecca Shelley, pro se.*

No. 13, original. Pennsylvania *v.* New Jersey et al. Argued April 22, 1940. Decided May 27, 1940. *Per Curiam:* As the questions sought to be presented in this suit by the Commonwealth of Pennsylvania have been determined by the judgment of this Court in *Delaware River Joint Toll Bridge Commission* v. *Colburn, ante,* p. 419, the complaint herein is dismissed without costs to either party. *Mr. Wm. A. Schnader,* with whom *Mr. Claude T. Reno,* Attorney General of Pennsylvania, was on the brief, for complainant. *Mr. John W. Ockford,* Assistant Attorney General, for New Jersey; and *Mr. Egbert Rosencrans* and *Mr. Robert B. Meyner, pro hac vice,* for John D. Colburn et al.,—defendants.

No. 459. H. Rouw Company *v.* Crivella. Certiorari, 308 U. S. 544, to the Circuit Court of Appeals for the Eighth Circuit. Submitted February 8, 1940. Decided May 27, 1940. *Per Curiam:* In the light of Public, No.

515, 76th Congress, Third Session, approved May 14, 1940, and, it appearing that it was the intention of the Congress to make that Act applicable to the present case, and to other cases similarly situated, the judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to hear the appeal from the award of the Secretary of Agriculture. *Messrs. William L. Curtis* and *D. H. Howell* submitted for petitioner. *Messrs. Harry P. Daily* and *John P. Wood* submitted for respondent. By leave of Court, *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Robert K. McConnaughey, Mastin G. White,* and *Joseph O. Parker* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal. Reported below: 105 F. 2d 434.

No. 822. STATE OF WASHINGTON EX REL. COLUMBIA BROADCASTING CO. *v.* SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY ET AL. Certiorari, 309 U. S. 638, to the Supreme Court of the State of Washington. May 27, 1940. *Per Curiam:* It appearing that the cause has become moot, the judgment of the Supreme Court of Washington is vacated and the cause is remanded for such proceedings as by that court may be deemed appropriate, without costs to either party in this Court. *Florida* v. *Knott,* 308 U. S. 507. *Messrs. Cassius E. Gates* and *Godfrey Goldmark* for petitioner. Reported below: 1 Wash. 2d 379; 96 P. 2d 248.

No. 998. SAENGER REALTY CORP. *v.* GROSJEAN, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Louisiana. May 27, 1940. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1)

Godchaux Co. v. *Estopinal,* 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.,* 261 U. S. 114, 117; *Herndon* v. *Georgia,* 295 U. S. 441, 443. (2) *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32; *Leffingwell* v. *Warren,* 2 Black 599, 603; *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 362. *Mr. Charles Rosen* for appellant. *Messrs. F. A. Blanche* and *E. Leland Richardson* for appellee. Reported below: 194 La. 470; 193 So. 710.

No. —, original. Ex parte Roy Hullig;

No. —, original. Ex parte Arthur R. McCleary; and

No. —, original. Ex parte Harry Murray. May 27, 1940. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —, original. Ex parte Norman Baker. May 27, 1940. The motion for leave to file petition for writ of habeas corpus is denied. The motion for leave to apply for a writ of certiorari is also denied.

No. —, original. United States ex rel. Geiselman *v.* Hunt, Warden. May 27, 1940. Motion for leave to proceed *in forma pauperis,* and motion for leave to file a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, denied.

No. —. Lewis, Executrix, et al. *v.* Fontento, Collector. May 27, 1940. Application denied.

No. 15, original. Kansas *v.* Missouri. May 27, 1940. The motion for leave to file a bill of complaint is granted

and process is ordered to issue returnable September 1, next. *Messrs. Jay S. Parker,* Attorney General of Kansas, *A. B. Mitchell,* Assistant Attorney General, *Clarence V. Beck,* and *Errett P. Scrivner* for complainant.

No. 1001. DOYLE *v.* CITY OF ST. PAUL ET AL. Appeal from the Supreme Court of Minnesota. June 3, 1940. *Per Curiam:* The judgment is affirmed. *Violet Trapping Co.* v. *Grace,* 297 U. S. 119, 120; *Ingraham* v. *Hanson,* 297 U. S. 378, 381; *Schenebeck* v. *McCrary,* 298 U. S. 36, 37. *Mr. Oscar Hallam* for appellant. *Mr. John W. McConneloug* for appellees. Reported below: 206 Minn. 649; 289 N. W. 784.

No. 476. UNITED STATES *v.* NORTHERN PACIFIC RAILWAY CO. ET AL. Appeal from the District Court of the United States for the Eastern District of Washington. June 3, 1940. This cause is set for reargument October 14, 1940. The Court desires to hear argument limited to the purpose, scope, and effect of the Act of June 25, 1929, the relief thereby afforded the parties, and the defenses made available to them; and to appellant's assignments of errors 1–12 inc., 13 (insofar as it relates to failure to construct a line from Wallula, Washington, to Portland, Oregon), 19–27 inc., 29, 30, 32, 33, 36–40 inc., 42, 43, 52–54 inc.—particularly with reference to the bearing of the matters comprehended in these assignments upon the nature and extent of the relief accorded, and the defenses made available, to the parties respectively, by §§ 1, 2, 5, and 6 of said Act.

No. —, original. EX PARTE EDMOND C. FLETCHER. June 3, 1940. Motion for leave to file petition for writ of prohibition denied.

No. —, original. Ex parte Robert H. Denton, Jr. June 3, 1940. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte Albert Smith. June 3, 1940. Motion for leave to file petition for writ of mandamus denied.

No. 15, original. Kansas *v.* Missouri. June 3, 1940. Motion of E. A. Cole for leave to file a Bill of Intervention denied. *Messrs. Jay S. Parker,* Attorney General of Kansas, *A. B. Mitchell,* Assistant Attorney General, *Clarence V. Beck,* and *Errett P. Scrivner* for complainant. *Mr. Robert Stone* for E. A. Cole.

No. 785. Lowman *v.* Federal Land Bank of Louisville et al. June 3, 1940. Motion for leave to file second petition for rehearing in this case granted. See *post,* p. 656.

No. 930. Railroad Commission of Texas et al. *v.* Humble Oil & Refining Co. Appeal from the District Court of the United States for the Western District of Texas. June 3, 1940. In this case probable jursidiction is noted. The motion to advance is denied. The motion for stay is granted and the enforcement of the decree of the District Court is stayed pending the determination of the case by this Court.

DECISIONS GRANTING CERTIORARI, FROM APRIL 23, 1940, THROUGH JUNE 3, 1940.

No. 907. Bernards et al. *v.* Johnson et al. April 29, 1940. Motion for leave to proceed *in forma pauperis,*

and petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted. *Martin J. Bernards* and *Lena Bernards, pro se.* Reported below: 103 F. 2d 567.

No. 843. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* JANNEY ET AL. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. MR. JUSTICE ROBERTS took no part in the consideration and decision of this application. *Attorney General Jackson* for petitioner. Reported below: 103 F. 2d 564.

No. 847. STERN BROTHERS & CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Arthur Mag* and *John H. McEvers* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 108 F. 2d 309.

No. 864. FEDERAL COMMUNICATIONS COMMISSION *v.* COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC. May 6, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Biddle* and *Mr. William J. Dempsey* for petitioner. *Mr. D. M. Patrick* for respondent. Reported below: 108 F. 2d 737.

No. 865. FEDERAL COMMUNICATIONS COMMISSION *v.* ASSOCIATED BROADCASTERS. May 6, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia granted. *Solicitor General Biddle* and *Mr. William J. Dempsey* for petitioner. Reported below: 108 F. 2d 737.

No. 867. C. E. STEVENS CO. ET AL. *v.* FOSTER & KLEISER CO. ET AL. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. H. B. Jones* and *Wheeler Grey* for petitioners. *Messrs. Herbert W. Clark* and *Stephens V. Carey* for respondents. Reported below: 109 F. 2d 764.

Nos. 888 and 889. WEST ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. May 6, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Orlin F. Goudy* and *H. L. Deibel* for petitioners. *Mr. William B. Cockley* for respondent. Reported below: 108 F. 2d 347.

No. 901. WRIGHT *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. May 20, 1940. Motion for leave to proceed *in forma pauperis*, and petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, granted. *Messrs. Samuel E. Cook* and *William Lemke* for petitioner. *Messrs. Arthur S. Lytton* and *Virgil D. Parish* for respondents. Reported below: 108 F. 2d 359, 361.

No. 417. NEW WORLD LIFE INSURANCE CO. *v.* UNITED STATES. See *post*, p. 654.

No. 707. REPUBLIC STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD. See *post*, p. 655.

No. 892. WISCONSIN ET AL. *v.* J. C. PENNEY CO. May 20, 1940. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Mr. Harold H. Persons* for

petitioners. *Messrs. W. H. Dannat Pell* and *G. Burgess Ela* for respondent. Reported below: 233 Wis. 286; 289 N. W. 677.

No. 893. WISCONSIN ET AL. *v.* F. W. WOOLWORTH CO. May 20, 1940. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Mr. Harold H. Persons* for petitioners. *Messrs. Edward Cornell, Martin A. Schenck, Orrin G. Judd,* and *G. Burgess Ela* for respondent. Reported below: 233 Wis. 305; 289 N. W. 685.

No. 894. WISCONSIN ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO. May 20, 1940. Petition for writ of certiorari to the Supreme Court of Wisconsin granted. *Mr. Harold H. Persons* for petitioners. *Messrs. Frederick J. Miller, John L. Connolly,* and *G. Burgess Ela* for respondent. Reported below: 233 Wis. 306; 289 N. W. 686.

No. 895. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* HAMMEL ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Biddle* for petitioner. Reported below: 108 F. 2d 753.

No. 897. J. E. RILEY INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Robert Ash* and *William J. Sebald* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Joseph M. Jones,* and *Richard H. Demuth* for respondent. Reported below: 110 F. 2d 655.

No. 868. UNITED STATES *v.* FALCONE ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for the United States. Reported below: 109 F. 2d 579.

No. 914. MCCLAIN *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. M. E. Kilpatrick* for petitioner. *Solicitor General Biddle* for respondent. Reported below: 110 F. 2d 878.

No. 929. AMERICAN FEDERATION OF LABOR ET AL. *v.* SWING ET AL. May 20, 1940. Motion to use the certified record filed in No. 615 as a part of the record in this case, and petition for writ of certiorari to the Supreme Court of Illinois, granted. *Messrs. Walter F. Dodd* and *Daniel D. Carmell* for petitioners. *Messrs. Samuel A. Rinella* and *Myer N. Rosengard* for respondents. Reported below: 298 Ill. App. 13; 372 Ill. 91; 18 N. E. 2d 258; 22 N. E. 2d 857.

No. 946. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* THOMSON. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Mr. T. F. Davis Haines* for respondent. Reported below: 108 F. 2d 642.

No. 548. NEUBERGER *v.* COMMISSIONER OF INTERNAL REVENUE. See *post*, p. 655.

No. 353. MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL NO. 753 ET AL. *v.* MEADOWMOOR DAIRIES, INC. See *post*, p. 655.

No. 953. BOWMAN *v.* LOPERENA ET AL. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. L. A. Luce* for petitioner. Reported below: 110 F. 2d 348.

No. 967. RYAN *v.* EMPLOYERS' LIABILITY ASSURANCE CORP., LTD. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. M. Y. Yost* for petitioner. *Mr. John R. Kistner* for respondent. Reported below: 109 F. 2d 690.

No. 977. KLOEB, JUDGE, *v.* ARMOUR & COMPANY. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Percy R. Taylor* and *Nolan Boggs* for petitioner. *Messrs. Edward W. Kelsey, Jr.* and *Fred A. Smith* for respondent. Reported below: 109 F. 2d 72.

No. 996. H. J. HEINZ CO. *v.* NATIONAL LABOR RELATIONS BOARD. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Earl F. Reed* and *Charles M. Thorp, Jr.* for petitioner. *Solicitor General Biddle* and *Mr. Charles Fahy* for respondent. Reported below 110 F. 2d 843.

No. 1005. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES AND

AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, *v.* IRVING TRUST CO., EXECUTOR, ET AL. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Biddle* for petitioner. *Messrs. Leonard B. Smith, Selden Bacon,* and *Nathan L. Miller* for respondents. Reported below: 109 F. 2d 714.

No. 1024. GORIN *v.* UNITED STATES; and

No. 1025. SALICH *v.* SAME. June 3, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Isaac Pacht, Donald R. Richberg, Seth W. Richardson,* and *Harry Graham Balter* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip, Fred E. Strine,* and *W. Marvin Smith* for the United States. Reported below: 111 F. 2d 712.

No. 978. MILLIKEN ET AL. *v.* MEYER. June 3, 1940. Petition for writ of certiorari to the Supreme Court of Colorado granted. *Messrs. Jean S. Breitenstein* and *Harold H. Healy* for Milliken et al.; and *Mr. Edward M. Freeman* for Texas Production Co.,—petitioners. Mr. *Fred S. Caldwell* for respondent. Reported below: 105 Colo. 532; 100 P. 2d 151.

No. 962. ELECTRO-CHEMICAL ENGRAVING CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. B. S. Barron* for petitioner. *Solicitor General Biddle* for respondent. Reported below 110 F. 2d 614.

No. 992. RECONSTRUCTION FINANCE CORPORATION ET AL. *v.* PRUDENCE SECURITIES ADVISORY GROUP ET AL.

June 3, 1940. The motion to dispense with the further printing of the record is granted, and the petition is deemed properly filed in accordance with Rule 38. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted. *Solicitor General Biddle* and *Messrs. Claude E. Hamilton, Jr., Charles M. McCarty, J. M. Richardson Lyeth,* and *Emery H. Sykes* for petitioners. *Mr. Percival E. Jackson* for Prudence Securities Advisory Group et al.; *Mr. Mark Hyman* for Metz Committee et al.; and *Mr. Grosvenor M. Calkins, pro se,*—respondents. Reported below: 111 F. 2d 37.

No. 972. TIMES-MIRROR COMPANY ET AL. *v.* SUPERIOR COURT OF CALIFORNIA. June 3, 1940. Petition for writ of certiorari to the Supreme Court of California granted. *Messrs. T. B. Cosgrove* and *John N. Cramer* for petitioners. *Messrs. Wm. B. McKesson, Allen W. Ashburn,* and *Isaac Pacht* for respondent. By leave of Court, briefs of *amici curiae* were filed by *Mr. Elisha Hanson* on behalf of American Newspaper Publishers Association; and by *Mr. A. L. Wirin, Leo Gallagher,* and *Grover Johnson* on behalf of American Civil Liberties Union, Southern California Branch,—in support of the petition. Reported below: 15 Cal. 2d 99; 98 P. 2d 1029.

Nos. 993 and 994. GRAND TRUNK WESTERN RAILROAD CO. *v.* STEPHENSON, ADMINISTRATRIX. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted, limited to the question whether the District Court properly disposed of the causes in view of Illinois Revised Statutes 1937, Chapter 70, § 2. *Mr. Silas H. Strawn* for petitioner. *Mr. Ralph F. Potter* for respondent. Reported below: 110 F. 2d 401.

DECISIONS DENYING CERTIORARI, FROM APRIL 23, 1940, THROUGH JUNE 3, 1940.

No. 854. MOON *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Samuel E. Cook* for petitioner. *Messrs. Arthur S. Lytton* and *Virgil D. Parish* for respondents. Reported below: 107 F. 2d 545.

No. 880. HARPIN *v.* JOHNSTON, WARDEN. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Harold Harpin, pro se.* Reported below: 109 F. 2d 434.

No. 916. ROBERTSON ET AL. *v.* CHRONISTER ET AL. April 29, 1940. Petition for writ of certiorari to the Supreme Court of Arkansas, and motion for leave to proceed further *in forma pauperis*, denied. *Dora Robertson, pro se.* Reported below: 199 Ark. 373.

No. 805. TOWNSHIP OF SOUTH HACKENSACK *v.* FEDERAL DEPOSIT INSURANCE CORP. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harry Lane* for petitioner. *Attoney General Jackson* and *Messrs. Warner W. Gardner, L. E. Birdzell, James M. Kane,* and *James D. Carpenter* for respondent. Reported below: 109 F. 2d 327.

No. 808. BAXTER *v.* EMORY UNIVERSITY ET AL. April 29, 1940. Petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit denied. *Mr. Irving K. Baxter* for petitioner. Reported below: 107 F. 2d 115.

No. 816. CARBON SILK MILL CO. *v.* POWELL ET AL., TRUSTEES OF VERTEX HOSIERY MILLS, INC. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Michael J. Evansha* for petitioner. *Mr. William E. Mikell, Jr.* for respondents. Reported below: 108 F. 2d 474.

No. 841. STANDARD OIL CO. *v.* ZANGERLE, AUDITOR, ET AL. April 29, 1940. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Isador Grossman* for petitioner. *Mr. Frederick W. Green* for respondents. Reported below: 136 Ohio St. 212; 24 N. E. 2d 829.

No. 856. NORCOR COMPANY *v.* SCHMITT. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Irving Breakstone* for petitioner. *Mr. Ralph M. Snyder* for respondent. Reported below: 109 F. 2d 407.

No. 857. AMERICAN LIFE INSURANCE CO. *v.* HUTCHESON. April 29, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. F. Finlay* for petitioner. *Mr. Chas. C. Moore* for respondent. Reported below: 109 F. 2d 424.

No. 885. RAILROAD CREDIT CORP. *v.* SOUTHERN RAILWAY CO. April 29, 1940. Petition for writ of certiorari

to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Palmer Pillans, D. Willard, Jr., Wm. J. Kane,* and *Alexis T. Gresham* for petitioner. *Messrs. S. R. Prince, Sidney S. Alderman,* and *Henry L. Walker* for respondent. Reported below: 110 F. 2d 66.

No. 821. WRIGHT *v.* FIRST JOINT STOCK LAND BANK OF FORT WAYNE ET AL. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Samuel E. Cook* for petitioner. *Messrs. Clyde J. Cover* and *John D. Shoaff* for respondents. Reported below: 108 F. 2d 359.

No. 848. CROCKETT *v.* JOHNSTON, WARDEN. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *William C. Crockett, pro se.* Reported below: 109 F. 2d 444.

No. 937. DEATHERAGE ET AL. *v.* PLUMMER, WARDEN, ET AL. May 6, 1940. Petition for writ of certiorari to the Supreme Court of California, and motion for leave to proceed further *in forma pauperis,* denied. *Thaddeus Deatherage* and *Louis Deatherage, pro se.*

No. 964. RHODES *v.* IOWA. May 6, 1940. Petition for writ of certiorari to the Supreme Court of Iowa, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. F. E. Northup* for petitioner. Reported below: 227 Iowa 332; 288 N. W. 98.

No. 871. FISHER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Mr. Benjamin E. Jaffe* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Arnold Raum* and *Maurice J. Mahoney* for respondent. Reported below: 108 F. 2d 707.

No. 882. FRETWELL *v.* GILLETTE SAFETY RAZOR CO. May 6, 1940. The motion to proceed on typewritten papers is granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Herbert J. Jacobi* for petitioner. *Mr. Henry R. Ashton* for respondent. Reported below: 106 F. 2d 728.

No. 817. BRITISH-AMERICAN TOBACCO CO., LTD. *v.* UNITED STATES. May 6, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. Marshall Bullitt, Joseph M. Hartfield,* and *Roy H. Callahan* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 89 Ct. Cls. 438.

No. 834. COLORADO SERUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert C. Foulston, George T. Buckingham, Paul E. Shorb,* and *H. Thomas Austern* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 108 F. 2d 843.

No. 850. SOUTHWESTERN SERUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert C. Foulston, George T. Buckingham, Paul E. Shorb,* and *H. Thomas Austern* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 108 F. 2d 843.

No. 842. NATIONAL FEDERATION OF RAILWAY WORKERS *v.* NATIONAL MEDIATION BOARD ET AL. May 6, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. James A. Cobb* and *Perry W. Howard* for petitioner. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern* and *Thomas E. Harris* for respondents. Reported below: 110 F. 2d 529.

No. 849. HUBBARD *v.* MATSON NAVIGATION CO. ET AL. May 6, 1940. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, California, denied. *Mr. George Olshausen* for petitioner. *Messrs. Herman Phleger, Maurice E. Harrison,* and *Gregory A. Harrison* for respondents. Reported below: 34 Cal. App. 2d 475; 93 P. 2d 846.

No. 852. ORENDORF ET AL. *v.* FAYETTE FARMS, INC. ET AL. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Laurence B. Finn* for petitioners. *Mr. Edward L. Bush* for respondents. Reported below: 112 F. 2d 149.

No. 858. BARBOUR *v.* COMMISSIONER OF INTERNAL REVENUE. May 6, 1940. Petition for writ of certiorari

to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Prew Savoy* for petitioner. *Attorney General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for respondent. Reported below: 110 F. 2d 660.

No. 859. REBHUHN ET AL. *v.* UNITED STATES. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur Garfield Hays* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 109 F. 2d 512.

No. 860. WILLIAMS, ADMINISTRATOR, *v.* UNITED STATES. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Guy L. Webb* for petitioner. *Solicitor General Biddle* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Young M. Smith,* and *W. Marvin Smith* for the United States. Reported below: 108 F. 2d 1023.

No. 866. TEXAS NATURAL GAS UTILITIES *v.* CITY OF EL CAMPO ET AL. May 6, 1940. Petition for writ of certiorari to the Court of Civil Appeals, 1st Supreme Judicial District, of Texas, denied. *Mr. Irl F. Kennerly* for petitioner. *Mr. Donald M. Duson* for respondents. Reported below: 135 S. W. 2d 133.

No. 869. WALTON *v.* SUTTON & CO., INC. May 6, 1940. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. George W. Reilly* for petitioner. *Messrs. Guy B. Hazelgrove* and *Ralph T. Catterall* for respondent.

No. 878. METROPOLITAN LIFE INSURANCE CO. *v.* UNITED STATES. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry Cole Bates* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for the United States. Reported below: 107 F. 2d 311.

No. 884. GOOD COAL CO. *v.* NATIONAL LABOR RELATIONS BOARD. May 6, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Cleon K. Calvert* for petitioner. *Solicitor General Biddle* and *Messrs. Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Owsley Vose* for respondent. Reported below: 110 F. 2d 501.

No. 727. MORSE *v.* BRAGG. May 20, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *John H. Morse, pro se.* Reported below: 71 App. D. C. 1; 107 F. 2d 648.

No. 951. TAGGART *v.* ABRAHAM ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Grantham I. Taggart, pro se.* Reported below: 107 F. 2d 720.

No. 970. COOK ET AL. *v.* ARMOUR & CO. ET AL. May 6, 1940. Petition for writ of certiorari to the Supreme Court of Kansas, and motion for leave to proceed further *in forma pauperis,* denied. *Isaiah Cook* and *Henrietta*

Harold, pro se. Reported below: 151 Kan. 487; 99 P. 2d 856.

No. 896. McCAMPBELL *v.* WARRICH CORP. ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Lewis H. Barnes* for petitioner. *Messrs. Harold L. Reeve* and *Elmer M. Leesman* for respondents. Reported below: 109 F. 2d 115.

No. 911. SPIVEY *v.* UNITED STATES. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. G. Ernest Jones* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron* and *Benj. M. Parker* for the United States. Reported below: 109 F. 2d 181.

No. 952. MALPUSS *v.* SANFORD, WARDEN. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Harry B. Malpuss, pro se.* Reported below: 109 F. 2d 1019.

No. 944. DISTRICT OF COLUMBIA *v.* SWEENEY. May 20, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance. *Messrs. Elwood H. Seal, Vernon E. West,* and *Glenn Simmon* for petitioner. *Mr. James J. Sweeney, pro se.* Reported below: 113 F. 2d 25.

No. 908. INTERNATIONAL ART CO. ET AL. *v.* FEDERAL TRADE COMMISSION. May 20, 1940. Motion to use the record printed for the Circuit Court of Appeals granted. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Albert H. Fry* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston, Richard H. Demuth,* and *W. T. Kelley* for respondent. Reported below: 109 F. 2d 393.

No. 833. BROWNSTEIN-LOUIS CO. *v.* UNITED STATES. May 20, 1940. Petition for writ of certiorari to the Court of Claims denied. *Mr. Don Marlin* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 90 Ct. Cls. 1.

No. 835. HARRIS TRUST & SAVINGS BANK ET AL. *v.* UNITED STATES. May 20, 1940. Petition for writ of certiorari to the Court of Claims denied. *Mr. Albert H. Veeder* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Richard H. Demuth* for the United States. Reported below: 90 Ct. Cls. 17; 29 F. Supp. 876.

No. 853. NORTH WHITTIER HEIGHTS CITRUS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ivan G. McDaniel* for petitioner. *Solicitor General Biddle* and *Messrs. Warner W. Gardner, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf;* and

Ruth Weyand for respondent. Reported below: 109 F. 2d 76.

No. 863. NEW YORK TRUST CO., TRUSTEE, ET AL. *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. ET AL.; and

No. 872. WOODRUFF ET AL., TRUSTEES, *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., DEBTOR, ET AL. May 20, 1940. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Harlin O'Connell* for petitioners in No. 863. *Mr. Arthur A. Ballantine* for Commercial Trust Co.; *Mr. John M. Perry* for Central Hanover Bank & Trust Co.; and *Mr. J. H. Harrison* for National State Bank, respondents in No. 863. *Mr. Wm. Clarke Mason* for petitioners in No. 872. *Mr. John M. Perry* for Central Hanover Bank & Trust Co.; and *Mr. J. H. Harrison* for National State Bank,—respondents in No. 872. Reported below: 109 F. 2d 988.

No. 877. AMERICAN INSURANCE CO. *v.* GENTILE BROS. CO. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Harry L. Thompson* and *J. Tweed McMullen* for petitioner. *Messrs. Hugh Akerman* and *William H. Dial* for respondent. Reported below: 109 F. 2d 732.

No. 886. MAXWELL ET AL. *v.* TARRANT COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NUMBER ONE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Clay Cooke, G. R. Lipscomb, George P. Barse, John F. Anderson, Lee Roy Stover,* and *William E. Allen* for

petitioners. *Messrs. Sidney L. Samuels, William R. Watkins,* and *Mark McGee* for respondent. Reported below: 109 F. 2d 604.

No. 887. SHALER COMPANY *v.* RITE-WAY PRODUCTS, INC. ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. S. L. Wheeler* for petitioner. *Messrs. John B. Snowden, II,* and *Frank E. Liverance, Jr.* for respondents. Reported below: 107 F. 2d 82.

No. 890. BENEDUM-TREES OIL CO. *v.* DAVIS ET AL.; and

No. 891. SAME *v.* SEDMAN ET AL. May 20, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. J. W. Stone* and *Rufus S. Marriner* for petitioner. *Mr. Joe C. Thomason* for respondents. Reported below: 107 F. 2d 981.

No. 898. MARYLAND CASUALTY CO. *v.* TOWN OF RIVER JUNCTION ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Francis M. Holt* and *Sam R. Marks* for petitioner. *Messrs. C. L. Waller* and *Millard Caldwell* for respondents. Reported below: 110 F. 2d 278.

No. 899. IRVING LEWIS *v.* UNITED STATES; and

No. 900. ROSE LEWIS *v.* UNITED STATES. May 20, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Julian C. Ryer* and *Philip Lutz* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and

Messrs. William W. Barron, Fred E. Strine, George F. Kneip, and *W. Marvin Smith* for the United States. Reported below: 110 F. 2d 460.

No. 902. MORPHY, RECEIVER, ET AL. *v.* GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edwin W. Lawrence, Hersey Egginton,* and *George L. Shearer* for petitioners. *Messrs. Harold C. Heiss, William R. McFeeters,* and *Harold N. McLaughlin* for respondents. Reported below: 109 F. 2d 576.

No. 903. MORPHY, RECEIVER, ET AL. *v.* BURKE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edwin W. Lawrence, Hersey Egginton,* and *George L. Shearer* for petitioners. *Messrs. Harold C. Heiss, William R. McFeeters,* and *Harold N. McLaughlin* for respondent. Reported below: 109 F. 2d 572.

No. 909. BEARD *v.* SANFORD, WARDEN. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James J. Laughlin* and *Ellis Klein* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for respondent. Reported below: 110 F. 2d 527.

No. 933. JEFFERSON STANDARD LIFE INSURANCE CO. *v.* DELONG. May 20, 1940. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Giles J. Patterson, Julius C. Smith,* and *C. R. Wharton* for petitioner. *Mr. Charles Cook Howell* for respondent. Reported below: 109 F. 2d 585.

No. 920. VOLUNTEER STATE LIFE INSURANCE CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Vaughn Miller* and *Robert A. Littleton* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Edward H. Horton,* and *Thomas E. Harris* for respondent. Reported below: 110 F. 2d 879.

No. 910. PRENTISS *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. T. Morton McDonald* for petitioner. *Mr. Edward H. Knight* for respondent. Reported below: 109 F. 2d 1.

No. 912. CARL *v.* FERRELL. May 20, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Paul J. Sedgwick* for petitioner. Reported below: 109 F. 2d 351.

No. 913. CARL *v.* NORRIS. May 20, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Paul J. Sedgwick* for petitioner. Reported below: 110 F. 2d 266.

No. 918. COOK *v.* UNITED STATES. May 20, 1940. Petition for writ of certiorari to the Circuit Court of

Appeals for the Fifth Circuit denied. *Mr. William R. Watkins* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Thomas E. Harris* for the United States. Reported below: 108 F. 2d 804.

No. 919. DICKINSON ET AL. *v.* PAYNE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hans v. Briesen* for petitioners. *Mr. Hugh C. Smith* for respondent. Reported below: 109 F. 2d 52.

No. 923. WEIR *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Earl F. Reed* for petitioner. *Attorney General Jackson, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Arnold Raum,* and *S. Dee Hanson* for respondent. Reported below: 109 F. 2d 996.

No. 924. LEHMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edgar J. Bernheimer* and *Sidney J. Schwartz* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Mr. Sewall Key* for respondent. Reported below: 109 F. 2d 99.

No. 925. SHOOLMAN *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. David Stoneman* for petitioner. *Solicitor*

General Biddle, Assistant Attorney General Clark, and *Messrs. Sewall Key* and *A. F. Prescott* for respondent. Reported below: 108 F. 2d 987.

No. 927. WEBB-CRAWFORD CO. ET AL. *v.* FEDERAL TRADE COMMISSION. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Max Michael* and *Edgar Watkins* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston* and *W. T. Kelley* for respondent. Reported below: 109 F. 2d 268.

No. 928. BAKEWELL *v.* UNITED STATES. May 20, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eight Circuit denied. *Paul Bakewell, Jr., pro se. Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Harry LeRoy Jones* for the United States. Reported below: 110 F. 2d 564.

No. 931. JEFFERS *v.* ILLINOIS. May 20, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. James W. Templeman* for petitioner. *Messrs. John E. Cassidy* and *Ivan J. Hutchens* for respondent. Reported below: 372 Ill. 590; 25 N. E. 2d 35.

No. 934. ERRINGTON *v.* HUDSPETH, WARDEN. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Robert G. Errington, pro se.* Reported below: 110 F. 2d 384.

No. 935. WILLIAMSON, TRUSTEE, *v.* COLUMBIA GAS & ELECTRIC CORP. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Arthur G. Logan* for petitioner. *Messrs. Douglas M. Moffat* and *Clarence A. Southerland* for respondent. Reported below: 110 F. 2d 15.

No. 861. R. HOE & CO., INC. ET AL. *v.* WEISS ET AL. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Samuel E. Darby, Jr., Neil P. Cullom,* and *James J. Kennedy* for petitioners. *Mr. Thomas G. Haight* for respondents. Reported below: 109 F. 2d 722.

No. 874. GENECOV *v.* WINE, RECEIVER. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eight Circuit denied. *Mr. W. Edward Lee* for petitioner. *Messrs. H. M. Barney, Frank S. Quinn,* and *James D. Head* for respondent. Reported below: 109 F. 2d 265.

Nos. 875 and 876. ROOSTH *v.* WINE, RECEIVER. May 27, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. Edward Lee* for petitioner. *Messrs. H. M. Barney* and *Frank S. Quinn* for respondent. Reported below: 109 F. 2d 265.

No. 883. SEMINOLE NATION *v.* UNITED STATES. May 27, 1940. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Paul M. Niebell, Ernest L.*

Wilkinson, Frank J. Boudinot, John W. Cragun, and *W. W. Pryor* for petitioner. *Solicitor General Biddle* for the United States. Reported below: 90 Ct. Cls. 151.

No. 904. MORGAN ET AL. *v.* SUN OIL CO. ET AL. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Oliver J. Todd* for petitioners. *Messrs. Fred L. Williams* and *W. N. Foster* for respondents. Reported below: 109 F. 2d 178.

No. 922. EQUITABLE LIFE ASSURANCE SOCIETY *v.* ZOLINTAKIS ET AL. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Ernest D. Hurd* for petitioner. *Messrs. Calvin W. Rawlings* and *H. E. Wallace* for respondents. Reported below: 108 F. 2d 902.

No. 932. PITCHER *v.* METROPOLITAN LIFE INSURANCE CO. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Eberhard P. Deutsch* for petitioner. Reported below: 108 F. 2d 621.

No. 936. ITALIANO ET AL. *v.* FLORIDA. May 27, 1940. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Kenneth I. McKay* for petitioners. *Mr. George Couper Gibbs,* Attorney General of Florida, for respondent. Reported below: 141 Fla. 249; 193 So. 48.

No. 938. PARSONS ET AL. *v.* CHILDS ET AL., TRUSTEES. May 27, 1940. Petition for writ of certiorari to the Su-

preme Court of Missouri denied. *Mr. Martin J. O'Donnell* for petitioners. *Messrs. Charles M. Blackmar, Samuel W. Sawyer,* and *Elliott H. Jones* for respondents. Reported below: 136 S. W. 2d 327.

No. 942. UNIVERSAL DEALERS CO. *v.* CROMELIN, TRUSTEE. May 27, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Wm. E. Richardson* for petitioner. *Mr. Francis C. Brooke* for respondent. Reported below: 109 F. 2d 828.

No. 945. EAGLE TRANSPORT CO. ET AL. *v.* UNITED STATES, AS OWNER OF THE POCAHONTAS. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert S. Erskine* for petitioners. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 109 F. 2d 929; 111 *id.* 451.

No. 947. BONET, TREASURER, *v.* HUMACAO SHIPPING CORP. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby, George A. Malcolm,* and *Nathan R. Margold* for petitioner. *Mr. Earle T. Fiddler* for respondent. Reported below: 108 F. 2d 157.

No. 948. HEWITT *v.* UNITED STATES. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wendel W. McCanles* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip, Fred E. Strine,* and *W. Marvin*

Smith for the United States. Reported below: 110 F. 2d 1.

No. 949. MAGNANI *v.* HARNETT, COMMISSIONER OF MOTOR VEHICLES, ET AL. May 27, 1940. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Samuel B. Wasserman* and *Roy P. Monahan* for petitioner. *Messrs. John J. Bennett,* Attorney General of New York, and *Henry Epstein,* Solicitor General, for respondents. Reported below: 257 App. Div. 487; 282 N. Y. 619; 169 Misc. 697; 8 N. Y. S. 2d 447; 14 N. Y. S. 2d 107; 25 N. E. 2d 395.

No. 955. ASPRODITES, ADMINISTRATRIX, *v.* STANDARD FRUIT & STEAMSHIP CO. May 27, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Samuel J. Tennant, Jr.* for petitioner. *Messrs. Geo. H. Terriberry* and *Jos. M. Rault* for respondent. Reported below: 108 F. 2d 728.

No. 982. WESTRUP *v.* ILLINOIS. May 27, 1940. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles P. R. Macaulay* for petitioner. *Mr. John E. Cassidy,* Attorney General of Illinois, for respondent. Reported below: 372 Ill. 517; 25 N. E. 2d 16.

No. 1003. SHELLEY *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Rebecca Shelley, pro se.*

No. 926. McAffee *v.* United States. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. Robert I. Miller* and *Thomas M. David* for petitioner. Reported below: 110 F. 2d 199.

No. 958. Williams *v.* Sanford, Warden. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Robert Henry Williams, pro se.* Reported below: 110 F. 2d 526.

No. 1028. Bradley *v.* Simpson, Solicitor General ex rel. of Piedmont Circuit, Georgia. June 3, 1940. Petition for writ of certiorari to the Court of Appeals of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. J. D. Bradley* and *G. Seals Aiken* for petitioner. Reported below: 189 Ga. 316; 6 S. E. 2d 424.

No. 1045. Moore *v.* Hudspeth, Warden. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. Mr. Justice Douglas took no part in the consideration and decision of this application. *Otis B. Moore, pro se.* Reported below: 110 F. 2d 386.

No. 1016. Wagner *v.* United States. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed

further *in forma pauperis*, denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Wm. W. Flournoy* for petitioner. Reported below: 110 F. 2d 595.

No. 959. AMERICAN MEDICAL ASSOCIATION ET AL. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. MR. JUSTICE MURPHY took no part in the consideration and decision of this application. *Messrs. Edward M. Burke, Seth W. Richardson, Charles S. Baker, Adrien F. Busick, William E. Leahy,* and *John E. Laskey* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Charles H. Weston, John Henry Lewin,* and *Grant W. Kelleher* for the United States. Reported below: 110 F. 2d 703.

No. 963. WICHITA ROYALTY CO. ET AL. *v.* CITY NATIONAL BANK OF WICHITA FALLS ET AL. June 3, 1940. The motion to dispense with reprinting Volumes 1, 2, and 3 of the record is granted. The petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is denied. *Messrs. Guy Rogers* and *Ray Bland* for petitioners. *Messrs. T. R. Boone* and *Leslie Humphrey* for respondents. Reported below: 109 F. 2d 299.

No. 1015. DONAHOE'S INCORPORATED PREFERRED AND CLASS A STOCKHOLDERS' PROTECTIVE ASSOCIATION ET AL. *v.* DONAHOE'S INCORPORATED ET AL. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration and decision of this application. *Mr. Samuel G. Wagner* for petitioners.

Messrs. William D. Donnelly and *Charles S. Lynch* for respondents. Reported below: 108 F. 2d 1012.

No. 873. ARABI PACKING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. W. Robinson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, F. E. Youngman,* and *Richard H. Demuth* for respondent. Reported below: 109 F. 2d 278.

No. 917. RUNDIN *v.* SELLS. June 3, 1940. Petition for writ of certiorari to the Supreme Court of Washington denied. *Elmer Rundin, pro se.* Reported below: 1 Wash. 2d 332; 95 P. 2d 1023.

No. 939. UNITED STATES EX REL. TSEVDOS *v.* REIMER, COMMISSIONER OF IMMIGRATION. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John S. Wise, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, George F. Kneip,* and *W. Marvin Smith* for respondent. Reported below: 108 F. 2d 860.

No. 940. SENTINEL OIL CO. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Reuben G. Hunt* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Lee A. Jackson* for respondent. Reported below: 109 F. 2d 854.

No. 941. LADINSKY ET AL. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George C. Dyer* for petitioners. *Solicitor General Biddle* and *Mr. Webster Spates* for the United States. Reported below: 109 F. 2d 908.

No. 950. ARROW DISTILLERIES, INC. *v.* ALEXANDER, ADMINISTRATOR. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Horace J. Donnelly, Jr.* for petitioner. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Robert L. Stern, Richard H. Demuth, Philip E. Buck,* and *Merton B. Tice* for respondent. Reported below: 109 F. 2d 397.

No. 954. De COPPET ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elden McFarland* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum;* and *Miss Helen R. Carloss* for respondent. Reported below: 108 F. 2d 787.

No. 956. BALLARD *v.* ATCHISON, TOPEKA & SANTA FE RY. CO. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walker Saulsbury* for petitioner. *Messrs. Ballinger Mills, Grady B. Ross,* and *Thornton Hardie* for respondent. Reported below: 108 F. 2d 768; 109 *id.* 1012.

No. 960. ARN ET AL. *v.* BRADSHAW OIL & GAS CO. ET AL. June 3, 1940. Petition for writ of certiorari to

the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Homer Cummings* and *T. P. Gore* for petitioners. *Mr. A. F. Moss* for respondents. Reported below: 108 F. 2d 125.

No. 965. HUGHES, TRUSTEE, *v.* LAWYERS TRUST CO. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John F. Hughes* for petitioner. *Mr. Richard L. Sullivan* for respondent. Reported below: 108 F. 2d 792.

No. 966. RICHTER *v.* PRITCHARD, TRUSTEE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. W. Richter* for petitioner. *Mr. Morris Karon* for respondent. Reported below: 110 F. 2d 459.

No. 968. UNION JOINT STOCK LAND BANK OF DETROIT *v.* EATON, RECEIVER. June 3, 1940. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Ralph G. Martin, A. G. Masters,* and *Robert E. Gibbs* for petitioner. *Messrs. Will L. Gates* and *Edward E. Corn* for respondent. Reported below: 136 Ohio St. 293; 25 N. E. 2d 345.

No. 969. GAY UNION CORP., INC., ET AL. *v.* WALLACE, SECRETARY OF AGRICULTURE. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Leonard B. Levy, William C. Dufour,* and *John St. Paul, Jr.;* and *Miss Anna Judge Veters* for petitioners. *Solicitor General Biddle, Assistant Attorney General Arnold,* and *Messrs. Hugh B. Cox, John S. L. Yost, W. Carroll Hunter,* and *Warner W. Gardner* for respondent. Reported below: 112 F. 2d 192.

No. 971. GRAIN BELT SUPPLY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. A. C. Kennedy, George T. Buckingham, Paul E. Shorb,* and *H. Thomas Austern* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 109 F. 2d 490.

No. 974. UNITED STATES EX REL. BERGDOLL *v.* DRUM, COMMANDING OFFICER, UNITED STATES ARMY, ET AL. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George R. Shields, Herman J. Galloway, Fred W. Shields,* and *Joseph C. Thomson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, Fred E. Strine, George F. Kneip,* and *W. Marvin Smith* for respondents. Reported below: 107 F. 2d 897.

No. 983. PIETCH *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Roy St. Lewis, John J. Sirica,* and *Paul Pinson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. J. Albert Woll, William J. Connor,* and *M. Joseph Matan* for the United States. Reported below: 110 F. 2d 817.

No. 985. BEIDLER *v.* PHOTOSTAT CORPORATION. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold E. Stonebraker* for petitioner. Reported below: 81 F. 2d 1015.

No. 988. HARTFORD ACCIDENT & INDEMNITY CO. *v.* CARDILLO, DEPUTY COMMISSIONER, ET AL. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Cornelius H. Doherty* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Richard H. Demuth* for respondents. Reported below: 112 F. 2d 11.

No. 989. NEUMANN-ENDLER, INC. *v.* UNITED STATES (MAJESTIC FORWARDING & SHIPPING CO., APPEARING AS PARTIES IN INTEREST). June 3, 1940. Petition for writ of certiorari to the Court of Customs & Patent Appeals denied. *Mr. John G. Lerch* for petitioner. *Mr. John Walsh* for Majestic Forwarding & Shipping Co., respondent. Reported below: 27 C. C. P. A. (Customs) 306.

No. 997. FIDELITY-BANKERS TRUST CO., TRUSTEE, ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. Forrest Andrews* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *F. E. Youngman* for respondent. Reported below: 113 F. 2d 14.

No. 973. TENNESSEE CONSOLIDATED COAL CO. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Court of Claims denied. *Mr. Geo. E. H. Goodner* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key* and *Arnold Raum* for the United States. Reported below: 89 Ct. Cls. 542.

No. 976. CHANNELL, EXECUTRIX, *v.* SAMPSON. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Edward R. Hale* for petitioner. *Mr. James T. Connolly* for respondent. Reported below: 110 F. 2d 754.

No. 980. SAMUEL E. DIESCHER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 981. AUGUST P. DIESCHER ET UX. *v.* SAME. June 3, 1940. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. S. Leo Ruslander* and *Samuel Kaufman* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 110 F. 2d 90.

No. 986. PORTLAND OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Malcolm Donald* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Berryman Green* for respondent. Reported below: 109 F. 2d 479.

No. 1002. PENDER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Richard B. Barker* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Maurice J. Mahoney,* and *Richard H. Demuth* for respondent. Reported below: 110 F. 2d 477.

No. 1004. MEYER, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry M. Stevenson* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Carlton Fox* for respondent. Reported below: 110 F. 2d 367.

No. 1006. PANDOLFI ET AL. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nicholas T. Rogers* and *Jesse Climenko* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. William W. Barron, Fred E. Strine, George F. Kneip,* and *W. Marvin Smith* for the United States. Reported below: 110 F. 2d 736.

No. 1008. BROWN PAPER MILL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. A. Bolinger* and *L. J. Benckenstein* for petitioner. *Solicitor General Biddle* and *Messrs. Thomas E. Harris, Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf* for respondent. Reported below: 108 F. 2d 867.

No. 1022. COUPE ET AL. *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Messrs. Oliver Wendell Holmes Hughes* and *Fred W. McConnell* for petitioners. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and

W. Marvin Smith for the United States. Reported below: 113 F. 2d 145.

No. 1038. TOUCHTON *v.* CITY OF FORT PIERCE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harvey C. Crittenden* for petitioner. *Mr. Robert J. Pleus* for respondent. Reported below: 109 F. 2d 370.

No. 1046. BAYER *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham Solomon* for petitioner. *Solicitor General Biddle, Assistant Attorney General Rogge,* and *Messrs. George F. Kneip* and *W. Marvin Smith* for the United States. Reported below: 111 F. 2d 649.

No. 975. INTERNATIONAL TRADING CORP. *v.* EDISON ET AL. June 3, 1940. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. D. F. McGowan* for petitioner. *Solicitor General Biddle, Assistant Attorney General Shea,* and *Messrs. Paul A. Sweeney* and *Warner W. Gardner* for respondents. Reported below: 109 F. 2d 825.

No. 984. DENTON *v.* LOWDEN ET AL., TRUSTEES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Mitchel J. Henderson* for petitioner. *Messrs. Hale Houts* and *William S. Hogsett* for respondents. Reported below: 110 F. 2d 274.

No. 990. CUMMER SONS CYPRESS CO. *v.* ATLANTIC COAST LINE RAILROAD CO. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry P. Adair* and *Clarence G. Ashby* for petitioner. *Messrs. Carl H. Davis, John B. Sutton, C. C. Howell,* and *Wm. Hart Sibley* for respondent. Reported below: 109 F. 2d 623.

No. 991. WILSON CYPRESS CO. *v.* ATLANTIC COAST LINE RAILROAD CO. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry P. Adair* and *Clarence G. Ashby* for petitioner. *Messrs. Carl H. Davis, John B. Sutton, C. C. Howell,* and *Wm. Hart Sibley* for respondent. Reported below: 109 F. 2d 623.

No. 999. JANE HOLDING CORP. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel N. Kirby* and *Harry W. Kroeger* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, J. Louis Monarch, Carlton Fox,* and *Thomas E. Harris* for respondent. Reported below: 109 F. 2d 933.

No. 1012. ZINSMASTER BAKING CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. R. Brown* for petitioner. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, F. E. Youngman,* and *Richard H. Demuth* for respondent. Reported below: 109 F. 2d 738.

No. 1019. MERCANTILE-COMMERCE BANK & TRUST CO. ET AL. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Blatchford Downing* for petitioners. *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, L. W. Post,* and *Thomas E. Harris* for respondent. Reported below: 111 F. 2d 224.

No. 1057. ZISKIN *v.* UNITED STATES. June 3, 1940. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Max Ziskin, pro se.* Reported below: 111 F. 2d 649.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 23, 1940, THROUGH JUNE 3, 1940.

No. 839. TRINITY UNIVERSAL INSURANCE CO. *v.* CUNNINGHAM, EXECUTRIX, ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. May 20, 1940. Dismissed on motion of counsel for the petitioner. *Mr. Hobert Price* for petitioner. *Mr. Mont. T. Prewitt* for respondents. Reported below: 107 F. 2d 857.

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No. 417. NEW WORLD LIFE INSURANCE CO. *v.* UNITED STATES. May 20, 1940. The petition for rehearing is granted, and the order denying certiorari, entered November 22, 1939, 308 U. S. 612, is vacated. The petition for writ of certiorari to the Court of Claims is granted, lim-

ited to the second question presented thereby. *Mr. Walter E. Barton* for petitioner.

No. 707. REPUBLIC STEEL CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. May 20, 1940. The motion for leave to file a petition for rehearing is granted, and the petition for rehearing is also granted. The order denying certiorari, dated April 8, 1940, 309 U. S. 684, is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted, limited to the fourth question therein presented, which relates to the work relief provisions of the decree below: provided that this order shall not operate to suspend the remaining provisions of the decree. *Messrs. Luther Day, Thomas F. Patton, Joseph W. Henderson,* and *Mortimor S. Gordon* for petitioner. *Solicitor General Biddle* and *Messrs. Charles Fahy, Robert B. Watts, Laurence A. Knapp,* and *Mortimer B. Wolf,* and *Ruth Weyand* for respondents. *Messrs. Lee Pressman, Joseph Kovner* and *Anthony Wayne Smith* for Steel Workers Organizing Committee, respondents.

No. 548. NEUBERGER *v.* COMMISSIONER OF INTERNAL REVENUE. May 27, 1940. The petition for rehearing is granted, and the order denying certiorari, entered January 2, 1940, 308 U. S. 623, is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted, limited to the second and third questions thereby presented. *Messrs. Joseph M. Proskauer* and *Wilbur H. Friedman* for petitioner.

No. 353. MILK WAGON DRIVERS UNION OF CHICAGO, LOCAL 753, ET AL. *v.* MEADOWMOOR DAIRIES, INC. June 3, 1940. Motion for leave to file a second petition for re-

hearing granted. The motion papers are treated as a petition for rehearing, and rehearing is granted. The order of October 23, 1939, denying certiorari, 308 U. S. 596, is vacated. The petition for certiorari to the Supreme Court of Illinois is granted. *Messrs. Joseph Padway* and *Abraham W. Brussell* for petitioners. *Messrs. Donald N. Schaffer* and *Edward M. Keating* for respondent.

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No. 823. A. M. KLEMM & SON *v.* CITY OF WINTER HAVEN ET AL. April 29, 1940. 309 U. S. 638.

No. 773. MCCANN *v.* NEW YORK STOCK EXCHANGE ET AL. May 6, 1940. 309 U. S. 684.

No. 10, Original, October Term, 1935. WYOMING *v.* COLORADO. May 20, 1940. 309 U. S. 572.

No. 542. CITY OF YONKERS *v.* DOWNEY, RECEIVER; Nos. 543 and 544. CONDON, MAYOR, ET AL. *v.* SAME. May 20, 1940. 309 U. S. 590.

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No. 381. RIECK *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE. May 27, 1940. Motion for leave to file a petition for rehearing denied. 308 U. S. 602.

No. 854. MOON *v.* UNION CENTRAL LIFE INSURANCE CO. ET AL. May 27, 1940. *Ante*, p. 624.

No. 915. SOUTHERN SERVICE CO., LTD. *v.* COUNTY OF LOS ANGELES ET AL. May 27, 1940. *Ante*, p. 610.

No. 179. JONES *v.* PAGE ET AL.;

No. 188. JACOBS *v.* NEW YORK; and

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No. 346. UNITED STATES *v.* SOCONY-VACUUM OIL CO. ET AL.; and

No. 347. SOCONY-VACUUM OIL CO. ET AL. *v.* UNITED STATES. June 3, 1940. The petitions for rehearing in these cases are denied. The CHIEF JUSTICE and MR. JUSTICE MURPHY took no part in the consideration and decision of these applications. *Ante*, p. 150.

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AMENDMENT OF BANKRUPTCY RULES.

ORDER

It is ordered that paragraph (2) of Order 53 of the General Orders in Bankruptcy heretofore promulgated by this Court be and it hereby is amended to read as follows:

"(2) The condition of bonds hereafter given shall be substantially to the effect that the banking institution, so designated, shall well and truly account for and pay over all moneys deposited with it as such depository, and shall pay out such moneys only as provided by the bankruptcy law and applicable general orders and court rules, and shall abide by all orders of the court in respect of such moneys, and shall otherwise faithfully perform all duties pertaining to it as such depository; provided, that no security in the form of a bond or otherwise shall be required in the case of such part of the deposits as are insured under section 12 B of the Federal Reserve Act, as amended."

It is further ordered that this amendment shall take effect immediately.

June 3, 1940.

STATEMENT SHOWING CASES ON DOCKETS, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1937, 1938, AND 1939

	ORIGINAL			APPELLATE			TOTALS		
Terms	1937	1938	1939	1937	1938	1939	1937	1938	1939
Total cases on dockets	22	13	15	1,069	1,007	1,063	1,091	1,020	1,078
Cases disposed of during terms	9	1	4	1,004	922	942	1,013	923	946
Cases remaining on dockets	13	12	11	65	85	121	78	97	132

	TERMS		
	1937	1938	1939
Distribution of cases disposed of during terms:			
Original cases	9	1	4
Appellate cases on merits	286	246	252
Petitions for certiorari	718	676	690
Cases remaining on dockets:			
Original cases	13	12	11
Appellate cases on merits	34	48	76
Petitions for certiorari	31	37	45

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UNITED STATES ATTORNEYS. See **New Trial,** 5.

VALUE. See **Constitutional Law,** II, 5.

VARIANCE. See **Indictment.**

VENDOR AND VENDEE. See **Taxation,** I, 1.

VENUE.

Offenses Under Sherman Act. Conspiracy to fix prices; prosecution in district where sales made by conspirator. *U. S.* v. *Socony-Vacuum Oil Co.,* 150.

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VESSELS. See **Admiralty**, 1–3.

WAGES. See **Motor Carrier Act**, 1; **Public Contracts Act**, 1–2.

WITHDRAWAL. See **Constitutional Law**, III.

WITNESSES. See **Grand Jury.**

WORSHIP. See **Constitutional Law**, V, (A), 1–3, 6–7.

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